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WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
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(120 Wash. 368)

DOMKE v. ERNST BROS. & FARNHAM.
(No. 16966.)

(Supreme Court of Washington. June 2, 1922.)

1. New trial \Leftrightarrow 162(1)—May be denied on condition of remission of part of verdict.

Where the verdict is the result of incorrect computation, the court may require a remittitur as a condition to the denial of a new trial.

2. Appeal and error \Leftrightarrow 1002—Verdict based on conflicting evidence not disturbed.

A verdict based on conflicting evidence, and which has abundant support in the evidence, will not be disturbed on appeal.

Department 1.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by Charles Domke against Ernst Bros. & Farnham, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Starkey & Creighton, of Spokane, for appellant.

Harry L. Cohn, of Spokane, for respondent.

MITCHELL, J. This action was brought to recover an agent's commission of \$700 for the furnishing of purchasers of trucks to the defendant. From a judgment for the plaintiff, the defendant has appealed.

The testimony on behalf of the respondent showed that a commission of 5 per cent. was agreed to be paid. Some question arose in the cross-examination of the respondent as to whether the commission was to be reckoned on the sale prices or on the factory prices of the trucks, whereupon the court instructed the jury in favor of the appellant in that respect.

[1, 2] The sale prices of the trucks were \$14,000. The factory prices were \$13,235. The verdict was in the sum of \$700. The excess in the verdict was eliminated by the trial court upon denying a motion for a new trial on condition that judgment be taken in the sum of \$661.75, or 5 per cent. on the factory prices, which condition was complied with, and judgment in that amount

was entered. This the trial court was justified in doing under the facts and circumstances of the case—a conclusion which disposes of some other assignments of error presented by the appeal.

The main questions presented on the appeal are questions of fact; that is, whether there was any contract of employment and whether the customers were furnished by the respondent. Upon both questions there was abundant testimony in favor of the respondent, and, although disputed on behalf of the appellant, we find no occasion to disturb the judgment.

Affirmed.

PARKER, O. J., and TOLMAN and BRIDGES, JJ., concur.

(119 Wash. 218)

STATE ex rel. NICHOLS et al. v. SUPERIOR COURT IN AND FOR GRAYS HARBOR COUNTY et al. (No. 17086.)

(Supreme Court of Washington. May 25, 1922.)

Insurance \Leftrightarrow 618—Foreign surety corporation may be sued in county where cause of action arose.

Under Rem. Code 1915, § 6059—13½, where the surety companies on a contractor's bond are foreign corporations, an action on the bond may be brought in the county where the cause of action arose by serving the summons upon the insurance commissioner.

Department 1.

Proceeding by the State of Washington, on relation of W. R. Nichols and others, for a writ of prohibition directed to the Superior Court of the State of Washington, in and for Grays Harbor county, and George D. Abel, Judge thereof. Supplemental opinion. Former decision (205 Pac. 745) adhered to.

A. R. Titlow, of Tacoma, for relators.

John C. Hogan, of Aberdeen, for respondents.

PER CURIAM. It is considered advisable, if not necessary, for the sake of clearness, to supplement the opinion in this case, reported in (Wash.) 205 Pac. 745, by stating

that the provisions of section 6059—13½ of the Insurance Code (Laws 1915, p. 589; section 6059—13½, Rem. Code), as follows:

"Any insurance company may be sued upon a policy of insurance in any county within this state where the cause of action arose, by serving the summons and a copy of the complaint upon the company, if a domestic company, or upon the commissioner, as attorney in fact of the company, if an alien or foreign company"

—were observed in this case, as service was made on the insurance commissioner at the commencement of the action, in addition to furnishing copies of the summons and complaint to the local agents of the insurance company in Grays Harbor county.

That the cause of action, or sufficient thereof, arose in Grays Harbor county to bring the case under the section of the Insurance Code above referred to, as that section has been construed in *Pratt v. Niagara Fire Ins. Co.*, 113 Wash. 347, 194 Pac. 411, appears from the record in this case and as pointed out in the main opinion herein.

This being a question of venue, the conclusion reached by the trial court and in our main opinion was correct.

(120 Wash. 327)

HUGHSON et ux. v. WINGHAM.
(No. 16774.)

(Supreme Court of Washington. May 23, 1922.)

1. Nuisance \S 36—Order of abatement should give reasonable time to obviate conditions complained of.

Before an order may issue to abate the operation of slaughterhouse and an adjacent hogpen as a nuisance, a reasonable time and opportunity should be given to operate the plant in a sanitary manner so as to obviate offensive odors and the presence of flies complained of.

2. Nuisance \S 3(10)—Slaughterhouse not a nuisance per se.

A slaughter house 300 feet distant from a dwelling house, while not pleasant to the aesthetic sense, does not in itself constitute a nuisance.

Department 2.

Appeal from Superior Court, Stevens County; Joseph Sessions, Judge.

Action by Robert Hughson and wife against Charles Wingham. From judgment dismissing an action to restrain the operation of a slaughterhouse, plaintiffs appeal. Affirmed.

W. Lon Johnson and Wentz & Bailey, all of Colville, for appellants.

F. Leo Grinstead and L. B. Donley, both of Colville, for respondent.

MAIN, J. This action was brought to restrain the operation of a slaughterhouse, plaintiff claiming that it constituted a nuisance. The trial before the court without a jury resulted in a judgment dismissing the action. From this judgment the plaintiffs appeal.

The appellants own, reside on, and operate a farm consisting of approximately 125 acres, located about 1½ miles south of the city of Colville in Stevens county.

The respondent is the owner of about 100 acres of land immediately adjoining that of the appellants. During the spring or early summer of the year 1920, the respondent constructed a slaughterhouse upon the land owned by him for the purpose of slaughtering cattle, sheep, and hogs to supply the retail meat market which he conducted in Colville. The Inland Empire Highway traverses both the land of the appellants and respondent, running in a north and south direction. The dwelling of the appellants is located on the east side of the highway, and their barns and other buildings located on the opposite side. The slaughterhouse is located about 300 feet northwest of the appellant's dwelling and on the west side of the highway, the dwelling house being of an elevation of approximately 60 feet above that of the slaughterhouse, which was located on what is referred to as the "valley floor." The barn and other outbuildings of the appellant's are immediately to the south of the slaughterhouse. Respondent, as the evidence shows, constructed the slaughterhouse with concrete floors and walls, and it is a modern building of its kind, comparing favorably with other slaughterhouses located at or near much larger towns than Colville. The appellants protested against the erection of a slaughterhouse at this particular place, and after its operation began, which was on about the 17th of August, 1920, claimed that offensive odors came therefrom and disturbed them in the enjoyment of their home; also, that it was a place which attracted flies which caused the appellants discomfort and endangered their health and repose.

Speaking generally, the appellants seem to make three principal contentions: First, with reference to the offensive odors; second, with reference to the flies; and, third, that the slaughterhouse as such is a menace to their comfort, repose, and health, and therefore should be abated. Upon the question of the odors and the flies the evidence is directly conflicting. The trial court made no findings of fact or conclusions of law, but simply entered a judgment of dismissal. From the remarks of the trial judge during the trial as they appear in the record, it is apparent that he recognized that if the plant gave off offensive odors, as contended for by the appellants, and was a place which at-

tracted flies which disturbed the appellants in their comfort and repose, it would constitute a nuisance. In dismissing the action, it is apparent that he was of the opinion that the weight of the testimony was against the appellant upon these questions.

[1] Without reviewing the evidence in detail, we are of the opinion that the weight of the testimony is to the effect that the odors from the plant do not permeate the air at a distance from the plant of more than 50 feet and that the plant is not the cause of the menace from flies, if such exists. It is true that a plant of this character, as shown by the evidence, has a smell or odor peculiar to itself the same as in other packing houses. We think the evidence shows that the plant is well constructed and operated in a sanitary manner. Complaint is made, in this connection, with reference to the hogpen adjacent to the slaughterhouse wherein are kept and fed from 15 to 30 head of hogs. If the operation of the plant were such as to cause offensive odors and the presence of flies, and if the hogpen was in such a condition that it would constitute a nuisance to the appellants, the remedy would be not to abate the operation of the slaughterhouse until such time as the appellants had had an opportunity to operate it in an entirely sanitary manner. With reference to a slaughterhouse, in *Grant v. Rosenburg*, 112 Wash. 361, 192 Pac. 889, 196 Pac. 626, upon rehearing en banc it was said:

"It follows that, before an order may issue destroying the plant of appellants, a reasonable time and opportunity should be given to the appellants to obviate the noxious odors."

[2] So, if the appellants are to prevail in this action at this time, it must be by reason of the fact that the location of the slaughterhouse 300 feet distant from their dwelling is a menace to their comfort, repose, and health. It is undoubtedly true that the presence of a slaughterhouse so near to a dwelling is not pleasant to the æsthetic sense. But this in itself would not be sufficient to constitute a nuisance. In *Rea v. Tacoma Mausoleum Association*, 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541, it was held that an addition to the mausoleum would not be restrained as a nuisance when unattended by injurious or offensive drainage or fumes sensible to the complaining party. In that case the cases of *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, 31 L. R. A. (N. S.) 827, Ann. Cas. 1912B, 1128, and *Densmore v. Evergreen Camp No. 147*, W. O. W., 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206, were noticed, and held not to be in conflict with the principle there announced. If the presence of the addition to the mausoleum which was in the resident district of the city of Tacoma did not in itself constitute a nuisance, it cannot

be held that a slaughterhouse, erected as this one was, 300 feet from the dwelling of the appellant, would by its mere presence constitute a nuisance. If at any time in the future the slaughterhouse should be operated in such a manner as to constitute a nuisance, the appellants will have a remedy in the courts.

The judgment will be affirmed.

PARKER, O. J., and MACKINTOSH and HOVEY, JJ., concur.

(120 Wash. 36)

STATE v. JEWETT et al. (No. 16676.)

(Supreme Court of Washington, May 5, 1922.)

1. Intoxicating liquors §6—States may enact and enforce laws effectuating Eighteenth Amendment and Volstead Act.

The states may enact new laws or may enforce any pre-existing laws as to intoxicating liquors which tend to effectuate and not defeat the purposes of Const. U. S. Amend. 18 and the Volstead Act.

2. Criminal law §201—Conviction of unlawful transportation under federal act held not to bar prosecution for bootlegging under state law.

Conviction of unlawful transportation of liquor in a federal court under Volstead Act does not bar prosecution under the state bootlegging act for carrying about the same liquor for purpose of sale; the offenses being distinct.

3. Intoxicating liquors §238(4)—Proof of possession of liquor sufficient under statute to support conviction for bootlegging.

Under a statute providing that proof of possession shall be prima facie evidence of holding liquor for the purpose of sale, in a bootlegging prosecution, where there was such proof, though defendant testified that he did not sell, and did not intend to sell the liquor, it was for the jury to determine whether accused's testimony was sufficient to overcome the statutory presumption, considering the circumstances.

Department 1.

Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

William C. Tiner and Ed. Jewett were convicted of unlawfully carrying intoxicating liquor for purpose of sale, and Jewett appeals. Affirmed.

Rummens & Griffin, of Seattle, and C. D. Beagle, of Mt. Vernon, for appellant.

W. L. Brickey and W. H. Hodge, both of Mt. Vernon, for the State.

BRIDGES, J. The information against the defendants charged that, in Skagit county, Wash., on or about May 1, 1920, they did,

"willfully, unlawfully, and feloniously carry about with them, for the purpose of unlawful sale thereof, certain intoxicating liquor, to wit, a keg of liquor or liquid capable of being used as a beverage and containing intoxicating properties. * * *." There were separate trials, and each defendant was convicted; the defendant Jewett has appealed.

[1] He first contends that the court erred in not sustaining his demurrer to the information because "since the adoption of the Eighteenth Amendment (to the federal Constitution) and the passage (by Congress) of the Volstead Act (41 Stat. 305), the states have no power to legislate upon the question with respect to intoxicating liquors," and because when the Volstead Act was passed "all then existing state laws were annulled." The questions thus presented to us are not new ones in this court. In the case of *State v. Turner* (Wash.) 196 Pac. 638, we said:

"Whatever may be the precise effect of the Eighteenth Amendment and the Volstead Act, passed pursuant thereto, * * * it cannot be said that, so far as the statutes prohibiting bootlegging and conducting illegal joints are concerned, they are not in aid of the enforcement of the Eighteenth Amendment, and the Eighteenth Amendment permits the passage and enforcement of laws which were enacted either before or after that amendment which tend to the enforcement of the amendment; that power being specifically reserved as concurrent with the power of the federal government."

We have affirmed the doctrine there announced in *State v. Woods* (Wash.) 198 Pac. 737, and *State v. Gibbons* (Wash.) 203 Pac. 390. At the earnest invitation of counsel for appellant we have again affirmatively and independently reviewed these questions, and we again unhesitatingly affirm the doctrine of the *Turner* Case, *supra*. We have no doubt that the several states now have a right to enact and enforce any laws, or enforce any previously enacted laws, on the subject of intoxicating liquors, which tend to carry into effect the purposes and objects of the Eighteenth Amendment and the Volstead Act, and that the only privilege of which they have been deprived by the amendment is that they may not enact or enforce laws which would be inimical to, or tend to defeat, the amendment, or acts of Congress passed by virtue of it. Not only may they enact any laws on this subject which are not inconsistent with the congressional acts or the Eighteenth Amendment, but it is conceivable that they may enact any laws so long as they do not undertake to declare that lawful which the amendment or congressional act declares unlawful, or seek to legalize that which the amendment has declared illegal. We do not deem it necessary, however, at this time to enter into a full discussion of this question. The great weight of authority supports the view we

have taken. *Jones v. Hicks*, 150 Ga. 657, 104 S. E. 771, 11 A. L. R. 1315, and notes; *State ex rel. Stranahan v. District Court*, 58 Mont. 684, 194 Pac. 308; *State v. Fore*, 180 N. C. 744, 105 S. E. 334; *Shreveport v. Marx*, 148 La. 31, 86 South. 602; *Commonwealth v. Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568; *People v. Foley*, 113 Misc. Rep. 244, 184 N. Y. Supp. 270.

[2] During the trial appellant offered in evidence a certified copy of the judgment roll of the United States District Court for the Western District of Washington, Northern Division, which shows that appellant had been tried and convicted in that court, under the Volstead Act, for the transportation of the identical liquor involved in this case. It is claimed that the court erred in refusing to receive this offer. Manifestly, the only purpose in offering this testimony was to show, if possible, former jeopardy. In our opinion, the ruling of the court was correct because the testimony offered and rejected tended to show that the appellant had been convicted of the crime of unlawful transportation of the liquor in question, whereas in this case he was being tried for the offense of carrying about with him, for purposes of unlawful sale, the same liquor. The offenses were not the same. One concerned unlawful transportation in violation of the Volstead Act, and the other concerned the violation of the bootlegging act of the state laws. Under no circumstances could the conviction for the one offense be a bar to his trial and conviction of the other.

[3] Appellant further contends that there was not sufficient testimony to support the verdict of guilty on the charge of bootlegging. His argument is that the state's testimony went no further than to show that when arrested he was in possession of the keg of liquor mentioned in the information, and that there was no effort on the part of the state to prove that he had sold—or intended to sell—or give away, any portion of the liquor, and that the only testimony on this subject was that of the appellant himself, who denied that he had sold, or intended to sell, any of the liquor which was found in his possession. One section of our statute provides that possession and proof of possession of intoxicating liquor "shall be prima facie evidence that said liquor was so held and kept for the purposes of unlawful sale or disposition." It was for the jury to determine whether the testimony of the appellant was sufficient to overcome this statutory presumption. In determining this question, the jury had a right to take into consideration the circumstances under which the liquor was taken, the amount found in appellant's possession, and the fact that it was shown he also had other liquor at his home. *State v. Bachtold*, 106 Wash. 550, 180 Pac. 896; *State v. Conner*, 107 Wash. 571, 182 Pac. 602.

The appellant also complains of one of the instructions given to the jury; we do not deem it necessary to discuss this matter in detail. We think the instruction was proper.

Judgment affirmed.

PARKER, C. J., and FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

(120 Wash. 169)

CARLTON v. JURICH et ux. (No. 16756.)

(Supreme Court of Washington. May 18, 1922.)

1. Appeal and error \S 554(2)—Appeal not dismissed for mere absence of statement of facts.

An appeal will not be dismissed on motion where there was a trial before the court without a jury, simply because there was no statement of facts.

2. Brokers \S 88(14)—Findings held to support recovery of commission.

Findings that defendants agreed to pay plaintiff \$500 for selling personalty for \$11,000; that in order to sell he associated with himself certain persons who had clients who might buy; that defendants agreed in addition to pay the associates the surplus in case of sale over \$11,000; that the property was sold to persons presented by plaintiff and his associates for \$11,500, and defendants paid the associates \$500, refusing to pay plaintiff, held to support a judgment for plaintiff for \$500.

Department 1.

Appeal from Superior Court, Spokane County; Joseph B. Lindsley, Judge.

Action by Samuel M. Carlton against Samuel S. Jurich and wife. From judgment for plaintiff, defendants appeal. Affirmed.

F. W. Girand, of Spokane, for appellants. Del Cary Smith and B. J. Onstine, both of Spokane, for respondent.

BRIDGES, J. The plaintiff sued the defendants to recover judgment for certain commissions on the sale of some personal property. The defendants have appealed from a judgment in favor of the plaintiff.

[1] The respondent has moved to dismiss the appeal, strike the appellants' briefs, and affirm the judgment, for the reason that the appellants have not brought here any statement of facts and that their briefs were not served nor filed within the time provided by law. The briefs were filed, however, before the motion to strike them was filed. We have uniformly held that an appeal will not be dismissed, where there was a trial before the court without a jury, simply because there is no statement of facts. The motion to dismiss is denied.

[2] The only argument made here by the appellants is that the judgment is not supported by the court's findings of fact. The substance of those findings is that the appellants were the owners of certain personal property, which they were desirous of selling for \$11,000. They listed the property with the respondent for sale at that sum, and agreed to pay respondent \$500 commission if he found a purchaser at those figures. Later respondent learned that certain other persons had some clients who might be willing to buy the property in question. He then associated those persons with himself in an effort to sell the property. Thereafter the respondent's representative and a representative of his associates took the matter up with the appellants, and it was agreed that the property was to be sold for not less than \$11,000, \$500 of which was to be paid by them to the respondent, and respondent's associates were to have for their services any sum over and above \$11,000. Subsequently the property was sold to persons presented by respondent and his associates for \$11,500. The appellants paid respondent's associates \$500, and retained the balance of \$11,000, and refused to pay the respondent any commission. The court concluded from these facts that the respondent was entitled to judgment in the sum of \$500. It seems to us beyond question that those findings clearly support the judgment.

Judgment affirmed.

PARKER, C. J., and FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

(120 Wash. 117)

STATE ex rel. JAHN v. SEARING, Chief of Police. (No. 17065.)

(Supreme Court of Washington. May 11, 1922.)

1. Habeas corpus \S 95—Constitutionality of ordinance not considered on petition for writ.

Under Rem. Code 1915, § 1075, providing that no court shall inquire into the legality of any judgment or process whereby one is in custody under any process issued on final judgment or upon a warrant issued from the superior court, the court cannot, on petition for a writ of habeas corpus, determine the constitutionality of a city ordinance under which petitioner was convicted and committed.

2. Courts \S 97(1)—Decision of federal Supreme Court as to matter of practice not binding on state court.

Although a state court is bound by a federal Supreme Court decision as to whether a statute or ordinance violates the federal Constitution, it is not bound by a decision of that court that in a habeas corpus proceeding it will determine the constitutionality of a statute

or ordinance, as it is for the state courts to construe state statutes and to determine their own procedure.

En Banc.

Petition by the State, on the relation of N. F. Jahn, against W. H. Searing, Chief of Police of the City of Seattle, for a writ of habeas corpus. Writ denied.

Raymond G. Wright and Flick & Paul, both of Seattle, for relator.

Walter F. Meier and Geo. A. Meagher, both of Seattle, for respondent.

BRIDGES, J. The charter of the city of Seattle provides that:

"Every contractor and subcontractor performing any local or other improvement work for the city of Seattle shall pay or cause to be paid to his employees on such work or on such contract not less than the current rate of wages paid by the city of Seattle for work of like character, and in any event not less than two and seventy-five one-hundredths dollars (\$2.75) per day. * * *

An ordinance provides that:

"Every contractor or subcontractor performing any local or other improvement work for the city of Seattle shall pay or cause to be paid to his employees on such work or under such contract not less than the current or prevailing wage paid by the city of Seattle for work of like character."

And that:

"Any contractor or subcontractor who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not exceeding one hundred dollars (\$100) or imprisoned in the city jail for the term not exceeding thirty days (30), or may be both fined and imprisoned."

This ordinance was in effect at all times hereinafter mentioned.

N. F. Jahn became a contractor doing certain work covered by the charter and ordinance mentioned. A criminal complaint against him was made, and a warrant of arrest issued by a police judge of the city of Seattle. This complaint charged Jahn with violating the ordinance above mentioned. After a trial in the police court, he was found guilty and judgment of sentence entered, and he was committed to the charge of the chief of police, who is the keeper of the city jail, for a designated period. He petitioned this court for a writ of habeas corpus, alleging generally the facts above recited, and that he was unlawfully deprived of his liberty. We issued a writ requiring the chief of police to show cause why he held the petitioner. Thereafter the chief of police duly made his return, setting up substantially the facts we have recited. Upon stipulation all of the testimony and proceedings taken in the police court have been

certified to us and made a part of the record.

The petitioner in his petition for the writ of habeas corpus, and also in his opening brief, bases his right to the writ upon many grounds, some of which would seem to go to the merits of the original criminal proceedings. In a supplemental brief, however, petitioner expressly claims the right to have the writ issued because the ordinance which it is claimed he violated is in violation of the Constitution of the state of Washington and the federal Constitution. In his supplemental brief he says:

"We are not invoking rectification of a mere irregularity. We are not appealing from a decision of a lower court or a writ of habeas corpus. We are seeking an original or alternative writ in this court. We are seeking this on the basis solely that the alleged ordinance and charter provision upon which this so-called crime is based are unconstitutional, and that this court has not, and will not, yield its right to free a citizen so restrained of his liberty."

[1] We shall therefore assume that the only question before us is whether, in an application for a writ of habeas corpus, we will determine whether the ordinance under which the conviction was had is violative of the state or federal Constitutions.

Section 1076, Rem. Code, provides that:

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: 1. Upon any process issued on final judgment of a court of competent jurisdiction. * * * 3. Upon a warrant issued from the superior court upon an indictment or information."

The question now before us was elaborately considered by this court, sitting en banc, in *Re Newcomb*, 56 Wash. 393, 105 Pac. 1042. In that case, speaking through Chief Justice Rudkin, we said:

"After a full and exhaustive examination of the authorities, we are convinced that the judgment of the superior court of Pierce county is not void for any of the reasons assigned. That court had full and complete jurisdiction to determine every question here presented, and its determination is not and cannot be void. We are further of the opinion that where a party is held in custody under process issued on the final judgment of a court of competent jurisdiction, or upon a warrant issued from the superior court upon an information or indictment, he is not entitled to his discharge on habeas corpus unless such process or judgment be void, and a judgment is not void simply because the court decided erroneously some question properly before it and within its acknowledged jurisdiction. * * * To say that an unconstitutional law or a repealed law is no law is both logical and sound, but to say that a judgment of a court of competent jurisdiction is no judgment, because some question of law properly before it was decided erroneously, is, in our opinion, a non sequitur."

At another place in the opinion we said:

"Many courts hold that habeas corpus will lie for the discharge of one held under an unconstitutional statute, or a statute that has been repealed. We think, indeed, a majority of the more recent cases so hold. Nevertheless there are many well-considered cases holding the contrary, for reasons which to our mind are unanswerable."

In that case we quoted with approval from *Ex parte Fisher*, 6 Neb. 309, as follows:

"And we are not prepared to say that, upon a writ of habeas corpus we can look beyond the judgment and re-examine the charges on which it was rendered, or to pronounce the judgment an absolute nullity on the ground that the constitutionality of the statute relative to the license law is controverted. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law."

In *Re J. W. Putnam*, 58 Wash. 687, 109 Pac. 111, we said:

"It can make no difference that the petitioner contends that the statute under which the state purports to proceed is unconstitutional, or has no application to one in his situation. The superior court before which the information is pending has jurisdiction and power to determine these questions, and the defendant must raise them in the pending proceeding, and appeal from the judgment if it be adverse to him, before he can ask this court to review the legality of the proceedings or the validity of the statute."

These cases expressly decide the question we are discussing. There may be found in some of our earlier cases isolated expressions which, at first glance, may appear to be not in harmony with the doctrine of these cases, but upon close examination it will be found that they do not hold to a doctrine contrary to that laid down in the *Newcomb* and *Putnam* Cases, *supra*.

The petitioner has vigorously assailed the *Newcomb* Case, contending that it is not only fundamentally wrong, but that the great weight of authority is against it, and we are asked to overrule it. From the quotations made from that case it will be noticed that the court admits that the weight of authority is against the position taken by it, and we there deliberately placed ourselves in line with the minority. We are satisfied with the view taken in those cases, and they must now be considered the settled law of this jurisdiction.

[2] The petitioner, however, claims that the federal Supreme Court has come to a conclusion different from the one at which we have arrived, and, since he is claiming the ordinance in question is in violation of

the federal Constitution, we are bound by the decision of that court. In support of his view he cites the case of *Koepke v. Hill*, 157 Ind. 172, 60 N. E. 1039, 87 Am. St. Rep. 161. In that case the court was discussing the same question involved here and came to substantially the same conclusion to which we have come. But the opinion further said:

"If a federal question were duly presented, we would be constrained to follow the decisions of the Supreme Court of the United States."

While a decision of the highest federal court would be binding on us on the question whether the ordinance violated the federal Constitution, yet a decision of that court to the effect that in a habeas corpus proceeding it will determine whether a statute or ordinance is unconstitutional is not binding upon us. It is for us to construe our own statutes, and determine our own manner of procedure.

Writ denied.

PARKER, C. J., and FULLERTON, HOL-COMB, TOLMAN, MITCHELL, HOVEY, MACKINTOSH, and MAIN, JJ., concur.

(120 Wash. 268)

STATE v. ADAMO. (No. 17019.)

(Supreme Court of Washington. May 18, 1922.)

1. Homicide \S 194—Defendant may show conduct of deceased during quarrels with third persons of which defendant had knowledge.

Generally a defendant charged with homicide may show by third persons that they had previously quarreled with the deceased, and may show the conduct of the deceased on such occasions, if such prior occurrences were known to the defendant before the commission of the crime for which he is being tried, since such testimony tends to show the state of mind of the defendant at the time of the killing, and to indicate whether at that time he had reason to fear bodily harm.

2. Homicide \S 190(5)—Testimony as to deceased's threats against witness five years before killing held too remote.

In a homicide prosecution defended on the ground of self-defense, testimony as to deceased's threats of violence against a witness communicated to defendant five years before the killing held properly excluded as being too remote.

3. Homicide \S 191—Testimony as to deceased's violent conduct toward witness not shown to have been communicated to defendant not admissible.

In a homicide prosecution defended on the ground of self-defense, exclusion of testimony as to deceased's conduct toward the witness not shown to have been communicated to the defendant before the killing held proper.

4. Homicide \S 188(2)—General reputation of deceased admissible on self-defense issue, though defendant had no knowledge thereof.

A defendant who seeks to excuse the killing on the ground of self-defense may show the general reputation and character of the deceased for a quarrelsome disposition, regardless of whether defendant had knowledge thereof, since such testimony tends to support the defendant's contention that the deceased was the aggressor, but cannot prove specific acts of which the defendant had no knowledge at the time of the killing.

5. Criminal law \S 413(2)—Testimony as to what defendant told witness as to why he carried revolver held inadmissible as self-serving.

In a homicide prosecution involving self-defense issue, testimony that defendant told witness that he carried a revolver and the reasons why he did so held not admissible, being purely self-serving.

6. Criminal law \S 390—Defendant could testify why he carried a revolver at time of shooting.

In a homicide prosecution, defendant, who claimed to have acted in self-defense, should have been permitted to testify why he carried a revolver at the time of the shooting.

7. Criminal law \S 1169(9)—Testimony as to the position in which the deceased must have been standing with reference to person who fired shot held harmless.

In homicide prosecution, testimony of physician who made post mortem examination that deceased must have had his left side toward person who fired the shot, if error, held harmless, where the fact that he had his left side toward the defendant when the shooting was done was so manifest that the testimony could not possibly have prejudiced the defendant.

8. Criminal law \S 476—Physician's testimony that blow received by defendant was not sufficient to affect his memory, held admissible.

Where defendant, on being asked if he had not made certain statements concerning the homicide, answered that he did not remember anything after the deceased had hit him on the head with some blunt instrument, a physician's testimony that the blow was not sufficient to affect the memory held admissible.

9. Homicide \S 300(14)—Instruction on self-defense held erroneous as ignoring defense.

In a homicide prosecution in which defendant claimed to have acted in self-defense in the belief that the deceased had a pistol and to have shot when deceased reached for his hip pocket, believing himself in great danger, instruction that defendant had not been justified in shooting deceased before deceased had come within striking distance held erroneous as ignoring defendant's chief defense.

10. Homicide \S 116(1)—One having reason to believe that another is about to shoot him need not wait to shoot until such other comes within striking distance.

One who has good reason to believe that another is about to shoot him need not wait

until such other is "within striking distance" from him before firing revolver at him.

11. Criminal law \S 829(5)—Refusal of requested instruction covered by instruction given, not error.

Refusal of requested instruction as to self-defense covered by instruction given held not error.

Department 1.

Appeal from Superior Court, Spokane County; Jos. B. Lindsley, Judge.

Luigi Adamo was convicted of homicide, and he appeals. Reversed and remanded, with instructions.

Corkery & Corkery, of Spokane, for appellant.

William C. Meyer and El. M. Alley, both of Spokane, for the State.

BRIDGES, J. The defendant was convicted of the crime of killing one Joseph Gracio, and has appealed to this court for redress.

It is not necessary here to go into any of the details of the killing, except to say that it was done on or about the 4th day of August, 1921.

[1] 1. The appellant offered to prove by one of his witnesses that about the middle of 1916 the deceased, in a quarrel with the witness, made a movement to his hip as if to draw a gun and made threats of violence against the witness, and that such facts were related to the appellant and were known to him prior to the commission of the offense with which he is here charged. The court refused this offer. Generally speaking, we have no doubt that a defendant charged with homicide may show by third persons that they had previously had quarrels with the deceased, and show the conduct of the deceased on those occasions, if such prior occurrence or occurrences were made known to the defendant before the commission of the crime for which he is being tried, because such testimony tends to show the state of mind of the defendant at the time of the killing, and to indicate whether he at that time had reason to fear bodily harm. *State v. Ackles*, 8 Wash. 462, 36 Pac. 597; *State v. Churchill*, 52 Wash. 210, 100 Pac. 309; 21 Cyc. 961; *Sneed v. Territory*, 16 Okl. 641, 86 Pac. 70, 8 Ann. Cas. 354.

[2] It does not follow, however, that the court erred in refusing to receive the testimony offered here. The occurrence connected with the offer happened five years before the commission of the offense charged, and we must hold that it is too remote. *State v. Farris*, 26 Wash. 205, 66 Pac. 412; *State v. Palmer*, 104 Wash. 396, 176 Pac. 547. We do not find any error in the court's ruling.

[3, 4] 2. The appellant sought to show by his witness Aranaldi that some time in 1918 the deceased used violent and insulting words

to the witness, and accompanied the words with a movement towards his hip, and threatened to shoot the witness. This offer was refused by the court. It is not necessary to determine whether this offer concerned an occurrence which was too remote. In our opinion, the court's ruling was correct because the offer did not show that the facts concerning this 1918 assault were conveyed to the appellant, or that he knew of them, before the time of the commission of the crime charged. When a defendant seeks to excuse the killing on the ground of self-defense, it is competent for him to show the general reputation and character of the deceased for a quarrelsome disposition. The character of the deceased may be shown whether the defendant knew of it or not, because such testimony has a tendency to support the defendant's contention that the deceased was the aggressor. 21 Cyc. 961; *People v. Farrell*, 137 Mich. 127, 100 N. W. 264; 13 R. O. L. 919. In proving the character of the deceased, specific acts of violence may not be shown. Such is the rule in any kind of case where there is an effort to show character. However, where the person accused is defending, in whole or in part, on the ground that at the time of the homicide he believed, and had good reason to believe, that he was in danger of his life or great bodily harm, he may, in addition to the character evidence, show specific acts of the deceased which are not too remote and of which he had knowledge at the time of the killing with which he is charged. But such acts of the deceased may not be shown unless it appears they were brought to the knowledge of the defendant before he committed the crime charged. See the cases heretofore cited under subdivision 1. 6 Encyc. of Evidence, 761; *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1062, 14 L. R. A. (N. S.) 704. It may be conceded that there is a conflict of authority on this last proposition, some courts holding that the specific acts may be shown whether the defendant knew of them or not; but we think we have stated the rule which is in accord with the reason and the weight of authority. The rejection by the court of the offer to prove by Aranaldi was proper because there was no offer to show that the appellant had knowledge of the facts within the offer.

[5, 6] 3. The appellant offered to prove by his witness Schacht that he, the defendant, at a time shortly prior to the commission of the offense with which he is charged, told the witness that he carried a revolver and the reasons why he did so. The court properly rejected this testimony. It would have been purely self-serving. Doubtless the appellant should have been permitted to testify why he carried a revolver at the time of the shooting in question, but that would not justify receiving hearsay and self-serving testimony on that question.

4. After the doctor who had made the post mortem examination had testified that one of the bullets had entered the left side of the deceased, he was asked by the state the following question:

"Now, in what position, Doctor, would the deceased's body have to be to receive a wound like that from a gun, with reference to the position of the man who shot the gun?"

Over the objections of the appellant, the witness was allowed to answer as follows:

"He would have to be with his left side towards the man with the gun, his left side, just about in the position that I am to you."

The authorities are not agreed as to whether a doctor who has examined the wounds may testify as to the relative attitude of the deceased and the instrument or person inflicting the wound. Some of the courts hold that the evidence cannot go farther than to describe the wound, and it is then for the jury to determine from the other testimony the relative positions of the parties. *Dial v. State*, 159 Ala. 66, 49 South, 230, 133 Am. St. Rep. 19; *Dumas v. State*, 159 Ala. 42, 49 South, 224, 133 Am. St. Rep. 17; *People v. Westlake*, 62 Cal. 303; *Price v. United States*, 2 Okl. Cr. 449, 101 Pac. 1036, 139 Am. St. Rep. 930. The general attitude of these cases is shown by that of *People v. Westlake*, supra. There the doctor performing a post mortem examination was asked to state, from the examinations he had made, whether the deceased, if standing or moving in a certain direction, would have received the pistol wound by a person firing from a given spot. The court said:

"Whether the wounds of which the deceased died could have been inflicted by a pistol shot fired by the defendant from a certain direction was a fact to be found by the jury from the evidence of the circumstances in which the homicide was committed, or to be inferred from the relative position of the parties at the time the shot was fired; it was not such a matter of science or skill as required the opinion of an expert."

The following are some of the cases which hold to the contrary doctrine: *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619; *State v. Sullivan*, 43 S. C. 205, 21 S. E. 4; *Perry v. State*, 110 Ga. 234, 36 S. E. 781; *State v. Asbell*, 57 Kan. 398, 46 Pac. 770; *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

Our attitude on questions somewhat different, yet similar to that involved here, is shown in the case of *State v. Hart* (Wash.) 203 Pac. 4.

[7] We do not, however, find it necessary to choose which line of decisions we will adopt, because here it is perfectly manifest that the error, if any, was without prejudice. The bullet had entered the left side, and, in answer to the question objected to,

the doctor testified that the deceased must have had his left side towards the defendant when the shooting was done. This fact is so manifest that there could not possibly be any prejudice in allowing the doctor, or any one else, to testify to it.

[8] 5. On cross-examination of the appellant, the prosecuting attorney asked him if he had not made certain statements at the police station, in the presence of certain named individuals, concerning the manner and circumstances of the homicide. The witness answered that he did not remember those conversations, and did not remember anything that occurred after the deceased had hit him on the head with some blunt instrument. The inference to be drawn from his testimony is that the blow so injured his brain that he did not know what took place for several hours. On rebuttal the state, over the objection of the appellant, was permitted to undertake to prove by two physicians who had examined the appellant's head wound that, in their opinion, the blow was not sufficient to affect the mind or memory of the appellant. It is now claimed that the receipt of such testimony was prejudicial error. The particular ground of the objection is that:

"This ruling allowed the state by medical testimony to show the capacity of the mental processes of mind of the defendant as to his recollection of the facts of the shooting."

The testimony was not offered or received for the purpose of showing that the appellant did not remember the conversations about which he had been asked. The sole purpose was to show, if possible, that the blow upon the head was not sufficient to cause him to lose his memory. Without doubt the testimony was admissible for that purpose.

6. Complaint is made concerning some instructions given by the court to the jury. In order to discuss these intelligently, it will be necessary to give some of the details of the occurrence. Both the appellant and respondent describe the quarrel which finally led to the shooting as occurring in two episodes. The appellant had been purchasing some fruit in a wholesale house, and, when he had completed his work, he left the building to go out on a platform towards the alley, which was the customary way of reaching the street. When he went through the door and reached the platform the deceased accosted him, and there were some words between them accompanied with threats. The appellant, during this altercation, retraced his steps and came up on the platform, the deceased following him and trying to hold him, but not succeeding in so doing. The appellant again entered the wholesale house. The foregoing is a brief description of what is designated as the first episode of the quarrel. In a short time appellant again came onto the platform, and again saw the de-

ceased there. There is a decided conflict in the testimony as to what happened following this. Generally speaking, the state's testimony tended to show that the deceased appeared to be no further interested in the controversy and appeared to have abandoned any attack which he may have previously made, and that the appellant, after walking some distance along the platform, suddenly turned, facing the deceased, and at once drew a revolver and shot him, or shot at him; that, after the first or second shot, the deceased went rapidly towards the appellant, and finally reached him, when a scuffle ensued, during all of which time the appellant fired three additional shots, every one striking the body of the deceased. The appellant's theory of what occurred during the second episode was that during the first episode the deceased said he was going to kill him, and that when he (appellant) came out onto the platform during the second episode the deceased was there in a threatening attitude, and again threatened to kill him, and that appellant was walking across the platform with the deceased following him, and that he saw deceased reach for his hip pocket, and he thought deceased was intending to draw a revolver, and he considered that his life was in great danger, and that he shot and killed deceased to protect himself. The testimony of all the witnesses fixed the distance between the two men when the shooting began at from about 4 feet to 12 or 15 feet, and that deceased did not come within striking distance of appellant until after the first shot. It is conceded by all witnesses that the deceased did not have any revolver, but did have a bright hammer, which he probably carried in his hip pocket, and that it was with this instrument he struck appellant after the two had come together, which was after the first shot.

By instruction No. 6 the court told the jury, in effect, that if they found that the deceased attacked the appellant, and that the latter believed, and had reasonable grounds to believe, that the deceased would at once take his life, or do him great bodily harm, and that the appellant shot and killed the deceased, believing, and having reasonable grounds to believe, it necessary to do so in order to protect himself against death or great bodily harm, then the shooting would be justifiable. The court then proceeded to give what is designated instruction No. 7, of which complaint is made. That instruction is as follows:

"If, on the other hand, you believe from the evidence, beyond a reasonable doubt, that the defendant, Luigi Adamo, at the time of the shooting made no effort to avoid the encounter with the said Joseph Gracio, or to withdraw from such encounter, and that there was opportunity for the said defendant to have avoided the encounter or to have withdrawn therefrom without the necessity of shooting

the said Joseph Gracio, and that he, the said defendant, fired and shot at the said Joseph Gracio before the said Joseph Gracio was within striking distance of the defendant, and that the defendant might have avoided the encounter with the said Joseph Gracio, but, not doing so, did shoot and kill the said Joseph Gracio, with the intent so to do, then it will be your duty to find the defendant guilty, for a killing under such circumstances is not justifiable or excusable on any grounds whatever."

[9, 10] It was error to give this instruction. The court, in effect, told the jury that under no circumstances did the appellant have a right to shoot the deceased so long as the latter was not "within striking distance" of the appellant. There was ample testimony from which the jury might have believed that, when the shooting commenced, the parties were from 8 to 15 feet apart, and that the appellant, seeing the deceased reach for his hip pocket, believed, and had reason to believe, that his life was in great danger. The instruction with reference to coming "within striking distance" entirely ignores the appellant's chief defense. It is not the law that one who believes, and has good reason to believe, that another is about to shoot him, or otherwise do him great bodily harm, must wait until the aggressor is within striking distance before he will be permitted to do anything which he considers necessary, and has a right to consider necessary, for the protection of his own life. In so far as our attention has been called by the appellant to the instructions of the court on the question of self-defense, it appears that they were proper and ample, but we are entirely unable to read out of the instruction this "striking distance" phrase, or to harmonize it in any way with the instructions which appear to have been proper. We think it would have been much better if the whole of instruction No. 7 had not been given.

7. Complaint is made because the court refused to give appellant's requested instruction No. 3, which reads as follows:

"The term 'apparent danger' means not apparent danger in fact, but apparent danger to the defendant's comprehension, as a reasonable man situated as he was situated; that is, did defendant believe and have reasonable grounds to believe that he was in imminent danger of death or great bodily harm at the time of the alleged killing?"

[11] It was not error to refuse to give this requested instruction, for the court, in a number of instructions, properly covered the identical ground suggested by this request.

We do not consider it necessary to discuss one or two other claimed errors, because it is improbable that the matters complained of will occur at a new trial.

For the error pointed out, the judgment is

reversed, and the cause remanded, with instructions to grant a new trial.

PARKER, C. J., and MITCHELL and TOLMAN, JJ., concur.

(120 Wash. 236)

In re HACKETT ESTATES. (No. 16989.)

(Supreme Court of Washington. May 16, 1922.)

1. Execution \Leftrightarrow 69—Execution on judgment secured before judgment debtor's death may issue after debtor's death.

Probate Code, § 119, provides when any judgment was rendered against testator in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor as any other claim, but if the judgment be a lien on any property of the deceased, the same may be sold for satisfaction thereof, and the officer making the sale shall account to the executor for any surplus; and, where a judgment was obtained during decedent's lifetime, which was a lien on the judgment debtor's property under Rem. Code 1915, §§ 445, 459, the property could be sold after his death in satisfaction of the judgment independent of the administration of his estate in probate and the precedence of other debts over the judgment, as enumerated under Probate Code, § 171.

2. Submission of controversy \Leftrightarrow 20—Submission of controversy to superior court held appealable.

Where issues arising under probate were submitted to a judge of the superior court "for his determination and decision and classification as to the prior rights of all claims herein set out, and that the sale * * * shall be subject to such decision as to priority of claims," the judge was called upon to decide the same as if the issues had been brought before the court by an action, and the judge's disposition is appealable.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

In the matter of the estates of Andrew Hackett and Della F. Hackett, deceased. On submission of controversy to superior court. From judgment that Edward Covell's deficiency judgment claim should be a general claim against the estate, but that he was not entitled to have execution and sale of real property in satisfaction of his judgment independent of probate proceeding, he appeals. Affirmed in part and reversed in part.

Charles Grant, of Spokane, for appellant.

S. S. Bassett, of Spokane, for respondent.

PARKER, C. J. This is a controversy over the claimed right of Edward Covell, a judgment creditor of Andrew Hackett and the community consisting of Andrew and

Della F. Hackett, both deceased, to have sold under an execution issued upon the judgment after the death of both Mr. and Mrs. Hackett real property situated in Spokane county and owned by Mr. Hackett and the community at the time of the rendering of the judgment, upon which real property the judgment became a lien by virtue of its rendition while they were alive. From the order and judgment which in effect denied the right of Covell to have such execution and sale upon the judgment after the death of Mr. and Mrs. Hackett, Covell has appealed to this court.

The controlling facts may be summarized as follows: The controversy was submitted to the superior court upon a statement of facts agreed upon by counsel for the administratrix and Covell. The estates of Mr. and Mrs. Hackett, both deceased, are being administered in one probate proceeding; the agreed statement being filed and this controversy submitted to the court therein. Prior to the deaths of Mr. and Mrs. Hackett there was rendered in the superior court for Spokane county a judgment against Mr. Hackett and the community, consisting of Mr. and Mrs. Hackett, in favor of Covell for the sum of \$12,368.91, which judgment it is conceded then "became and is a general lien upon the real estate of said Andrew Hackett, deceased, and, upon any community interest in real estate of said Andrew Hackett and Della Hackett, deceased." This refers only to real estate in Spokane county. Thereafter both Mr. and Mrs. Hackett died, and Clara McMillan was duly appointed and qualified as administratrix of their estates by the probate court for Spokane county, in which court the estates are now being administered in one probate proceeding. A number of claims have been duly established against the estates, which will take precedence over the judgment claim of Covell under section 171 of our Probate Code (Laws of 1917, p. 692), viewing Covell's judgment claim merely as a general debt of the estate of Mr. Hackett and the community, apart from the right Covell may have to subject the real property of Mr. Hackett and the community, situated in Spokane county, to the payment of his judgment in preference to any other charge against that particular real property. Covell filed his judgment claim as a general claim against the estate of Mr. Hackett and the community, but, as it is stipulated:

"Said Edward Covell does not submit his said judgment claim as a claim to be paid in the administration of said estate other than as a claim for payment of any deficiency remaining after sale of real estate on which said judgment is a lien out of any other assets of said estates."

After the death of both Mr. and Mrs. Hackett, Covell caused execution to be issued

upon his judgment, entirely independent of the probate proceeding, which was followed in due course by sale thereunder of the interests possessed by Mr. Hackett and the community, at the time of the rendering of the judgment, in certain real property in Spokane county upon which the judgment had become a lien. At about the time Covell caused the execution to be issued, the administratrix obtained an order from the court in the probate proceeding, authorizing the sale of the same property by the administratrix to pay the debts of the estate. This order of sale made by the court in the probate proceeding was evidently rested by the court upon the theory that there could be no sale of real property of the deceased in satisfaction of Covell's judgment upon any execution issued after their deaths had occurred. This view of the law entertained by the judge of the superior court was evidently rested by him upon section 119 of our Probate Code (Laws of 1917, p. 675). The question as to whether or not Covell was entitled to execution and sale so made in his behalf was submitted to the court for decision by the following language found in the stipulation:

"That in order to save the costs of obtaining an order setting aside said sale [the execution sale] by said Edward Covell made as aforesaid, and to determine fully and definitely the priority of said claims of said Covell and others, hereinabove set out, it is hereby agreed by and between the parties hereto that said issue shall be submitted to the judge of the above-entitled court on the 25th day of May, 1921, at the hour of 10 o'clock a. m. of said day, or as soon thereafter as same can be heard, for his determination and decision and classification as to the prior rights of all the claims hereinabove set out, and that the sale by said Edward Covell as aforesaid shall be subject to such decision as to priority of claims."

The matter came on for hearing in the superior court accordingly, and resulted in an order and judgment which is in effect a decision by the superior court that Covell was not entitled to have execution and sale of the real property in satisfaction of his judgment independent of the probate proceeding, and that his judgment claim is of the sixth class in order of preference, not only as a general claim against the estate, but also as a judgment lien claim against the particular real property sold under the execution; the court holding, in effect, that certain claims against the estates, established as of the first, second, and fifth classes enumerated in section 171 of our Probate Code, should be paid in preference to Covell's judgment, viewing that judgment not only as a general charge against the estate, but also as a lien charge against the particular real property upon which it became a lien at the time of its rendition.

[1] Has appellant, Covell, the right to have execution upon his judgment and sale of the property in question made thereunder, independent of the probate proceeding, Mr. and Mrs. Hackett having died after the rendering of the judgment and before the issuing of the execution? This question is to be answered by reference to the following statutory provisions relating to the lien of judgments and the order of paying debts of estates of deceased persons in course of administration:

"The real estate of any judgment debtor and such as he may acquire, shall be held and bound to satisfy any judgment * * * of the superior * * * court * * * for the period of five years from the day on which said judgment was rendered, and such judgments shall be a lien thereupon to commence as follows: Judgments of the superior court of the county in which real estate of the judgment debtor is situated, from the date of the entry thereof. * * * " Rem. Code, § 445.

This statute remains in full force, except that by the provisions of Rem. Code, § 459, later enacted, the judgment lien continues for a period of six years. *Seattle Brewing & Malting Co. v. Donofrio*, 59 Wash. 98, 109 Pac. 335; *Catton v. Reehling*, 78 Wash. 187, 138 Pac. 669; *Kelleher v. Wells*, 87 Wash. 323, 151 Pac. 823.

"When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator, as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration: Provided, however, that if it be a lien on any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands." Probate Code, § 119; Laws of 1917, p. 675.

"The debts of the estate shall be paid in the following order:

"1. Funeral expenses in such amount as the court shall order.

"2. Expenses of the last sickness, in such amount as the court shall order.

"3. Wages due for labor performed within sixty days immediately preceding the death of decedent.

"4. Debts having preference by the laws of the United States.

"5. Taxes, or any debts or dues owing to the state.

"6. Judgments rendered against the deceased in his lifetime which are liens upon real estate on which executions might have been issued at the time of his death, and debts secured by mortgages in the order of their priority.

"7. All other demands against the estate."

Probate Code, § 171; Laws of 1917, p. 692.

It is argued in behalf of the administratrix that, while Rem. Code, § 445, in terms makes the judgment a lien upon the real property of the judgment debtor, such lien ceases to be

effective as a lien upon the real property of the judgment debtor, after his death, superior to the five classes of debts and charges which may be established against his estate, mentioned in the first five subdivisions of section 171 of the Probate Code above quoted. It will be conducive to a clear comprehension of the conditions of our problem to be reminded that there is a marked distinction between the question of the order of priority of established claims against an estate of a deceased person, viewed as general claims against all property indiscriminately, real and personal, which such deceased person may leave, and the question of priority of liens upon real property situated in a given county, which such deceased person may leave. As to general claims against an estate, none of which are liens against any particular property or class of property of the estate, it seems plain that they are to be paid in the order mentioned in section 171 above quoted, and that in so far as Covell is seeking payment of his judgment out of the estate generally—which he is here seeking only to the extent of any deficiency there may be due thereon after exhausting the real property upon which it is a lien—his claim must take rank as one of the sixth class mentioned in section 171 above quoted.

But that is not the real question here presented. We are here inquiring, not as to his preference right as a creditor having a claim chargeable against all property, real and personal, wherever situated, which might be owned by the estates, but as to his right to have his judgment claim satisfied out of the particular property upon which it became a lien at the time of its rendition in preference to other general claims against the estates. The concluding proviso of section 119 above quoted renders it plain that execution may issue upon a judgment after the death of the judgment debtor if the judgment be "a lien on any property" of the deceased judgment debtor, looking to the sale of such property in satisfaction of the judgment, independent of the administration of the estate of the deceased judgment debtor in a probate proceeding. It is argued that the proviso of section 119 refers only to specific liens of such a nature as are foreclosable by a suit in equity, such as mortgages, mechanics' liens, etc. This we think is not a correct view of this proviso. It is true the judgment lien upon real property of the judgment debtor, which comes into being upon the rendition of a judgment of a superior court, may not be specific in the sense that the judgment specifically describes the real property upon which it becomes a lien; but such lien is none the less a real, vital, existing lien upon all the real property of the judgment debtor situated in the county wherein the judgment is rendered. We are not here concerned with how it may become

a lien upon the judgment debtor's real property situated elsewhere, or upon his personal property. Were it not for the sixth subdivision of section 171 it seems to us there could be no possible ground for the contention here made by counsel for the administratrix to rest upon. Indeed she seems to rest her contention wholly upon the sixth subdivision of section 171 in arguing that it is therein in effect provided that a general lien upon the real estate ceases to be such upon the death of the judgment debtor in so far as the priority of those claims mentioned in the five preceding classes enumerated in section 171 is concerned. This argument could with as much reason be directed against debts of the estate secured by a mortgage; for such debts by this same subdivision 6 of section 171 are put in the same class as debts secured by judgment liens on real property; and manifestly it was never intended that the lien of a mortgage, as against property of a deceased person, should be impaired by the general provisions of section 171. It seems to us that the conclusion cannot be escaped that the provisions of section 171 of the Probate Code, specifying the order in which debts of an estate shall be paid, does not in the least impair the lien of a judgment upon real property of the deceased which became established prior to the death of the deceased as provided by Rem. Code, § 445.

Counsel for the administratrix seems to think that, because all the property of these estates is the real property here in question situated in Spokane county, as the record seems to show, this fact has some controlling force in our present inquiry; but this is a mere coincidence, which we think cannot in the least impair Covell's judgment lien against the interests of the deceased in the real property situated in Spokane county. Plainly that lien cannot be affected by the amount, more or less, of the personal property of the estate, or the amount, more or less, of the real property of the estate situated elsewhere than in Spokane county, upon which Covell's judgment is not claimed to be a lien.

The decisions of other courts brought to our attention we find do not materially aid us here. Read superficially, they seem conflicting, but probably they are not so, read in the light of the different statutes discussed therein. The reasoning in our recent decision in *Hawley v. Isaacson* (Wash.) 200 Pac. 1109, seems in harmony with the conclusion we here reach, though we do not cite that decision as being directly in point here.

[2] Some contention is made in behalf of the administratrix that there can be no appeal from the disposition of this controversy made by the superior court or the judge thereof, seemingly rested upon the theory

that by the terms of the stipulation it was only submitted to the superior judge as an arbiter whose decision was to become final, rather than to the superior court for official judicial determination. We cannot agree with this view of the submission of the controversy. We think the record plainly shows that it was submitted to the court as such, and that the judge was called upon to decide it the same as if it had been brought before the court by an action commenced by the administratrix looking to the setting aside of the sale made under the execution issued upon Covell's judgment. It seems quite plain to us that the judge's disposition of the controversy is appealable to this court.

Looking to the language of the judgment rendered by the superior court disposing of the controversy, entirely apart from the record upon which it is rendered, it seems hardly proper for us to reverse the judgment in terms, since it does correctly determine the priority and order of payment of the several classes of general claims established against the estate, putting Covell's judgment in the sixth class as provided by section 171 of the Probate Code. In so far as it was so adjudged, viewing Covell's deficiency judgment claim merely as a general claim against the estate, the judgment is correct. But the judgment, read in the light of the record on which it was rendered, has the effect of denying the superiority of Covell's judgment as a lien on the real property of the estates situated in Spokane county, and also his right to have execution issued upon his judgment and sale made of the real property upon which it is a lien, independent of the probate proceedings. We think the court erred in declining to embody in its judgment appropriate language sustaining the sale made under the execution issued upon Covell's judgment, and in declining to confine its judgment with reference to the order of payment of the debts of the estate to property of the estate other than the real property in question, and to the proceeds of the execution sale of the real property in question in so far as there may be any surplus as the result of the execution sale over and above the amount necessary to satisfy Covell's judgment claim. The cause is remanded to the superior court, with directions to correct its judgment accordingly.

We note that it appears in the record that there is an action pending—which we assume has not yet been determined—commenced by Mr. Hackett during his lifetime against Covell looking to the setting aside of Covell's judgment. It seems unfortunate that the question of the validity of that judgment, so drawn in question, was not finally determined before this controversy was determined, or determined in this controversy. But that was not done, and we therefore con-

clude that the question of the validity of Covell's judgment—which judgment is here conceded to be good in form and in so far as the record upon which it is rested is concerned—should not be foreclosed or deemed adjudicated by this proceeding. If the final prosecution of that action should result in a determination that the judgment upon which the execution was issued and the sale made are invalid, of course the sale would fall with the judgment, except as to possible innocent purchasers through mesne conveyances after the execution sale and the sheriff's deed issued in pursuance thereof. The superior court is also directed to so save this question from being *res judicata*, by appropriate language in its corrected judgment to be rendered as herein directed.

HOVEY, MACKINTOSH, HOLCOMB, and MAIN, JJ., concur.

(120 Wash. 126.)

• VAIL v. SEABORG et al. (No. 17074.)

(Supreme Court of Washington. May 11, 1922.)

1. Constitutional law § 62—Fish § 9—Statute authorizing state fisheries board to adopt regulations governing food fish held not void as a delegation of legislative powers.

Laws 1921, pp. 58, 59, §§ 108-111, and page 715, §§ 10, 11, providing for the creation of the state fisheries board and authorizing the board to adopt rules and regulations governing the possession, disposal, and sale of food fishes within the state, held not void as a delegation of legislative power.

2. Evidence § 20(1)—It is a well-known fact that the salmon industry in the state is rapidly disappearing.

In action involving validity of statutes authorizing state fisheries board to regulate the possession, disposal, and sale of food fishes within the state, held, that it is a well-known fact that the salmon industry of the state is rapidly disappearing.

3. Fish § 1, 8—Food fish in waters of state belong to the people of the whole state.

The food fish in the waters of the state belong to the people of the whole state, and the state through its Legislature has the same right of regulation and control of such property that it has of any other state property; persons having no property in such fish prior to the taking of the fish from the water because of the fact that they are engaged in the business of fishing.

4. Fish § 12—Orders of state fisheries board prohibiting taking of salmon from waters of Puget Sound not violative of joint compact between states of Washington and Oregon.

Orders of state fisheries board prohibiting the taking of salmon from the waters of Puget Sound between certain dates held not vio-

lative of the joint compact between the states of Washington and Oregon, Laws 1915, p. 115, § 116; such compact having reference only to the waters of the Columbia river and its tributaries.

5. Constitutional law § 278(6)—Eminent domain § 2(4)—Statute authorizing state fisheries board to prohibit fishing between certain dates held not to take property without due process of law or without just compensation.

Laws 1921, pp. 58, 59, §§ 108-111, and page 715, §§ 10, 11, authorizing state fisheries board to prohibit fishing between certain dates, held not to take property of one engaged in the business of fishing without due process of law or without just compensation in violation of Const. U. S. Amends. 5 and 14.

Tolman, J., dissenting.

En Banc.

Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

Action by C. S. Vail against E. A. Seaborg and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

Thomas Smith, of Mt. Vernon, and C. E. Abrams and Will J. Griswold, both of Bellingham, for appellant.

Lindsay L. Thompson, of Olympia, for respondents.

HOVEY, J. This is an appeal from a judgment of dismissal, after the sustaining of a demurrer to a complaint, whereby appellant sought to enjoin the respondents from enforcing the rules and orders of the state fisheries board, and particularly certain orders of the respondent board prohibiting the taking of salmon from the waters of Puget Sound from the 26th day of August to the 15th day of September, and from the 26th day of October to the 30th day of the following April, by any fishing appliance or any means whatsoever except with hook and line, and prohibiting the sale and disposal of any salmon which has been so taken.

It is alleged in the complaint that appellant is engaged in the business of fishing for salmon with gill nets in the waters of Puget Sound, and has an investment in the form of fishing boats and appliances devoted to this particular purpose, and that this is his only means of livelihood, and that a great many other citizens of this state are similarly situated. It is alleged that the enforcing of these orders will deprive the plaintiff and others similarly situated of their means of livelihood.

There are a good many other allegations to the same effect, but we have stated enough to show a sufficient injury if the appellant is in a position to complain.

It is alleged in the complaint, and urged upon the argument, that the orders in ques-

tion are void because the respondent board which made them was formed and acts by virtue of the provisions of section 108 et seq. of chapter 7 of the Laws of 1921 of this state, being a portion of the act known as the "Administrative Code." The portions of chapter 7 relative to this subject-matter are as follows:

"Sec. 108. The food fishes in the waters of the state of Washington shall be preserved, protected, and perpetuated, and to that end such food fishes shall not be taken at such times or places, by such means, or in such manner, as will impair the supply thereof.

"Sec. 109. The Governor shall have the power, and it shall be his duty, to appoint three citizens of this state who have a general knowledge of fish and fisheries of the waters of and adjacent to the state of Washington, as members of, and who shall constitute, the state fisheries board to serve at the pleasure of the Governor, and who shall receive their actual and necessary expenses while engaged in the performance of their duties.

"Sec. 110. The state fisheries board shall have the power to investigate the habits, supply, and economic uses of, and to classify, the food fishes in the waters of the state of Washington and, from time to time, make, adopt, amend, and promulgate rules and regulations governing the taking thereof, (1) fixing the times when the taking of the several classes of, and all, food fishes is prohibited, (2) specifying and defining the places and waters in which the taking of the several classes of, and all, food fishes is prohibited, and (3) defining, fixing, and prescribing the kinds of gear, appliances, or other means that may be used in taking the several classes of food fishes, and the times, places, and manner of using the same.

"Sec. 111. All laws relating to the matters referred to in the last preceding section are hereby repealed as statutes, and are hereby constituted and declared to be operative and to remain in force as the rules and regulations of the state fisheries board, until such time as they or any of them are amended, modified, or revoked by the state fisheries board: Provided, that holders of existing fishing locations shall hold and enjoy the same with the exclusive right to operate their fishing appliances thereon under the rules and regulations of said board at all times when fishing in the waters where such locations are situated shall be permitted."

At the same session the Legislature passed an act, the same being chapter 180 of the laws of that session, which contains the following sections:

"Sec. 10. The food fishes in the waters of the state of Washington shall be preserved, protected and perpetuated, and to that end such food fishes shall not be possessed, sold or disposed of at such times as will impair the supply thereof.

"Sec. 11. The state fisheries board shall have the power from time to time to make, adopt, amend and promulgate, in the manner provided by law, rules and regulations governing the possession, disposal and sale of food

fishes within the state of Washington, whether taken within or without the state of Washington, fixing the times when the possession, disposal or sale of the several classes of, or all, food fishes is prohibited."

[1] Prior to the enactment of the statutes in question, there had been in force a great many laws of this state prescribing in considerable detail the operation of the fishing business. It will be noted that by the provisions of section 111 these laws are all repealed, but they are continued as rules and regulations until such time as the new board shall see fit to change the same. The main contention of appellant is that the acts in question constitute a delegation of legislative power, and an able argument is presented to the general effect that the acts in question violate the recognized rule that a Legislature cannot delegate its power to legislate to a board or commission.

The recognized distinction in matters of this kind, however, is between power to legislate and the power to administer. This is well stated in a case cited by appellant, *State v. Normand*, 76 N. H. 541, 85 Atl. 899, Ann. Cas. 1913E, 996:

"Congress cannot delegate its power to make a law; but it can make a law and delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend."

[2] The great increase in the duties of the governing bodies has brought about a demand that matters in which the general public are interested shall be governed in their details to an extent impracticable to be attended to by the legislative bodies which meet only biennially, and statutes of this character are passed to meet the situation. The fact that Legislatures formerly attended to the details does not change the character of such details from that of an administrative character. By section 108 the purpose of the Legislature is declared. It is a well-known fact that the salmon industry of the state is rapidly disappearing, and the Legislature declares its purpose to protect and perpetuate it.

That this is a sufficient act of legislation is supported by the decisions of this court in *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938; *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595; *Carstens v. De Sellem*, 82 Wash. 643, 144 Pac. 934; *State ex rel. McBride v. Superior Court*, 103 Wash. 409, 174 Pac. 973; *State v. Storey*, 51 Wash. 630, 99 Pac. 878; *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037; and a very persuasive parallel was drawn by the Attorney General of section 108 of this act with section 2 of chapter 174 of the Laws of 1913, the latter being a section of the minimum wage law.

The former acts were an exercise of the

police power and dealt with contract rights between individuals. Whether section 108 would be a sufficient act of legislation in all cases we are not called upon to decide in this case.

[3] The food fish in the waters of the state belong to the people of the whole state, and the state through its Legislature has the same right of regulation and control of this property that it has of any other state property. The fact that appellant and others are engaged in the business of taking fish does not give them any property in the fish prior to taking. The right exists in the state in the first place to say whether any fish whatever shall be taken. By the act in question the right to fish is provided for, but only under such regulations as shall be found by a properly constituted board to preserve and perpetuate the supply. We sustained a similar act in *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938, relative to the regulation of game by county commissioners. We consider the following cases in point: *Portland Fish Co. v. Benson*, 56 Or. 147, 108 Pac. 122; *Ex parte Fritz*, 86 Miss. 210, 38 South. 722, 109 Am. St. Rep. 700; *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630; *State v. Nelson*, 31 R. I. 264, 77 Atl. 170.

In *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 490, 55 L. Ed. 563, the Supreme Court of the United States uses the following language:

"To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. . . .

"In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features: and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent. . . .

"From the beginning of the government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations. . . ."

A very recent case is *State v. Dudley*, 182 N. C. 822, 109 S. E. 63. In this case the Supreme Court of North Carolina sustained an act in all respects similar to the act now under consideration, with the exception that the North Carolina act provides for giving notice of the regulations before they become effective; but this lat-

ter provision has no bearing upon the question of whether there is a delegation of legislative power, and notice of regulations is not necessary to due process. *Spokane Hotel Co. v. Younger*, supra.

We conclude that the act in question is not invalid as a delegation of legislative power.

It is also urged that the orders are void because not enacted under the requirements prescribed for legislative acts; but, as we conclude the orders are of an administrative character, it is not necessary to further discuss this question.

[4] It is also contended that the orders are void because of the provisions of section 116 of the Laws of 1915, p. 115, being the enactment entitled "Joint Compact Between the States of Washington and Oregon." This compact relates solely to the waters of Columbia river and its tributaries. It has no application to the subject-matter of this controversy. It will therefore be unnecessary to inquire at this time what effect new legislation may have upon the compact.

[5] It is also stated that the act in question violates the Fifth and Fourteenth Amendments to the Constitution of the United States. In his argument on this branch of the case appellant starts out by conceding that he has no property rights in or to the fish native to the waters of the state of Washington, and that the Legislature has unlimited power with reference to the same. But he contends that he has a license, and that this is a "franchise" as defined in *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488. The case in question dealt merely with the right of the holder of a license to a fishing location to prevent trespass from one not authorized to fish within the territory covered by the right. It is not claimed in the present case that the appellant has any license to fish contrary to valid rules and regulations.

In *State v. Hals*, 90 Wash. 540, 156 Pac. 395, we decided that a fishing location license gave no vested property right in the holder as against the state.

The argument on this branch seems to proceed upon the basis that due process of law is not provided. In the case of *Geer v. Connecticut*, 161 U. S. 519, 18 Sup. Ct. 600, 40 L. Ed. 793, Mr. Justice White used the following language:

"The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict, as in the opinions of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority—not a right inherent in each individual, and consequently

nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game."

The same rule was announced in *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469.

We conclude that the acts in question are a valid exercise of the legislative power of the state, and that the orders complained of are a valid exercise of the administrative board created by chapter 7 of the Laws of 1921.

The judgment is affirmed.

PARKER, C. J., and MITCHELL, FULLERTON, BRIDGES, and MAIN, JJ., concur.

HOLCOMB, J. I concur in the result solely upon the ground which I wish to make clear and positive, and which is all-sufficient, that the legislation in question is not of the character of those involved in *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595, but is merely regulation of dealing with property belonging wholly to the people of the state. The details of such regulations are merely committed to administrative officers. Otherwise, such delegation of powers could never be logically and constitutionally sustained.

TOLMAN, J. (dissenting). While in hearty sympathy with the purpose sought to be accomplished by the so-called legislation here in question, I cannot concur with the majority. Admitting that food fish in the waters of the state belong to the whole people, and that the Legislature has the same power of regulation and control thereof as it has of other state property, yet the fact remains that such power must be exercised in the regular and constitutional way, and can no more be delegated than the power to legislate upon other subjects.

It being conceded by the majority that, under all the authorities, the Legislature cannot delegate its power to make the law, that question need not now be discussed.

Clearly, in dealing with food fish belonging to the state, the Legislature might have forbidden the taking of such fish at all, or during the spawning season, for a limited time preceding such season, on or near the places of spawning, and fixed any other conditions for the perpetuation of the supply, and then left to an administrative board the duty of determining when the spawning season occurs at each particular place, how long it lasts, and like matters which require study and investigation; but here the whole subject-matter is attempted to be placed in the hands of an administrative body, with full power to legislate on every phase of the question. To my mind

this is a clear attempt to delegate legislative power.

It was well said, in effect, by the Attorney General in oral argument, that the appellant's contentions would have been forceful 20 years ago, since which time the courts have gone far in the direction now taken by the majority. This is unfortunately true. By reason of the supposed good to be accomplished in each particular instance, the courts have indeed more and more departed from the firm foundation upon which representative government rests, and little by little insiduously and almost imperceptibly, there has grown up a line of authorities, which with slight exaggeration, seems to warrant the views of the majority; and, unless a halt be called, by the same growth continued representative government will be wholly abolished. Believing that we have already reached the extreme limit, I can go no further, and therefore dissent.

(120 Wash. 146)

STATE ex rel. EWING v. MORRIS.
(No. 16931.)

(Supreme Court of Washington. May 12, 1922.)

1. Mortgages \S 474—Receiver on mortgage foreclosure is officer of the court.

Although a receiver was appointed in a mortgage foreclosure proceeding under authority of the statute and under stipulation of the parties, and not as general receiver of an insolvent, yet he is a court officer, required to account to the court for all funds received, rather than to the parties.

2. Mortgages \S 474—Stipulation of parties to discharge receiver without report to court without force as to court.

Where, in a mortgage foreclosure, a receiver was appointed under the statute and by stipulation of the parties, and the receiver ordered to make his report to the court, a further stipulation to discharge the receiver without reporting to the court filed by the parties was without force as to the court, nor was the fact controlling that the cases had been dismissed with prejudice by the court, for the court retained jurisdiction for the purpose of compelling the receiver to report.

3. Contempt \S 20—Failure to comply with court order is continuing contempt.

Where a receiver had been ordered to report receipts and disbursements of his trust to the court and by stipulation of the parties the suits out of which his receivership arose had been settled and dismissed with prejudice, a petition for the vacation of the order to report because of the changed conditions arising subsequent to the order did not purge the contempt, as the failure or refusal to comply with the order of the court or purge the contempt was a continuing contempt.

4. Contempt \S 41½—Immaterial who sets in motion power of court to enforce compliance with order to report.

In the case of a receiver it is of very little importance who moves to set in motion the power of the court to enforce compliance with its valid orders.

5. Contempt \S 54(2)—In indirect contempt, jurisdictional facts must appear on face of affidavit.

In all cases of indirect or constructive contempt, it is necessary that all jurisdictional facts appear on the face of the affidavit of complaint, and cannot be made to appear by proof.

6. Contempt \S 2—Negative acts may constitute direct contempt.

Negative acts may constitute direct contempt.

7. Contempt \S 21—Receiver may question order to report only in so far as the order void.

Where a receiver had been ordered to report and for his failure was in contempt, he may question the order which he is charged with refusing to obey only in so far as shown to be absolutely void, and he cannot say that it was merely erroneous, since judgments of the court cannot be attacked collaterally for irregularities.

8. Contempt \S 42, 53—Facts showed receiver in contempt for disobedience to court order to report proceedings.

Where, in foreclosure proceeding, a receiver was appointed under the statute and by stipulation of the parties, notwithstanding a further stipulation of the parties dismissing the suits with prejudice, his willful disobedience of a valid court order to report constituted direct contempt for which he could be proceeded against by the court of its own motion, and only an order or citation of the court setting up the facts constituting the contempt and giving the receiver an opportunity to be heard in his own defense was necessary.

Hovey, J., dissenting.

Department 2.

Appeal from Superior Court, Benton County; John Truax, Judge.

Action by the State of Washington, on the relation of Henry C. Ewing, against C. L. Morris, on application by relator for order to show cause why defendant should not be punished for contempt. From an order adjudging defendant in contempt, he appeals. Affirmed.

Lee C. Delle, of Yakima, for appellant.

Robinson, Murphy & Murphine, of Seattle, and Parker, La Berge & Parker, of Yakima, for respondent.

HOLCOMB, J. In March, 1916, a mortgage debt being in default by the Kiona-Benton Land & Water Company, hereinafter called the land company, to the North American Mortgage Company, foreclosure of

the mortgage was instituted. At about the same time, there being another mortgage for a large amount from the same mortgagor, which had been assigned to the International Mortgage Bank, in April, 1916, foreclosure of that mortgage was commenced. Both were commenced in the superior court for Benton county. It had been agreed between the mortgage companies and the mortgagor that separate mortgage foreclosures should be had, and that C. L. Morris, of Seattle, a stockholder in the Kiona-Benton Land & Water Company, a domestic corporation, who had had no act or part in the management of the land company, should be appointed receiver under the foreclosure proceedings, of the mortgaged premises, and take control and active management of the same, and determine whether the mortgages could ultimately be paid from the earnings of the property, or whether it would be necessary to prosecute foreclosure proceedings to final judgment and sale. It was also agreed at that time between the mortgage companies, the land company, and the receiver, that, by reason of the uncertain conditions of the outstanding sale contracts, and the general depreciated condition of the whole project, the records would not be incumbered with reports; but that the receiver should first make a preliminary report with his recommendations to each of the mortgage companies, and the land company, and annually thereafter make and file with each of the mortgage companies and the land company a report of his acts and doings for that year. The receiver agreed upon by the parties to the action was accepted by the trial court and was appointed, thereafter duly qualified, and entered upon his duties as such receiver. Pursuant to the agreement between the parties to the action and the receiver, the receiver made his preliminary reports and recommendations to each of the mortgage companies foreclosing, and the land company, and each year thereafter made and filed with each of the parties his annual report.

The land company continued to maintain its corporate existence, and there were no proceedings to liquidate it and end its corporate existence. The method above outlined of proceeding with the operation and management of the property and reporting to the parties continued until September 15, 1919, when there was a meeting of the stockholders and trustees of the land company at its office in Seattle, at which Receiver Morris was called upon for a report, and at which resolutions were unanimously adopted authorizing him to lease, sell, mortgage, or otherwise dispose of all or any part of the property of the land company, real, personal, or mixed, on such terms, conditions, consideration, and credits, and at such times,

as in his judgment and discretion he should deem to be to the best interests of the corporation, with a proviso that no sale of the corporation's property as a whole should be finally consummated without the approval of the board of trustees. All his acts and doings in relation thereto were ratified and confirmed. Thereafter the receiver filed a petition in the superior court on October 15, 1919, for, and obtained an order granting him the same power as had been conferred by the parties to the action. He then proceeded, through the agency of the Henry C. Ewing Company, a corporation in Seattle, to make a large number of sales of the land under foreclosure.

On November 26, 1920, Henry C. Ewing, a stockholder of the land company, filed an application in both mortgage foreclosure suits demanding inspection of the books and records of the defendant corporation, and a report to the court of the receiver's doings as such receiver. The court duly issued a citation on these applications, and on December 14, 1920, the date on which the hearing was set, the mortgage companies, the receiver, and the defendant land company appeared in court and contested the petition. The court did not at that time enter an order, but took the matter under advisement, and later, and on March 17, 1921, made and entered an order reciting the hearing on December 14, 1920, on the petition of Ewing, and, on the answers of the receiver and the defendant land company, recited that Ewing did not appear in person, but appeared by his attorney, and that the receiver, Morris, appeared in person and was represented in court by his attorney. It was therein ordered that on or before April 6, 1921, Morris, as receiver, should file a full and complete report of his receivership from the time of his appointment to the date of the filing of such report, which report should show all amounts still owing and other details, and, in fact, furnish a general report of such receivership since the year 1916. It was specified that the receiver should report the amount paid as attorney's fees to date, and whether or not any charges by way of counsel fees remained unpaid at the date of the report, and that the receiver should set forth how much has been paid for his services rendered thus far, as well as the amount of his claim, if any, on account of services still remaining unpaid at the time of filing his report. The order contained other matters not here material. After the entry of the foregoing order and prior to April 6, 1921, Morris, as such receiver, made and filed a complete settlement with each of the mortgage companies. On April 6, 1921, a stipulation was filed in each cause, to the effect that the mortgage companies had been paid their indebtedness in full, including attorney's fees and costs, and had executed full and complete releases and satisfactions

of their mortgages, and the notes secured thereby; stipulated that they had no further claim against the defendant land company, and that their actions should be dismissed with prejudice, and the *lis pendens* notice of record canceled and discharged. It was also stipulated that, upon the presentation and filing of the stipulation in each case, the court should forthwith, and without notice to either party thereto, make and enter an order dismissing the case with prejudice, no costs to be taxed to either party, and discharging the receiver and exonerating his bondsmen. It was further stipulated and agreed that the parties to each stipulation were fully satisfied with all the acts and doings of the receiver, Morris, and that the defendant land company was fully satisfied with all his acts and doings, and that at a meeting of the stockholders on April 2, 1921, by several resolutions duly and regularly adopted, it had ratified and confirmed the settlement made in the foreclosure actions and the acts of the receiver.

Upon the filing of the above stipulation, the court made and entered an order in each case, on April 6, 1921, reciting the reading and filing of the stipulations entered in to between the plaintiffs and defendant in each case, and ordered and adjudged that the causes be dismissed with prejudice; that the *lis pendens* notices be canceled and dismissed; that no costs be taxed to either party, "but that the receivership proceedings are not discharged and the receiver is required to file a report as heretofore ordered."

Thereupon, on the same day, the defendant land company filed in court its verified petition asking the court to vacate and annul the order of March 17, 1921, requiring the receiver to file a report, and as grounds therefor alleged with great detail the formal proceedings of the stockholders and board of trustees of the land company, approving and ratifying and confirming the acts of Morris, and the settlement made with the plaintiff in each of the actions, and prayed that the actions be dismissed and the receiver be discharged without requiring him to file reports. This petition was also joined in by the receiver through his attorney by way of a separate motion supported by the affidavit of his attorney.

Before the proceedings to vacate the orders of the court could be brought on for hearing and examination in the court below, Ewing, as relator, applied to and obtained from the trial court, on April 8, 1921, an order to show cause, returnable on April 13, 1921, why Morris should not be punished for contempt for failure to file the reports required by the order of March 17, 1921. The order of March 17, 1921, was set forth in a written application signed by the attorneys for relator, and the application was supported by an affidavit by one of the attorneys for relator, referring to the orders

of March 17, 1921, and of April 6, 1921, requiring the receiver to file a full and complete report of his receivership from the date of his appointment to the date of such report, and that Morris, as such receiver, had failed to comply with the orders and had failed to file in the court below any kind of a report as required to be filed in such orders, or any report. On the return day of the citation, Morris appeared in person and by his attorney and demurred to the application and affidavit upon the grounds that: (1) There was a defect of parties defendant; (2) that the application and affidavit did not, nor does either of them, state facts sufficient to constitute a cause of action; (3) that the application and affidavit do not, nor does either of them, state facts sufficient to require this defendant to appear and show cause why he should not be punished for contempt; (4) that the court has no jurisdiction of this cause.

The court overruled the demurrer, and appellant electing to stand upon his demurrer, and, refusing to plead or respond further, the court thereupon made and entered an order or judgment reciting the previous orders; reciting the taking of testimony, oral and documentary; reciting the refusal of Morris to plead further, and, upon being asked by the court if he had any cause to show why the judgment of the court should not be pronounced upon him, said nothing except as before, standing on his demurrer, and challenging the jurisdiction of the court. It was therefore ordered and adjudged that he was in contempt, and that he be punished for such contempt by a fine of \$100; and it was further ordered that unless he should file in the office of the clerk of the court his report as such receiver, as in the order theretofore entered required, on or before 5 o'clock p. m. on the 23d day of April, 1921, he be taken into custody by the sheriff and confined in the county jail of Benton county until he complied with the orders and filed his report required, and pay the costs and disbursements of the contempt proceeding. The order in contempt was thereupon superseded under a writ from this court, and the receiver has appealed.

Appellant first contends that he was not guilty of any contempt of court, and the court had no legal right or authority to cite and punish him as for a contempt, because a report was not filed as directed in the orders of the court, when the sole parties in interest had timely and in good faith moved the court on the same day the report was directed to be filed, April 6, 1921, and after the cause had been dismissed with prejudice by the court, for the vacation of that order, because of changed conditions arising subsequent thereto.

[1] Although this receiver was appointed in a mortgage foreclosure proceeding, under the authority of the statute providing

therefor, and under stipulations of the parties that the receiver should be appointed, and that Morris should be the receiver, and also the fact that it is not a general receivership of an insolvent, nevertheless a receiver is an officer of the court, and he is required to account to the court for all receipts and disbursements of the funds received by him. 23 R. C. L. § 142, p. 135.

"Generally speaking a receiver is not an agent, except of the court appointing him; the very term receiver negatives such an idea. He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court, * * * really representing the court, and acting under its direction, for the benefit of all the parties in interest. * * * His acts and possession are the acts and possession of the court. * * * The parties to the litigation have not the least authority over him. * * * His authority is derived solely from the act of the court appointing him, and he is the subject of its order only." 23 R. C. L. § 2.

While it is a very satisfactory arrangement for the parties to the actions for the person acting as receiver to report to them, and no doubt his operation of the properties in his hands was very satisfactory and profitable to them, he was under no legal duty to report to them, and was under legal duty to report to the court.

It is important for the courts to know whether the receivers that are appointed by them "honestly and faithfully discharge their duties and properly dispose of property and funds intrusted to their keeping," and "whether they can control their receivers or whether their receivers shall control them." *Tindall v. Westcott*, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

[2, 3] We are emphatically of the opinion, therefore, that the court had jurisdiction of the cause, and that a stipulation to discharge the receiver without reporting to the court, filed by the parties, was of no force whatever as to the court. Neither was the fact controlling that the cases had been dismissed with prejudice by the court, for the reason that the court retained jurisdiction for the purpose of compelling the receiver to report as he had been theretofore ordered. Nor did the petition for the vacation of the order because of changed conditions arising subsequent thereto purge the receiver of contempt. The failure or refusal to comply with the order of the court or purge the contempt is a continuing contempt, and the court may base judgment thereon. *Cobb v. Black*, 34 Ga. 162; *Tindall v. Westcott*, *supra*.

The proceedings to vacate the orders against the receiver requiring him to report may be appropriately presented to the court having charge and jurisdiction over the receiver, and may be sufficient to induce him to vacate or modify his former orders, and

relieve the receiver of any further duty to the court; but, until the court has so acted, the receiver is wilfully evading or disobeying the order of his superior that he report; and it cannot be argued with any great persuasion to us that the receiver is not guilty of any contempt in failing or refusing to report to the court which appointed him. It would have been easy, after the order of the court of March 17, 1921, for the receiver to have made a duplicate of the report which he made to the parties to the action, which was approved by them, and which might have been approved by the court; but he saw fit to ignore and disregard the power which controlled him, and considered only the parties to the litigation. There is no doubt, as said by appellant, that the mortgage companies had the absolute right to a dismissal of their foreclosure proceedings either upon or without satisfaction of their debt; but no party has the absolute right to the discharge of a receiver appointed by the court until the court is through with him. Of course, the court appointing a receiver cannot arbitrarily keep the receiver under his control permanently, but he certainly can keep him in his control until the receiver has complied with a very valid order made by the court.

[4] It is further contended that the court cannot compel the filing of a receiver's report upon the application of a stockholder of the defendant company who is not in anywise a proper or necessary party in the cause, where the company has fully settled and discharged its indebtedness, which was the subject-matter of the litigation, and where the action had been dismissed with prejudice. In the case of a receiver it is of very little importance who moves to set in motion the power of the court to enforce compliance with its valid orders. Nor is it material whether any comprehensive pleading or affidavit be filed. We do not understand that the judge can give no directions to the receiver except upon pleadings or applications of parties, and findings thereon. The receiver is his officer, and subject to his directions.

The remaining assignment of error is that the order or judgment of the court punishing the appellant for contempt is void.

This is based upon the contention that the affidavit and application for the show cause order in contempt were wholly insufficient under the statute, and confer no jurisdiction upon the court. The statute, section 1049, Rem. & Bal. Code, regulates the proceedings for contempt and limits the punishment therefor, and provides, among other things, "(5) Disobedience of any lawful judgment, decree, order, or process of the court," is contempt.

Section 1052 provides that, in cases other than these occurring in the immediate presence of the court, the facts constituting a

contempt may be shown by an affidavit presented to the court or judicial officer.

Many of our own cases and cases from other jurisdictions are cited and quoted to the effect that the affidavit required by statute setting up the facts constituting the contempt must show that a copy of the order or decree constituting the basis of the proceedings was served upon him, and a demand duly made that he comply therewith, unless it appear that he had actual knowledge or notice of such order or decree, and such service or knowledge or notice must appear by appropriate affidavit, upon the face of the affidavit. Not so appearing, its jurisdiction is defective, does not meet the requirements of statute, and is insufficient to give the court jurisdiction to punish for contempt.

[5] All the cases cited relate to cases where the alleged contempt was committed out of the immediate presence of the court, or by a person not having or being charged with notice or knowledge of the order or decree alleged to have been violated. We concede that, in all cases of indirect or constructive contempt, it is necessary that all jurisdictional facts appear on the face of the affidavit or complaint, and cannot be made to appear by proof. And so, as in *State ex rel. Lindsley v. Grady*, 114 Wash. 692, 195 Pac. 1049, 15 A. L. R. 383, where the defendant was accused of violating the terms of an injunction decree and it did not appear from the proofs that he had any notice or knowledge of the terms of the decree, he not being a party to the action in any way, it was held that he could not be adjudged guilty of contempt. Also, in *State ex rel. Olson v. Allen*, 14 Wash. 684, 45 Pac. 644, it was held that, where the affidavit used as a basis for contempt proceedings failed to show that it was within the power of the party prosecuted to comply with the order, the fact that proof subsequently introduced upon the trial tends to show that the one charged with contempt of court had the books in his possession which he was ordered to produce, but that he violated the order, is immaterial, when such fact is not shown by the affidavit used as the basis for the proceeding.

[6] But this is not the kind of a case illustrated by those decisions. This is a case of an officer of the court, continuously under the power and jurisdiction of the court, evading or disobeying a valid court order. He was present at the hearing, and was represented by his attorney. Notice or knowledge must necessarily be imputed to him. It is of vital importance that a receiver as an officer of the court obey the orders given him. Hence it is contempt for him to disobey the court's instructions. 6 R. C. L. par. 8, p. 495. Negative acts may constitute direct contempt; as, for instance, the failure to produce a prisoner at the trial or

hearing. 6 R. C. L. § 4, p. 491; *Ex parte Sternes*, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251.

"It is a general principle that the disobedience of any valid order of the court constitutes contempt unless the defendant was not able to comply with it." 6 R. C. L. § 15, p. 502; *Webb v. Webb*, 140 Ala. 262, 37 South. 96, 103 Am. St. Rep. 30.

[7] The defendant may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void; he cannot be heard to say that it was merely erroneous, however flagrant it may appear to be, since judgments of courts cannot be attacked collaterally for mere irregularities. 6 R. C. L. § 17, p. 505; *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966.

We have found no case exactly parallel with the case in hand, nor has counsel on either side cited us to any. The nearest case discovered in our independent search which analogously decides many of the points involved in this case, from a state where a statute regulating proceedings in contempt exists, is that of *Tindall v. Westcott*, supra, from Georgia, which has been heretofore briefly quoted. In that case, in reference to the necessity for sufficient pleadings against a receiver under the statute, further observation by the court is as follows:

"The receiver is his officer [of the judge] and subject to his directions and findings. Suppose he deemed a certain action of the receiver was necessary for the preservation of the fund; is he powerless to order it unless somebody presents pleadings about it? Must he induce some one to plead and get a judgment, before he can order a receiver to do some necessary thing?"

In *Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817, a case cited by appellant the Supreme Court of California adverted to the fact that the defendant in that case was not a party to the proceeding in which the order was made and hence knowledge of it could not be imputed to him.

[8] We are of the opinion, therefore, that the willful evasion or disobedience of the receiver of the valid order of the trial court constituted direct contempt for which the receiver could be proceeded against by the court, of its own motion, and in that case no affidavit or application would be necessary, and only an order or citation of the court setting up the facts constituting the contempt and giving the defendant an opportunity to be heard in his own defense was necessary. The sufficiency of the application and affidavit is not necessary to determine. It is only necessary to determine the validity of the order requiring the receiver to report, and the validity of the order depending thereon, setting forth the or-

ders previously made requiring him to report, and his disobedience thereof, and his failure to justify and purge himself of his contempt or show his utter inability to comply with the orders.

We conclude that the judgment of the trial court must be affirmed.

Affirmed.

PARKER, C. J., and MACKINTOSH and MAIN, JJ., concur.

HOVEY, J. (dissenting). The appellant was appointed receiver in a proceeding to foreclose a mortgage. The controversy having been disposed of, the attorneys for both parties stipulated that the receiver should be discharged. A dissatisfied stockholder of one of the parties seeks in this proceeding to set aside the action of the corporation of which he is a stockholder in discharging the receiver without a final report. It seems to me that this is not the appropriate place to dispose of that controversy, and that, the necessity for a final report having ceased, the previous order should be vacated and the receiver discharged in accordance with the stipulation. I am therefore unable to concur in the opinion of the majority.

(120 Wash. 283)

STATE ex rel. FIRST NAT. BANK OF CENTRAL CITY, COLO., v. HASTINGS, Mayor, et al. STATE ex rel. EMERSON v. SAME. STATE ex rel. WELDRICK v. SAME. (No. 16899.)

(Supreme Court of Washington. May 20, 1922.)

1. *Mandamus* ¶168(4)—Evidence held not to show judgments involved were rendered pursuant to agreement in fraud of defendant city's rights.

In a mandamus proceeding to compel the mayor and council of a city to levy taxes, under Rem. Code 1915, §§ 5129, 5131, to pay warrants issued pursuant to judgment against the city which had failed to pay for street improvements, by local assessments, evidence held insufficient to show any agreement or understanding pursuant to which those judgments were rendered against the city in fraud of its rights or those of its general taxpayers.

2. *Municipal corporations* ¶87—Warrants in payment of judgments held not void merely because resolution authorizing issuance was made at special meeting of council.

In view of Rem. Code 1915, § 7671—10, providing that no ordinance shall be passed or contract let or entered into or bill for payment of money allowed at any special meeting, held, that section 9553, relating to payment of judgments against public corporations, applies to cities of the third class, and that the city council, in passing at a special meeting a resolution

authorizing warrants in payment of judgments, was not assuming to allow any "bill for the payment of money" other than what the judgment creditors could have enforced without any action of the council, and the warrants in payment of such judgments were not invalid for such reason.

3. Municipal corporations \S 374(6) — Judgment held not invalid because of failure to require surrender of local improvement warrants on which judgment was obtained.

The failure to have local improvement warrants surrendered at the time of the rendering of the judgment against the city for its negligent failure to provide funds by special assessment to pay such warrants did not render such judgment invalid.

4. Judgment \S 501—That court decided issues erroneously would not render judgment subject to reversal except by appeal.

That the court decided issues erroneously would not render the judgment void or subject them to reversal or annulment other than by appeal therefrom.

5. Judgment \S 721—In mandamus to compel levy of tax by city to pay warrants given to pay judgments, the judgments are binding as to issues determined therein.

In mandamus to compel city officials to levy taxes to pay warrants issued for judgments, the judgments cannot be held void on the ground that the city was indebted beyond its constitutional debt limit, or because the city was not then liable as a general indebtedness for failure to produce funds by local assessments to pay local improvement warrants, since such matters were adjudicated in proceedings resulting in such judgments.

6. Limitation of actions \S 48(6)—Three-year statute held not to have barred rights to mandamus to compel levy of taxes to pay municipal warrants.

In a mandamus proceeding to compel city authorities to levy general taxes to pay warrants given in payment of judgments, an alleged wrongful diversion by the city of moneys from such general indebtedness fund *held* not by the lapse of the three-year limitation period to affect relators' right to the relief sought; the diversion being small as to the total amount of warrants against the indebtedness fund remaining unpaid.

7. Municipal corporations \S 374(1)—City liable as on a general indebtedness for failure to levy and collect assessments for local improvements.

A city is not liable as on a general indebtedness for its failure for any cause to levy and collect local assessments to pay purely local assessment obligations, even though the power to collect such assessments be entirely lost by the lapse of time, and complaints seeking such recovery on the ground of the city's negligent failure to levy local assessments sufficient to pay local warrants did not state facts constituting causes of action entitling the plaintiffs to recovery, and were incapable of being made good.

8. Judgment \S 101(2) — Default judgments void to the extent that the plaintiffs were not entitled to relief given.

Where complaints against a city failed to state facts entitling plaintiffs to any recovery as on a general indebtedness for failure to levy and collect local improvement assessments, default judgments rendered thereon are void in so far as they give relief beyond that which the allegations of the complaint show plaintiffs entitled to.

9. Municipal corporations \S 374(1)—Failure to produce by local assessment a local improvement fund is not a consideration for city's voluntary agreement for consent judgment.

Failure to produce a fund by local assessment to pay a purely local assessment obligation, even though the city's power to produce such fund has been lost by lapse of time, is not such a moral or legal consideration as will support a voluntary agreement by the city to pay such an obligation as a general indebtedness or a consent judgment thereon.

10. Judgment \S 829(3)—Judgment of federal court not involving same parties or same issues held not *res judicata*.

A federal court judgment against a city on a number of warrants in an action not brought in behalf of plaintiff bank and others similarly situated, and not involving the warrants at issue in the present case, where the then holders of their warrants were not similarly situated with those in the present case, *held* not *res judicata* as against the city.

11. Judgment \S 666—Party not estopped by judgment unless he could have used it as a protection or foundation of a claim had judgment been the other way.

Estoppels must be mutual, and a party will not be concluded by a former judgment unless he could have used it as a protection or as a foundation of a claim, had the judgment been the other way, and no one can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case.

12. Dismissal and nonsuit \S 19(1)—Awarding voluntary nonsuit held error where answer prayed affirmative relief.

In an action against a city on indebtedness warrants, where the city answering prayed that the warrants be declared fraudulent and void, it was error to award plaintiff a voluntary nonsuit.

13. Mandamus \S 176—Any relief granted relators should not call for levying taxes annually in excess of statutory limitation.

In a proceeding in mandamus to compel city officials to levy general taxes to pay warrants issued in payment of judgments against the city, where the proceedings were begun several years ago, *held*, that relief should in no event call for the levying of taxes in excess annually of those authorized by Laws 1897, p. 222 (Rem. Code 1915, § 5129 et seq.).

En Banc.

Appeal from Superior Court, Jefferson County.

Petitions by the State, on the relation of the First National Bank of Central City, Colo., and on the relation of William H. Emerson, and two causes on the relation of George Weldrick for writs of mandamus against L. B. Hastings, as Mayor of the city of Port Townsend, and others, and from judgments therein, the relators appeal. The first and last cases are reversed and remanded, with instructions, while the second and third are reversed in part and remanded, with instructions.

Charles E. Shepard and E. H. Guie, both of Seattle, for appellants.

Jas. W. B. Scott and U. D. Gragey, both of Port Townsend, for respondents.

PARKER, C. J. The relators in these three cases sought in the superior court for Jefferson county writs of mandamus to compel the mayor and councilmen of the city of Port Townsend to levy taxes upon the taxable property within that city in pursuance of the provisions of chapter 84, Laws of 1897, for the purpose of paying certain indebtedness fund warrants of the city held and owned by relators, which warrants were issued in satisfaction of certain judgments rendered against the city by the superior court for that county. While the cases were not formally consolidated in the superior court for all purposes, they were all tried therein together by consent of all parties; some of the questions both of law and fact being common to all. The trial so had in the superior court resulted in findings and judgment in each case denying to relators any relief whatever, the judgments being rested upon the theory that all of the judgments in payment of which the warrants were issued were "fraudulent and void," and that therefore all warrants issued in payment thereof were issued without consideration, and do not now evidence any legal obligation or indebtedness against the city. From this disposition of the cases in the superior court the relators have appealed to this court.

Port Townsend was incorporated as a city by a special act of the territorial Legislature in 1881 (Loc. & Priv. Laws, p. 115). It became a city of the third class in the year 1896 under the general laws of the state enacted after its admission into the Union. The city has at all times since then been and remained a city of the third class, having less than 10,000 inhabitants. Being such a city, it concededly possesses powers and has imposed upon it duties, as provided by chapter 84, p. 222, Laws of 1897, reading in part as follows:

"Section 1. In all municipal corporations, having less than twenty thousand inhabitants,

there shall be maintained a fund to be designated as 'current expense fund,' and, after the first day of February, 1898, a fund to be designated as 'indebtedness fund.' * * *

"Sec. 3. Such municipal corporations shall levy and collect annually a property tax for the payment of current expenses, not exceeding ten mills on the dollar, a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar, and all moneys collected from the taxes levied for payment of current expenses shall be credited and applied by the treasurer to 'current expense fund;' and all moneys collected from the taxes levied for payment of indebtedness shall be credited and applied to a fund to be designated as 'indebtedness fund.'"

Rem. Code, §§ 5129 and 5131.

It is to compel the city authorities to make sufficient tax levies in pursuance of this law, from year to year, to the end that relators' warrants be paid, that these cases were commenced and are being prosecuted. It is at once apparent that the principal questions to be here decided are as to the validity and binding force, as against the city, of the several judgments of the superior court for Jefferson county in payment of which the warrants here in question were issued.

Prior to the year 1893 the city constructed several local street improvements, and in payment therefor issued warrants against local improvement funds to be raised by special assessments to be levied against the property benefited thereby. The city failed to produce by special assessments sufficient funds to pay any of the warrants issued in payment of the improvements, which were held and owned by those who obtained the judgments here in question, at the time of their rendition. In October, 1893, the Bank of British Columbia, E. M. Johnson, the First National Bank of Port Townsend, and Emil Heuschöber, each being then the owner and holder of certain of the unpaid local improvement warrants, commenced separate actions in the superior court for Jefferson county, being numbered 1258, 1259, 1260, and 1261, respectively, of the records of that court, seeking recovery of judgments against the city as general indebtedness of the city; each resting its or his claimed right of such recovery upon the ground that the city had negligently failed to produce from special assessments, contemplated to be levied to pay for the improvements and the warrants issued therefor, sufficient funds to pay any portion of such warrants then held and owned by each of those plaintiffs. The superior court sustained demurrers to the complaints in each of those actions, holding in effect that no cause of action was stated therein rendering the city liable as a general indebtedness. The plaintiffs in each of those actions electing not to plead further, judgment of dismissal was accordingly rendered against them, from which they appealed to this court. Those judgments were all there-

after, on February 11, 1897, reversed by this court and remanded to the superior court for further proceedings; this court holding that the complaints stated facts constituting causes of action against the city. *Bank of British Columbia v. Port Townsend*, 16 Wash. 450, 47 Pac. 896; *Johnson v. Port Townsend*, 16 Wash. 701, 47 Pac. 1103; *Heuschobor v. Port Townsend*, 16 Wash. 701, 47 Pac. 1103; *First National Bank of Port Townsend v. City of Port Townsend*, 16 Wash. 702, 47 Pac. 1103.

Thereafter the city answered in each of those cases, and they proceeded to trial upon the merits, resulting in judgments in each case against the city, as a general indebtedness of the city in the several amounts prayed for, all of which judgments were rendered on February 1, 1898, and none of which were ever appealed from or in any manner set aside. In May, June, and July, 1895, the Merchants' Bank of Port Townsend, the Commercial Bank of Port Townsend, the Manchester Bank of New Hampshire, and Marcus A. Sawtelle, as receiver of the Port Townsend National Bank, each being the owner and holder of certain of the unpaid local improvement warrants, commenced actions in the superior court for Jefferson county, being numbered 1536, 1537, 1538, and 1539, respectively, of the records of that court, seeking recovery of judgments against the city as general indebtedness of the city; each resting its or his claimed right of such recovery upon the ground that the city had negligently failed to produce from special assessments, contemplated to be levied to pay for the improvements and the warrants issued therefor, sufficient funds to pay any portion of such warrants then held by each of those plaintiffs. The city answered in each of those cases, and they thereafter proceeded to trial upon the merits, resulting in judgment in each case against the city, as a general indebtedness of the city, in the several amounts as prayed for, all of which judgments were rendered February 5, 1898, and none of which were ever appealed from or in any manner set aside; the judgment in the case commenced by Sawtelle as receiver being finally rendered in favor of John Barneson, who had become assignee of the receiver's rights while that case was pending, and he being substituted as plaintiff therein. These eight judgments, as we view them, all have the same standing as to their validity. They all rest upon causes of action which are in substance of the same nature. There are involved in each of the three cases here on appeal warrants issued in payment of one or more of these eight judgments.

[1] We first inquire as to the validity of those eight judgments, in so far as their validity is challenged upon the ground of fraud in procuring their rendition. It is contended in behalf of the mayor and council that they

were all rendered in pursuance of an agreement between the local improvement warrant holders and the city authorities made in fraud of the rights of the city and its general taxpayers, upon causes of action which were not general obligations against the city. All of these judgments were rendered after the city had answered to the merits and after a trial upon the merits, as appears by the record in each case; in other words, upon the face of the records the judgments all appear valid in all respects. Touching the question of the alleged agreement between those judgment creditors and the city officials before the rendering of any of those judgments, we have the testimony of Mr. Hastings, as follows:

"Q. Do you remember whether or not during the year 1898 and 1897 you occupied any official position in the city of Port Townsend? A. About that time, I do not remember exactly the year, but about that time I became one of the councilmen. Q. Do you remember the time when the matter of the suits on street grade warrants came up before the council and were discussed by the council in open session and privately? A. I do. * * * Q. Now, we have the time fixed, and you say you do remember the circumstance. Now, I will ask you this question: Do you remember whether there was any understanding between the members of the city council individually, including yourself and the persons that brought these suits on street grade warrants? * * * A. I do. There was some understanding. Q. What was that understanding? * * * A. That this suit—we would allow them to take judgment on the suit and issue warrants for the amount at a smaller rate of interest on the indebtedness fund. As I remember, it provided that the city would go no further; we would not appeal the suit; we would not appeal, and they could take judgment as it was, and go through the form, but the trial would never come off, except that they take judgment, and we would issue warrants in lieu of the others. * * * Q. Do you remember, Mr. Hastings, who was the city attorney at that time? A. Mr. Plumley. Q. Do you remember whether or not you left the details of carrying out that idea to Mr. Plumley or not? A. I think we did; yes."

We also have what may be regarded as the testimony to the same effect in substance of Mr. Hill, who was mayor of the city at the time of the rendering of these judgments. We have his testimony by virtue of a stipulation made between counsel upon the trial of the cases that he, if present, would testify in substance the same as Hastings testified. This testimony of Hastings and Hill does seem to refer to some agreement had before the rendering of the judgments; but, assuming that it was so intended by them, their testimony seems to us not at all satisfactory as showing the making or carrying out of such an agreement in fraud of the city's rights. It was little else than the conclusion of the witnesses, rather than their statement of facts with that degree of clearness and

precision called for to sustain a charge of fraud in the procuring of those judgments. Opposed to this we have the testimony of Mr. Felger, who was attorney for the plaintiffs in cases numbered 1258, 1259, 1260, and 1261, in part as follows:

"Q. Tell the facts, Mr. Felger, upon the subject raised by the defense. A. Each one of these cases was tried before the court. My recollection is that all eight of the cases that are mentioned were brought at about the same time. Judge Sachs represented four of the plaintiffs, and I represented four, having associated with me the firm of Struve, Allen, Hughes & McMicken. The case known as the Bank of British Columbia against the city came up on demurrer, and was decided according to my recollection in favor of the city by the lower court. The case was appealed by the plaintiff, and the Supreme Court held that the demurrer was not well taken, and that, if the facts were as set forth in the complaint were true and could be proven, the plaintiff was entitled to recover. That decision of the Supreme Court having settled the law of the case, it was taken for granted that it settled the law of all of these cases, and, after proper notice, the cases were tried. * * * The records were all presented, the matter gone into thoroughly and carefully, and the judge, considering the facts and the law in the case, as was settled in the bank of British Columbia case, decided the cases then and there in favor of the plaintiffs and against the city. * * * Q. What is the fact, Mr. Felger, as to any agreement or understanding or negotiation between the city and these creditors, or their attorneys, or any agents for them, previous to the trial of the cases. Was there or was there not any agreement or understanding between them that the city was to allow or consent to the taking of judgment? A. Absolutely no agreement with anybody. The matter was never discussed with any person excepting in the regular way before the attorneys, and with the attorneys as to the time of the trial of the case; and the case was contested by the city attorney, just the same as in any other case."

We also have the testimony of Judge Sachs, who was attorney for the plaintiffs in cases numbered 1536, 1537, 1538, and 1539, in substance the same as that of Mr. Felger in so far as it relates to the question of any agreement existing between any of those judgment creditors or their counsel and the city officials before the rendering of the judgments. This is the whole of the evidence in this record touching the question of the making of any agreement or of the having of any understanding between any of these judgment creditors or their counsel and the city officials prior to the rendering of any of the judgments in those cases. About a week after the rendering of those eight judgments counsel for the judgment creditors did enter into negotiations with the members of the city council looking to the payment of the judgments by the issuance of general fund warrants of the city, the result of which was that on February 17, 1898,

the city council passed a resolution authorizing the issuance of indebtedness fund warrants of the city bearing interest at the rate of 6 per cent. per annum, in payment of all of those judgments, which was done, and the judgments satisfied accordingly. Some of the judgments specified in terms that the amount awarded therein should draw interest at 10 per cent. per annum, and others were silent on that question. At the time of the rendering of those judgments, the legal rate of interest upon judgments in this state, in the absence of any express specification therein, was 7 per cent. per annum (Laws of 1895, p. 350); so that those judgment creditors waived interest upon all of their adjudged claims in excess of 6 per cent., and the city by so voluntarily paying the judgments of course waived its right of appeal in each case. This compromise, if it may be so characterized, all occurred after the rights of those judgment creditors had become fully adjudicated by the judgments rendered in the manner above noticed. We are quite unable to see that what thus occurred after the rendering of the judgments lends any substantial support to the contention that the judgments were rendered by consent or in pursuance of any agreement made prior to their rendition. It seems clear to us that this agreed settlement and satisfaction of the eight judgments, after their rendition, is what the witnesses Hastings and Hill had in mind when they testified about an agreement and understanding arrived at between the judgment creditors and the councilmen. We think it is easy to see that Hastings and Hill were honestly mistaken as to the exact nature, and as to the time of making, of the agreement they had in mind. It is worthy of note, in determining this question of fact, that the judgments in question were rendered more than 10 years prior to the trial of these actions, wherein their testimony constitutes practically the whole of respondents' case, looking to the setting aside of these judgments upon the ground of fraud in the procuring of their rendition. We are quite convinced that there has not been shown any agreement or understanding pursuant to which those eight judgments were rendered against the city, in fraud of the rights of the city or its general taxpayers, and that they cannot be set aside or held for naught because of any such alleged fraud.

[2] Contention is made in behalf of the mayor and council that the warrants issued in payment of those eight judgments are void as evidencing a general indebtedness of the city, because the resolution of the city council authorizing their issuance was passed at a meeting of the city council other than a regular meeting thereof. Arguing that the meeting of the council in question was other than a regular meeting, respondents invoke the statute relating to the meetings of city

councils of cities of the third class, reading in part as follows:

"Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed, at any special meeting. * * *." Rem. Code, § 7671-10.

The answer to this contention is found in the statute which provides for the manner of enforcing money judgments against county and other public corporations. We there read:

"If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows:

"1. The party in whose favor such judgment is given may, at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof;

"2. On the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment, and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation. * * *"

Rem. Code, § 953.

We think it plain from other portions of the statute relating to actions against public corporations, which we need not here notice, that the words "or other public corporation" include cities of the third class. Our conclusion upon this contention is therefore that the city council, in passing the resolution authorizing the issuance of the warrants in payment of the judgments, was not assuming to allow any "bill for the payment of money" other than what the judgment creditors could have enforced payment of without any action of the council whatever. The action of the city council in passing the resolution manifestly did cause the issuance of the warrants bearing a lower rate of interest than they otherwise would have borne; but that does not argue that the warrants were illegally issued as against the city. We think that the passing of the resolution, and the accepting of the warrants by the judgment creditors, had no other effect than to estop the judgment creditors from thereafter claiming a higher rate of interest from the city upon their judgment and the warrants issued in payment thereof than the 6 per cent. specified in the warrants, and a waiver of the city's right of appeal from those judgments. We conclude that the mere fact that the resolution was passed at what might be deemed a special meeting of the city council and the issuance of the warrants

in pursuance of such resolution becomes of no consequence in our present inquiry, in view of the fact that such action on the part of the council and the judgment creditors resulted in the latter receiving less than they were in law entitled to and could have obtained by virtue of their judgment alone, without any action on the part of the city council.

[3] Contention is made in behalf of the mayor and council, rested upon the alleged fact that the local improvement warrants held by the plaintiff in the case of the Commercial Bank v. City, the failure to provide for the payment of which was the ground upon which the bank sought and was awarded recovery, were not delivered up and canceled at the time of the trial and the rendering of the judgment in that case. It does seem from the evidence introduced in the cases here upon appeal that those particular local improvement warrants were not surrendered upon the rendering of the judgment in the Commercial Bank case, as the local improvement warrants were surrendered in the other seven cases. Now the Commercial Bank sought, and was awarded, recovery from the city, as a general indebtedness, of damages for the negligent failure on the part of the city to provide funds by special assessment to pay those warrants. It did not seek and was not awarded recovery upon the local improvement warrants as such. In other words, its action was, as were all of the other seven, in substance, an action for damages. Those local improvement warrants, like other city warrants, were not negotiable instruments in the sense that the city could not defend against them either in behalf of the local improvement district or in behalf of the city itself. It seems then that, if it has been established by a valid judgment, as we think it has been, that the Commercial Bank was, at the time of rendering the judgment in its case, the owner and holder of the local improvement warrants for the nonpayment of which it sought recovery of damages, the city can no longer suffer damages at the hands of any subsequent holder of those warrants. In that case the trial court made rather extended findings, and, among other things, found that the Commercial Bank "is now the owner and holder of" those warrants. The judgment rendered upon those findings was absolute and unconditional in form, being a plain money judgment. There was no statement of facts preserved in that case, there being no appeal from that judgment. We must now presume that the local improvement warrants were there introduced in evidence as a part of the bank's case, or, in any event that there was evidence introduced warranting the court's finding that the Commercial Bank was then the owner and holder of those warrants. What has become of those

warrants since that time seems to be now a matter of conjecture. We think, in view of their nonnegotiable nature and the finding of the court in the Commercial Bank case that the bank was then the owner and holder of them, it is now of no consequence, so far as our present inquiry is concerned, what has become of them. We are of the opinion that the failure to have those local improvement warrants surrendered at the time of the rendering of that judgment does not render it subject to successful attack at the present time.

[4, 5] It is contended in behalf of the mayor and council that the relief now sought by relators as holders of the warrants should be denied because at the time of the rendering of the judgments the city was indebted beyond its constitutional debt limit, and also because the city was not then liable as a general indebtedness for its failure to produce funds by local assessments sufficient to pay the local improvement warrants held and owned by the plaintiffs in those actions. Plainly these were defenses which could have been made in those actions, presenting questions which we must now view as having been therein finally decided and adjudicated against the city. If the court decided them erroneously, that would not in the least render the judgments void or subject them to reversal or annulment other than by appeals therefrom to this court. We have seen that those judgments were all rendered after appearance by the city in each case, after it had answered to the merits in each case, after trials upon the merits in each case at which the city was present and represented by counsel, and that none of those judgments were ever appealed from or sought to be in any manner set aside or annulled except as such attempt is being made in these actions, and, as we may further observe, was unsuccessfully made in a case in the federal court, which need not at present be noticed. If those judgments had been rendered by default without any appearance whatever on the part of the city, and we could now say that the complaints upon which they were rendered wholly fail to state any causes of action against the city, we could probably in the present cases, as will presently be seen, hold them to be of no binding force or effect as against the city. But they do not rest upon any such frail foundation. They are judgments of a court of general jurisdiction which plainly had jurisdiction over the subject-matter which they purport to have adjudicated, and also over the person of the city by virtue of its general appearance, answers to the merits, and participation in the trials upon the merits. They have not been appealed from or set aside, and must therefore now be regarded by us as of full force and effect, as their records import.

Sayward v. Thayer, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137; State ex rel. Ledger Pub. Co. v. Gloyd, 14 Wash. 5, 44 Pac. 103; Isensee v. Austin, 15 Wash. 352, 46 Pac. 394; Boston National Bank of Seattle v. Hammond, 21 Wash. 158, 57 Pac. 365; Olson v. Title Trust Co., 58 Wash. 599, 109 Pac. 49.

[6] Contention is made in behalf of the mayor and council that the relief now sought by relators is barred by our three-year statute of limitations. It is argued that the relief prayed for by appellants is so barred because of the wrongful diversion by the city of moneys from this indebtedness fund to the prejudice of appellants more than three years before the commencement of these actions. The record does seem to show a wrongful diversion of some funds from the indebtedness fund by the city, but such diversion is in any event small in amount as compared with the total amount of the warrants against the indebtedness fund here in question remaining unpaid. If these were actions to recover damages from the city for such wrongful diversion of a local assessment fund against which the appellants held local assessment warrants, there might be some foundation for this contention; but this is not an action seeking recovery of damages from the city because of its wrongful diversion from a fund which it holds in effect in trust for the creditors of a local improvement district. Counsel's argument on this point has to do, at most, only with the diversion of a comparatively small sum from a fund raised by general taxation to pay general indebtedness of the city. These are actions to compel the city to levy taxes as required by law for the indebtedness fund, which is after all only one class of the city's general funds, to pay its general indebtedness. We think that the alleged wrongful diversion by the city of moneys from such a general indebtedness fund did not by lapse of time thereafter affect relators' right to the relief here sought. Attorneys for the mayor and council concede that "this court has definitely decided that the statute of limitations will not begin to run against a county or city warrant until after there is money in the treasury to pay the same and the warrant holder has notice of such fact." Contention is also made in this connection that the relief prayed for by relators is barred by lapse of time, because of acts of the city authorities, which it is claimed amounted to a repudiation, or rather an assertion of nonliability, of the city's obligation to pay any of the warrants here in question, made and brought to the knowledge of the warrant holders many years before the commencement of these actions. It may be that such an assertion of nonliability might be so pronounced and persisted in for a sufficient length of time to bar warrant holders from relief at the hands of

the courts looking to their payment. We think it sufficient to say that, however that may be, we have no such case here. We conclude that the rights of relators here sought to be enforced are not barred by lapse of time.

[7] We now inquire as to the validity and binding force, as against the city, of eight other judgments rendered against it during the year 1898, after the rendering of the judgments above mentioned, in payment of which general indebtedness warrants were issued by the city authorities, which warrants, with others issued in payment of the judgments above mentioned, are involved in the Emerson and Weldrick cases here on appeal. Some few years prior to 1893 the city constructed several local improvements, and in payment thereof issued warrants against local improvement funds to be raised by special assessments to be levied against the property benefited thereby. The city failed to produce by special assessments sufficient funds to pay the costs of those improvements and of the warrants issued therefor then held and owned by those who obtained these last mentioned eight judgments. During July, 1897, and April, May, June, July, and August, 1898, the Franklin Savings Bank, N. D. Hill, R. Springer, Lee Baker, Merchants' Bank, C. M. Sawtelle, J. C. Smith, and Henry Landes commenced separate actions in the superior court for Jefferson county, being numbered 1775, 1819, 1823, 1825, 1844, 1849, 1851, and 1853, respectively, of the records of that court, seeking recovery of judgments against the city as general indebtedness, each resting its or his claimed right of such recovery upon the ground that the city had negligently failed to produce by special assessments, contemplated to be levied to pay for the improvements and the warrants issued therefor, sufficient funds to pay any portion of such warrants then held and owned by each of those plaintiffs. The city was duly served with summons in each of those cases. It filed a demurrer to the complaint in the Franklin Savings Bank case, but thereafter withdrew its demurrer and expressly consented in open court to the rendering of judgment against it as prayed for in the complaint, which judgment was accordingly rendered on April 9, 1898. The city failed to appear in any manner in all of the seven other cases, and judgment was rendered by default against the city in each of them as prayed for in May, June, July, August, and September, 1898. All of those eight judgments having been rendered by consent or by default, we are warranted, as we shall presently show in looking back of the judgments themselves to the allegations of the complaints upon which they were rendered, in testing their validity and binding force as against the city. We deem it sufficient to

say that it appears by the allegations of those complaints that the local improvement warrants for the payment of which the city was alleged to have failed to provide funds by special assessments were all issued in payment of local improvements to be paid for by special assessments against the property benefited thereby, and were not intended to be issued otherwise than as obligations against local improvement funds to be so raised. In other words, none of those warrants were issued or authorized to be issued as evidencing general obligations or indebtedness of the city. In none of those complaints was it alleged that the city had collected and misappropriated any local improvement funds to the prejudice of the rights of any of the holders of those local improvement warrants; the only claim being that the city had negligently failed to levy or collect local assessments sufficient to pay any of the local improvement warrants held by the plaintiffs in those cases, and that therefore it was liable in damages as a general city indebtedness measured by the several amounts due upon the plaintiffs' local improvement warrants. In some of the complaints in those actions it was alleged not only that the city had failed to levy and collect sufficient local improvement funds to pay any portion of the plaintiffs' local improvement warrants, but also that by reason of the lapse of time the city had lost its power to further levy or collect any such local improvement funds. Counsel for relators do not in their briefs differentiate those actions one from another in such manner that we feel called upon to do so here in testing the validity of the several judgments rendered therein.

Let us now inquire as to whether or not those complaints stated good causes of action as against the city, entitling the plaintiffs therein to recover as a general indebtedness of the city, assuming for the present that the correct answer to such inquiry will be controlling of the question of the validity and binding force of the judgments rendered thereon. On July 9, 1897, this court rendered its decision in German-American Savings Bank v. Spokane, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, holding in substance that a city is not rendered liable, as a general indebtedness, for its failure to provide a local assessment fund to pay warrants issued in payment of a local improvement, in the absence of an express contract to become so liable. The question was exhaustively reviewed in that case in the light of a finding by the trial court, not only that the city had negligently failed to levy and collect the contemplated special assessments, but also that "the right to enforce collection of the special assessments was lost," evidently by lapse of time. In the course of the opinion, Chief Justice Scott, speaking for the court, said:

"From our investigation of the cases and textbooks, we are of the opinion that the decided weight of authority is against allowing a recovery of the city upon such matters at all, in the absence of an express lawful contract, to that effect, or in cases where the money has been collected on the assessments and is in the city treasury. However, it is not necessary to go that far in this case, at least at this time."

The concluding words of this quotation suggest that the general statement preceding might be regarded in some measure as obiter dictum. But we think the reasoning upon which the decision of the case was rested shows that general statement of the law to be sound. Further language used in the opinion practically amounted to an invitation to counsel to ask a rehearing of the case, particularly touching the court's expressed view of the law by the use of the language above quoted. A petition for rehearing was thereafter filed, which was denied on September 15, 1897, thus evidencing the court's adherence to the view of the law expressed in the above-quoted language. On March 7, 1898, in *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524, the same view of the law was adhered to under circumstances where the same expressed view of the law by the court cannot be said to have been in any sense obiter dictum. Having before it facts showing that the city had not only negligently failed to levy and collect special assessments, but also the fact that its right so to do had been lost by lapse of time, the court, in holding that the city was not thereby rendered liable as a general indebtedness, and referring to the *German-American Bank Case* as authority therefor, and again speaking through Chief Justice Scott, said:

"* * * For the purposes of this case we adopt the concession that the remedy to prosecute the assessments is no longer available. But, notwithstanding this, we do not think the city should be held liable for the reasons set forth in the case referred to, although the question was not expressly decided in the opinion, it not being necessary. But the reasons for deciding against the plaintiff there apply with equal force against the plaintiffs here, although the special remedy is lost. The obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and, if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences. They were bound to take notice of what was being done in the premises, or of any failure to proceed."

Now whatever may be said as to what may have seemed to be the unsettled condition of the law upon this question prior to the rendering of the decisions of this court in those two cases, it manifestly did by those deci-

sions become the settled law of this state that a city would not be rendered liable as a general indebtedness for its failure for any cause to levy and collect local assessments to pay purely local assessment obligations, even though the power to levy and collect such assessments be entirely lost by the lapse of time. And this, it will be noticed, so became the settled law of this state by the rendering of those two decisions—the first nine months, and the second one month, before the rendering of the first of the last eight judgments above mentioned. This court has repeatedly adhered to the law so settled by those two decisions. *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935; *North Western Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115; *Potter v. City of Whatcom*, 25 Wash. 207, 65 Pac. 197; *State ex rel. Security Sav. Soc. v. Moss*, 44 Wash. 91, 86 Pac. 1129; *State ex rel. Barnes v. Blaine*, 44 Wash. 218, 87 Pac. 124; *State ex rel. American, etc., Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *State ex rel. National Bank, etc., v. Tacoma*, 97 Wash. 190, 166 Pac. 66; *Pratt v. Seattle*, 111 Wash. 104, 189 Pac. 585.

In all of the five cases last cited it was held, in substance, that a pure local improvement obligation would not even constitute a moral or legal consideration sufficient to support a voluntary agreement by a city to pay such an obligation from funds other than the special assessment fund. We see no escape from the conclusion that the complaints upon which these last-mentioned eight judgments were rendered against the city by consent or by default did not state facts constituting causes of action entitling the plaintiffs to any recovery such as was attempted, to be awarded thereby. Those were not complaints imperfectly stating causes of action which might have been made good by proper allegations. They were complaints in which the allegations affirmatively showed that the plaintiffs, under the then settled law, did not have, and could not have, as against the city, any right of recovery of the nature awarded by the judgments rendered upon them.

[8] We now inquire: Did such a complete failure to show grounds of recovery by the allegations of the complaints upon which these consent and default judgments were entered render the judgments void and of no binding force as against the city? We feel constrained to hold that such was the effect of those wholly defective complaints. It is elementary law that a default judgment cannot award any relief beyond that which the facts alleged in the complaint in the action show the plaintiff legally entitled to. This also means, of course, that, if a complaint wholly fails to state facts legally entitling the plaintiff to any recovery, or states facts affirmatively showing that the plaintiff has no

right of recovery, as those complaints did, a default judgment rendered thereon is void just as such a default judgment would be void in so far as it awarded relief beyond that which the allegations of the complaint showed the plaintiff legally entitled to. In state ex rel. Summerfield v. Tyler, 14 Wash. 495, 45 Pac. 31, 37 L. R. A. 207, 53 Am. St. Rep. 878, there was drawn in question the validity of a judgment rendered by default against Spokane county upon a garnishment process. That was a mandamus proceeding in which it was sought to compel Tyler, as county auditor, to issue a county warrant in payment of a default garnishment judgment rendered against the county. The opinion does not expressly state that the judgment was one rendered by default, but it is plain that the reasoning of the court's opinion proceeds upon the theory that it was so rendered; and besides we find that the original record of that case in this court shows that the judgment there in question was rendered by default. Chief Justice Hoyt, speaking for the court, holding that the judgment was void because the county was not then subject to garnishment process, observed:

"It is familiar law that a judgment rendered in an action in which a court has jurisdiction of the person upon a complaint which does not state a cause of action is not void, but simply erroneous, and it is upon this principle that the contention of the appellant that the judgment in question is not void is founded. But, in our opinion, if the county was not subject to garnishee process, the complaint in the action in which the judgment in question was rendered not only failed to state a cause of action, but affirmatively showed that no judgment could be rendered thereon against the county."

We think the first above-quoted statement of the learned Chief Justice was not intended by him as applicable to other than complaints subject to demurrer in actions resulting in judgments other than by default. There may be room for arguing that, because the county was not subject to garnishment process at all at the time of the rendering of the judgment against it there in question, there was a complete want of jurisdiction in the court in that action over the subject-matter of the complaint. We apprehend, however, that if the county had entered its general appearance in the action and answered to the merits, and thereby necessarily invoked the jurisdiction of the court to decide the question of the county's liability to garnishment process, and a judgment against the county had followed, and no appeal had been taken therefrom by the county, the judgment would have become conclusive as against the county. This must be so because of the court's being one of general jurisdiction. The judgments which are the subjects of our present inquiry, as we have seen, were rendered upon alleged causes of

action which in law did not exist as against the city any more than the cause of action forming the basis of the garnishment judgment in the Summerfield Case existed as against the county. That decision may not be exactly in point here, in view of the room for arguing that there was involved therein more nearly a question of jurisdiction over the subject-matter than in the case in which the consent and default judgments here in question were rendered, but we think it becomes very nearly controlling in our present inquiry. It in any event lends strong support to the view that the judgments here in question are void. In Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054, a case involving an attack upon a default judgment, Judge Dunbar, speaking for the court, made this pertinent observation:

"Again, it is insisted that the complaint did not state a cause of action sufficient to give the court jurisdiction. A glance at the complaint is sufficient to refute this assertion. We think it was a good complaint in every respect and the usual complaint in cases of this kind. However, there is a vast difference, so far as jurisdiction is concerned, between a complaint which imperfectly states a good cause of action, and which might be a proper subject of a demurrer or motion, and a complaint which states no cause of action at all. * * *"

This plainly is a recognition of the general rule that "a complaint which states no cause of action at all" will not support a default judgment rendered thereon. The general rule is well stated in the text of 23 Cyc. 740, as follows:

"A default admits only what is well pleaded; and consequently a judgment by default cannot be sustained if plaintiff's declaration or complaint does not state a good cause of action or lacks those averments which are necessary to show his right to recover."

This view of the law finds support in a great many decisions cited in the note. It is followed in the text by this further observation:

"The test proposed by some of the decisions is that the declaration or complaint must be sufficient to withstand a general demurrer."

As intimated by the remarks of Judge Dunbar above quoted from the Krutz Case, we would probably not make the sufficiency of the complaint, as tested by demurrer, our controlling guide in all cases wherein the question of the validity of a default judgment is rested upon the allegation of the complaint in the action. But in our present inquiry we are not called upon to rest our conclusions upon such a test of the complaints in question; since, as we have seen, they affirmatively show that the plaintiffs were not legally entitled to recover in any sums as a general indebtedness of the city.

It follows that all of these seven default judgments are void. We might also well conclude that the consent judgment in favor of the Franklin Savings Bank is void for the same reason that we hold the default judgments to be void.

[9] However, the invalidity of the Franklin Savings Bank judgment is rendered plain in the light of the facts attending its rendition, by our decision in *State ex rel. American, etc., Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321, wherein it is held that a failure to produce a fund by local assessment to pay a purely local assessment obligation, even though the power of the city to produce such fund has become lost by the lapse of time, is not such a moral or legal consideration as will support a voluntary agreement by the city to pay such an obligation as a general indebtedness of the city, or a consent judgment rendered thereon. We conclude that all of the eight judgments last above mentioned are void and of no binding force as against the city; that the warrants issued in payment thereof are likewise void and do not constitute an indebtedness of the city for the payment of which general taxes may be levied.

[10, 11] There was introduced in evidence, on behalf of appellants, the record of the case of *First National Bank of Central City v. City of Port Townsend*, from the federal District Court, in which case judgment was rendered in favor of the bank and against the city upon a number of warrants issued by the city against its indebtedness fund, which warrants had been issued in part payment of some of the superior court judgments above mentioned. The purpose of introducing the record of that case and the judgment rendered therein in the cases here on appeal was to lay the foundation for the contention that that judgment became *res judicata* against the city as to the validity of all of the sixteen superior court judgments above mentioned and the warrants issued in payment thereof against the city's indebtedness fund. As to the effect of that federal court judgment upon the warrants issued against the indebtedness fund in payment of the first eight superior court judgments above mentioned, which are the only warrants in which the *First National Bank of Central City* is interested, we need not now inquire; since we have held upon other grounds that those eight judgments are valid and binding judgments against the city, and are not subject to attack as are the last-mentioned eight consent and default judgments. As to the latter, we think the question of the federal court judgment, introduced in evidence, being *res judicata* as against the city, must be answered in the negative. That action was not brought in behalf of the plaintiff bank and others similarly situated; nor was the judgment there-

in so rendered; nor were either of the relators Emerson or Weldrick parties to that action; nor were any of the warrants for which they seek payment in their actions here upon appeal involved therein; nor were the then holders of their warrants here involved similarly situated, other than possibly in a limited degree. If Emerson and Weldrick would not have been bound by the adjudication of the federal court had the judgment of that court been in favor of the city—and manifestly they would not—it is plain that the city is not now bound by that judgment as an adjudication against it, in so far as we are here concerned with the warrants which are here sought to be made the foundation of the relief sought by Emerson and Weldrick. The elementary rule that estoppels must be mutual to be effective seems to be conclusive in favor of the city on the question of this federal court judgment being *res judicata* against Emerson and Weldrick. The rule is well stated in the text of 23 Cyc. 1238, as follows:

"It is a rule that estoppels must be mutual; and therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case."

We are of the opinion that the judgment rendered in the federal court case is not *res judicata* as against the city of any of the matters here drawn in question in the Emerson and Weldrick cases. To what extent it may be so in the other case is of no moment here.

[12] After the trial of these cases in the superior court, but before their submission for final decision, Weldrick asked for a judgment of voluntary nonsuit in his case as to his indebtedness fund warrants numbered 166, 167, 172, and 173, which were issued by the city in payment of the Franklin Savings Bank judgment, that being the judgment that was rendered against the city by consent. Judgment of nonsuit was rendered accordingly in favor of Weldrick as to those warrants, over the objections of counsel for the mayor and councilmen. This prevented the rendering of an affirmative final judgment against the validity of the Franklin Savings Bank judgment and those warrants issued in payment thereof. From this judgment of nonsuit the mayor and council have appealed to this court. Relator Weldrick by his complaint and application for mandamus sought relief, looking to the payment of those warrants upon the same ground as he sought relief looking to the payment of his other indebtedness warrants involved in his case.

The affirmative answer of the mayor and council pleaded the invalidity of the Franklin Savings Bank judgment and those warrants issued in payment thereof, as they pleaded the invalidity of the other superior court judgments and the warrants issued in payment thereof, and prayed "that all of the said indebtedness fund warrants mentioned and described in said application be declared fraudulent and void." We think this was the same in effect as if the city and its officers had commenced an action against Weldrick seeking an affirmative judgment decreeing the warrants issued in payment of the Franklin Savings Bank judgment to be void. In other words, in this state of the pleadings and this affirmative relief asked for by the mayor and the council in behalf of the city, they had a right to an affirmative judgment decreeing these Franklin Savings Bank judgment warrants to be void and constituting no obligation as an indebtedness against the city, as they were entitled to such a judgment with reference to indebtedness warrants issued in payment of the other seven superior court judgments. We conclude that the superior court erred in awarding to Weldrick the voluntary nonsuit.

[13] We have given attention to the other questions presented in the briefs of counsel, but think the cases do not call for further discussion. It now remains for us to announce our final conclusions in the disposition of these three cases. But before doing so we note that they were commenced several years ago; the judgments denying all relief being rendered on June 4, 1920. It now seems plain that whatever relief is to be granted any of the relators must of necessity consist of the levying of taxes in the future under the provisions of chapter 84, Laws of 1897 (section 5129 et seq., Rem. Code). We are of the opinion that any such relief should in no event call for the levying of taxes in excess annually of the taxes authorized to be levied by that law.

We conclude:

First. The judgment rendered by the superior court in the case of State ex rel. First National Bank of Central City v. Mayor, being numbered 3084 of the records of the superior court and 16897 of the records of this court, must be reversed; since, as we have held, all of the indebtedness warrants involved in that case are valid indebtedness warrants of the city, issued in payment of the first above mentioned eight valid superior court judgments. It is so ordered. That case is remanded to the superior court, with directions to enter its judgment and decree awarding to the relator First National Bank of Central City a writ of mandate requiring the mayor and council of the city of Port Townsend to levy a tax from year to year, in the future, to be paid into the city's indebtedness fund, in compliance with chapter 84, Laws of 1897 (section 5129 et seq.,

Rem. Code), to the end that as speedily as possible that fund may be replenished to the full extent of the city authorities' tax-levying power under that law, as it may become necessary to exercise such power, and the funds so raised be applied from time to time, as raised, to the payment of those indebtedness warrants, together with all other valid indebtedness warrants payable from such indebtedness fund, in order as provided by law. Appellant First National Bank of Central City will recover its costs incurred in its appeal to this court.

Second. The judgment rendered by the superior court in the case of State ex rel. Emerson v. Mayor et al., being numbered 2960 of the records of the superior court and 16898 of the records of this court, must be reversed in so far as it denies relief to Emerson looking to the levying of a tax from year to year by the mayor and councilmen of the city of Port Townsend to pay in proper order the indebtedness fund warrants involved in that case which were issued in part payment of any of the first above mentioned eight valid superior court judgments. It is so ordered. That case is remanded to the superior court, with directions to enter its judgment and decree awarding such relief to the relator Emerson by a writ of mandate of the same import and nature as above directed by us in our disposition of the First National Bank of Central City case. Appellant Emerson will recover his costs incurred in his appeal to this court.

Third. The judgment rendered by the superior court in the case of State ex rel. Weldrick v. Mayor et al., being numbered 2961 of the records of the superior court and 16899 of the records of this court, must be reversed in so far as it denies relief to Weldrick looking to the levying of a tax from year to year by the mayor and councilmen of the city of Port Townsend to pay in proper order the indebtedness fund warrants involved in that case which were issued in part payment of any of the first above-mentioned eight valid superior court judgments. It is so ordered. That case is remanded to the superior court, with directions to enter its judgment and decree awarding such relief to the relator Weldrick by a writ of mandate of the same import and nature as above directed by us in our disposition of the First National Bank of Central City case.

Fourth. The judgment of voluntary nonsuit rendered in favor of Weldrick by the superior court in the case of State ex rel. Weldrick v. Mayor et al., being numbered 2961 of the records of the superior court and 16899 of the records of this court, must also be reversed. It is so ordered. That case is remanded to the superior court with further directions to enter its judgment and decree adjudging and decreeing the indebtedness fund warrants, numbered 166, 167, 172, and 173, issued in payment of the Franklin

Savings Bank superior court judgment, to be void and of no effect as evidencing an indebtedness of the city, as it was so adjudged and decreed with reference to the other indebtedness warrants issued in payment of the seven default superior court judgments. Neither party will recover costs incurred in their respective appeals to this court in the case of State ex rel. Weldrick v. Mayor et al., since the parties upon both sides have in a measure been successful in their respective appeals.

MITCHELL, MAIN, MACKINTOSH, HOLCOMB, TOLMAN, and HOVEY, JJ., concur.

BRIDGES, J. (concurring). I am in accord with what is said by the Chief Justice concerning those judgments which were rendered after the trial. I concur in the result reached by the foregoing opinion with reference to the eight judgments which were taken by default. I prefer, however, to hold those judgments void because of legal fraud practiced by the city officials, rather than because, as stated in the opinion, the complaints not only failed to state causes of action, but affirmatively showed that they could not be amended to state causes of action. The main opinion clearly shows that, because of the previous decisions of this court, the city officials must have known, and, as a matter of law, did know, that the city was not liable on the facts pleaded, or on any facts which could be pleaded in those actions. Under such circumstances, the city authorities, representing as they did the taxpayers of the city, had no right or power to willingly permit a judgment to be entered. It was in substance so held in the cases of State ex rel. American, etc., Mtg. Co. v. Tanner, 45 Wash. 348, 88 Pac. 321, and State ex rel. Bradway v. De Mattos, 88 Wash. 35, 152 Pac. 721. It is true that in the De Mattos Case the judgment was taken with the express consent of the city officials, and in the Tanner Case the city agreed in advance that the judgment might be taken by default, while here, according to the showing made, the city simply defaulted. But there is as much legal fraud on the part of the city officials in deliberately allowing judgment by default as by express agreement; each amounts to a consent judgment. I think the two cases last cited are decisive of the question under discussion.

I am also of the opinion that, in so far as the default judgments are concerned, the result of the deliberations of this court must have been the same whether the complaints stated or failed to state causes of action. State ex rel. Bradway v. De Mattos, supra.

FULLERTON, J. I concur in what is said by Judge BRIDGES.

KEENA v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 3951; S. F. 9563.)

(District Court of Appeal, First District, Division 2, California. March 20, 1922. Hearing Denied by Supreme Court May 18, 1922.)

1. Trial §296(4, 5)—Instructions held erroneous as ignoring contributory negligence notwithstanding other instructions.

In father's action against street railway for death of child, struck by street car, defended on the ground of contributory negligence of parents, instructions making railroad liable if guilty of negligence which proximately contributed to child's death, without requiring the parents to have been free from contributory negligence, held erroneous notwithstanding other instructions as to contributory negligence.

2. Street railroads §95(1)—Injury not actionable unless caused by negligence.

A street railroad is not liable for the death of a child struck by a street car if the motorman was not negligent.

3. Street railroads §101—Contributory negligence bars recovery.

Where negligence of injured person proximately contributed to the injuries by a street car, the railroad company is not liable, even though it was negligent.

4. Street railroads §118(15)—Instruction on last clear chance doctrine held justified.

In father's action for death of child struck by street car, in which there was conflicting evidence as to whether the car was stopped as soon as it could have been stopped after the gripman saw the child in a place of danger, an instruction on the last clear chance doctrine was proper.

On Hearing in Supreme Court.

5. Husband and wife §249—Proceeds of father's judgment for death of child community property.

In father's action under Code Civ. Proc. § 376, for death of infant child, in which the mother was not joined as a plaintiff, under section 378, the proceeds of the judgment in the father's favor become community property, under Civ. Code, §§ 163, 164, 197, 687.

6. Death §24—Negligence of mother imputable to father claiming damages for death of child.

In father's action for death of infant child, in which the mother is not joined as a plaintiff the contributory negligence of the mother was a good defense, not because of her interest in the community property of which the proceeds of a judgment in the father's favor will constitute a part, but because in caring for the child she represents and acts for the community and for the husband as the head of the community, and her negligence in caring for the child is the negligence of the husband.

7. Negligence §141(1)—General definition of contributory negligence sufficient.

In father's action for death of a child struck by a street car, in which it was claimed that the mother was negligent in not watching the child, a general definition of negligence would be a sufficient guide to the jury in determining whether or not the mother was guilty of negligence under the evidence.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Michael T. Kenna against the United Railroads of San Francisco, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. M. Abbott and K. W. Cannon, both of San Francisco (Ivory R. Dains, of San Francisco, of counsel), for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for the death of his minor child, a boy of the age of four years and eight months, who was struck by a Castro street cable car on May 9, 1918, and from which wounds the child subsequently died. The plaintiff was awarded a judgment in the sum of \$2,500, and the defendant has appealed under section 953a of the Code of Civil Procedure.

[1] In his complaint the plaintiff alleged that the defendant's agent negligently operated the car, and by reason of such negligence the child was killed. The defendant answered denying the material allegations of the complaint and pleaded the contributory negligence of the child and also the contributory negligence of the child's parents. The points made by the appellant asking for a reversal will be discussed in the order of their presentation by the appellant. The first two points are so closely allied that they will be discussed together. The plaintiff requested, and the trial court gave two instructions, which the appellant assigns as erroneous. One of the instructions is as follows:

"If you find that, at the time and place in question, the gripman in charge of said car saw said child upon or near the tracks, and did not give any warning of its approach, and if you further find that he was negligent in not doing so, and that such negligence proximately contributed to the death of the plaintiff's child, then your verdict must be in favor of the plaintiff and against the defendant."

The other instruction complained of is as follows:

"If you find at the time and place in question, the gripman operating said car drove the same at a dangerous rate of speed, then I charge you that he was guilty of negligence; and, if you

find that such negligence proximately contributed to the death of plaintiff's child, your verdict must be in favor of the plaintiff and against said defendant United Railroads of San Francisco."

The objection, made to each of the instructions, is that, if an instruction by its terms purports to settle the conditions necessary to the predication of a verdict, it must be correct in its entirety, and must not overlook pleaded defenses on which substantial evidence has been introduced. As the defendant had pleaded the contributory negligence of the child's parents, and as it had introduced substantial testimony in support of its plea, the defendant complains that the instructions were erroneous for, in legal effect, they directed a verdict even though the parents were guilty of contributory negligence. In support of its position the appellant cites and relies on *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 Pac. 700; *Killelea v. California Horseshoe Co.*, 140 Cal. 602, 74 Pac. 157. The respondent attempts to justify the instructions by calling attention to the fact that each of the instructions contained the limitation, "That such negligence proximately contributed to the death." As we understand the respondent, he would argue therefrom that if a defendant is negligent, and the negligence proximately contributes to an injury, then, and in that event, the defendant is liable, notwithstanding that the plaintiff is negligent and the plaintiff's negligence proximately contributes to the injury.

[2, 3] However, we think it is settled law in this state that in such a case as the case before us a defendant is not liable if it is not negligent; again, if it is negligent, and the injured person is also negligent, and the negligence of the injured person proximately contributes to the injuries complained of, the defendant is not liable. The respondent also claims that, in other places, the court had fully instructed the jury on the defenses of contributory negligence and its importance as an element in the case. However, the same argument could have been made and was made in those cases in which the same error was complained of as is complained of in this case. *Lemasters v. Southern Pacific Co.*, 131 Cal. 105, 108, 63 Pac. 128; *Rathbun v. White*, 157 Cal. 248, 253, 107 Pac. 309; *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184-187, 118 Pac. 700; *Tognazzini v. Freeman*, 18 Cal. App. 468, 472-473, 123 Pac. 540. As the Supreme Court said in *Rathbun v. White*, 157 Cal. at page 253, 107 Pac. 311:

"Nor was the vice of the instruction cured by the general direction that plaintiff must establish every material allegation of the complaint by a preponderance of the testimony. This produced, at most, a hopeless conflict between the various instructions. The different declarations of the court were not capable of being harmonized. In such case it is impossible to deter-

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mine which of the conflicting rules presented to them was followed by the jury and the error in any of the instructions must be deemed prejudicial. *Estate of Cunningham*, 52 Cal. 465; *Sappenfield v. Main St. R. R. Co.*, 91 Cal. 48 (27 Pac. 500)."

The respondent attempts to distinguish the *Pierce Case* by calling attention to the fact that there were two children involved. However, the most cursory examination of the case shows that the instruction complained of, and which was held to be prejudicially erroneous, was faulty, not because of the number that had been injured, but by reason of the fact that the instruction took from the jury material facts pertinent to the issues on trial. The respondent attempts to distinguish the *Killelea Case* by pointing out that in that case the court "recited the evidence and virtually told the jury that, if they found the evidence was true, 'then I charge you that the defendant is guilty of negligence and plaintiff is entitled to a verdict.'" True, but the instructions complained of in this case did the same thing. The trial court recited merely the evidence of the defendant's negligence, and the jury was directed that if they found that the defendant was so negligent that then, and in that event, it should return a verdict in favor of the plaintiff, and, in so doing, the case of the plaintiff on the issue of contributory negligence was entirely ignored.

In what we have said above we are not to be understood as holding that either instruction was a sound proposition of law in all other respects.

The appellant complains of another instruction which is as follows:

"If you find that the mother of said child permitted the child to go upon the street in front of the house and across the street therefrom, and that she made frequent trips to the window to watch said child, and if you find that she exercised reasonable care in that regard, and that during one of the intervals of time between the mother going to the window, the said child wandered away from where he had been playing, and that the interval of time was not longer than that which would be ordinarily permitted by an ordinarily prudent person under the same circumstances, then contributory negligence cannot be imputed to the parents."

The appellant says that said instruction violates section 19, art. 6, of the state Constitution, which provides that judges shall not charge juries with respect to matters of fact, and that it took from the jury the question of ordinary care. The appellant also contends that the instruction states in effect that watching a child at intervals constitutes reasonable care. In reply to this criticism, the respondent claims that the instruction particularly defines the meaning of ordinary care, and instructs the jury that if they find that the parent, or parents, of the child, did use ordinary care, then, so far as the parents, or custodians, of the child are con-

cerned, they cannot be held guilty of contributory negligence. We will not attempt to answer the objections made by the appellant. A brief reading of the instruction and of respondent's explanation thereof, both show that the instruction attempts to define ordinary care. Both show that the definition as tendered is to the effect that ordinary care is reasonable care. However, as reasonable and ordinary are interchangeable expressions, the definition does not carry us forward. We will not attempt to frame a full instruction on the subject, and are not to be understood as attempting to do so. However, we call attention at this time to the fact that as an instruction pertinent to the particular facts of this particular case the instruction omits many pertinent matters. It does not state the age of the deceased child, whether the child was allowed to go out of the house attended or unattended, whether the house is in a thickly populated neighborhood, or whether the street and adjacent streets are slightly traveled or busy thoroughfares, nor does it state what is meant by frequent trips to the window. Neither does it state whether the windows were opened or closed, and whether the mother was possessed of good hearing or was very deaf. It seems unnecessary for us to do more than to mention the foregoing as being elements that would enter into the mind of a reasonably careful mother as quieting her mind with reference to the welfare of her child. It is also quite clear that a material change or addition of any one of the foregoing elements might cause any jury to take a different view of the matter.

[4] The appellant complains because the court instructed the jury on the last clear chance doctrine. In this behalf the appellant quotes the testimony of the gripman to the effect that after he saw the child in a place of danger that then he stopped the car as quickly as he could. The respondent replies by pointing to the record and showing that the respondent called two experienced railroad men who testified that the car was not stopped as soon as it could have been. Under these circumstances, we think that the trial court did not err in instructing the jury on the doctrine of the last clear chance. There was a conflict in the evidence, and the jury were entitled to be advised as to the law and then to believe the plaintiff's witness, or witnesses, or to believe the defendant's witness.

The appellant asserts that the verdict of \$2,500 was excessive. In view of what has been said above, we think it is unnecessary for us to pass on that point. A new trial must be had, and it should be left to the jury under appropriate instructions to determine the amount without being hampered in any respect by the opinion of this court.

After the above was written, the respondent filed a petition for a rehearing, and in

that petition set forth that the father was in no manner responsible for the acts of omission on the part of the mother, and that therefore the instruction on the subject of the mother's contributory negligence was not pertinent because the father is maintaining this action. These matters had not been touched on theretofore by counsel, and, for the purpose of giving the question a full consideration, the court granted a rehearing. In this state a father may maintain an action for an injury to, or the death of, a minor child. Code Civ. Proc. § 376. The mother, having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as a plaintiff. Code Civ. Proc. § 378. The proceeds of a favorable judgment in such an action become community property. Civ. Code, §§ 163, 164, and 687. The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services, and earnings. Civ. Code, § 197. And, under the law of this state, when a right is created in favor of several persons, it is presumed to be joint and not several. This presumption in the case of a right can be overcome only by express words to the contrary. Civ. Code, § 1431. Such an action as the instant case did not exist at common law and is purely statutory. *Bond v. United Railroads*, 159 Cal. 270, 276, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. If a judgment for damages is recovered, the proceeds do not belong to the estate of the decedent and are not liable for the decedent's debts. The recovery is for the injury inflicted upon the plaintiff personally and not for injuries inflicted upon the decedent. *Redfield v. Oakland C. S. Ry. Co.*, 110 Cal. 277, 290, 42 Pac. 822, 1063. It would therefore appear to be the law of California that the proceeds of such a judgment passed to the surviving husband and wife, one moiety to each. It has been directly held that such is the rule in other jurisdictions. *Toner's Adm'r v. South Covington & C. St. Ry. Co.*, 109 Ky. 41, 58 S. W. 439, 441. Actions for injuries to a child are commonly classified: (1) Action by the child; (2) action by the executor or administrator of the child; and (3) action by the parent. This case does not fall in class 1, nor in class 2, but does fall in class 3. In other jurisdictions it has been held that when the case falls in class 3, and where the statute vests a common joint interest in the award in both father and mother, as does the California statute, contributory negligence of the mother constitutes a defense in an action by the father for the death of a child of tender years. *Vinnette v. Northern P. R. Co.*, 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328; *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754; *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269, L. R. A. 1915E, 781; *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29; *Kuchler v.*

Milwaukee Elec. R., etc., Co., 157 Wis. 107, 146 N. W. 1133, Ann. Cas. 1916A, 891. In California the earnings of the wife and the earnings of the husband are both community property, and the contributory negligence of the husband may be set forth as a defense in an action by him to recover damages for an injury sustained by the wife. *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 518, 111 Pac. 530, Ann. Cas. 1912A, 642. The statute makes no distinction between the case last cited and the instant case, and we think that we are controlled by the doctrine declared in the *Basler Case* and for the reasons there stated. The respondent calls to our attention the case entitled *Atlanta, etc., Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145. That decision discloses that it was based on a special statute then in force in the state of Georgia. Respondent also relies on the case entitled *Macdonald v. O'Reilly*, 45 Or. 589, 78 Pac. 753. That case is not helpful. In the state of Oregon the father is the sole heir of a deceased minor child. B. & C. Ann. Codes, §§ 5577 and 5578. Such a suit as the instant case is provided by statute, but it must be maintained by the representative of the decedent and the proceeds become a part of and are administered upon the same as other personal property. B. & C. Ann. Codes, § 381. The Oregon court was therefore logical in holding that the father was not chargeable with the negligence of the mother.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. [8-7] We approve of that portion of the opinion holding that the proceeds of the judgment in favor of the father is community property, but we disapprove of that portion of the opinion to the effect that the proceeds of the judgment pass to the parents, one-half to each. The contributory negligence of the mother is a defense to the action on behalf of the community to recover for the death of the child, not because of her interest in the community property, but because in caring for the child she represents and acts for the community and for the husband as the head of the community, and her negligence in caring for the child is the negligence of the husband. We agree with the balance of the opinion of the District Court of Appeal, but think that a general definition of negligence would be a sufficient guide to the jury in determining whether or not the mother was guilty of negligence under the evidence.

Transfer denied.

SHAW, C. J., and WILBUR, LENNON, SLOANE, and SHURTLEFF, JJ., concur.

LAWLOR, J., voted for a hearing in this court.

(57 Cal. App. 312)

PFLUG v. BROWN. (Civ. 4249.)

(District Court of Appeal, First District, Division 2, California. April 11, 1922.)

Appeal and error \S 347(2) — **Appeal taken more than 30 days after entry of order denying new trial in minutes is too late.**

Under Code Civ. Proc. \S 939, permitting appeal to be taken within 30 days after entry of the order determining a motion for a new trial, a notice of appeal filed more than 30 days after the entry of the order in the minutes of the court was too late, though within 30 days after the entry in the register of actions.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Pauline Pflug against Julius B. Brown. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Appeal dismissed.

Klein, Clarke & Gerlack, of San Francisco, for appellant.

Wm. J. Hayes, of Oakland, for respondent.

LANGDON, P. J. This is a motion to dismiss an appeal upon the ground that it was not taken within the time prescribed by section 939 of the Code of Civil Procedure. Said motion is supported by a certificate of the clerk of the superior court, showing that a judgment herein was rendered in favor of plaintiff on November 10, 1921; that on November 17, 1921, defendant served and filed a notice of intention to move for a new trial; that on November 25, 1921, said defendant filed a bond on appeal in due form; that said motion for a new trial was heard on January 6, 1922, and denied; that the following entry appears in the minutes of said court under date of January 6, 1922:

"No. 113527. Pauline Pflug v. Julius B. Brown. In this action, the motion for a new trial came on regularly this day to be heard, and, after argument by counsel for respective parties, it is ordered that said motion be, and the same is hereby, denied."

The certificate of said clerk further states that on February 27, 1922, defendant filed a written notice of appeal from said judgment.

It is apparent from the foregoing recital of facts that the notice of appeal was filed too late, having been filed more than 30 days "after entry in the trial court of the order determining" the motion for a new trial.

Upon the hearing before this court of the motion to dismiss the appeal, appellant opposed the same urging that there was no showing made by respondent that the notice of appeal had been filed more than 30 days after the entry in the register of actions of the denial of said motion for a new trial. It was contended that section 939 of the

Code of Civil Procedure contemplates such an entry in the register of actions, and not in the minutes of the court. We are cited to no authorities in support of this position, and we think it is without merit.

Upon the face of the record presented to this court, the appeal was not taken in time.

The motion to dismiss the appeal is granted.

We concur: **NOURSE, J.; STURTEVANT, J.**

(57 Cal. App. 66)

VIAU v. VIAU. (Civ. 4130, S. F. 9920.)

(District Court of Appeal, First District, Division 2, California. March 14, 1922. Hearing Denied by Supreme Court May 11, 1922.)

1. Pleading \S 9—**Unnecessary to allege in hæc verba that consideration of promise to be specifically enforced was adequate where facts are alleged.**

It is unnecessary to allege in hæc verba that the consideration for the promise sought to be specifically enforced was adequate, and that the contract was just and equitable, where sufficient facts are alleged from which a court of equity can see that these elements exist.

2. Frauds, statute of \S 129(3)—**Working on farm in partial execution of contract not part performance.**

The fact that the purchaser worked on the land in partial execution of an oral contract to convey did not furnish the part performance required to withdraw the case from the stringency of the rule requiring the contract to be in writing; the purchaser never having been given possession.

3. Limitation of actions \S 36(4)—**Delay in suit for specific performance within statute.**

Where the complaint in an action for specific performance alleged that defendant repudiated the contract and refused to perform in March, 1916, and the action was not brought until February, 1920, under Code Civ. Proc. \S 339, subd. 1, the action was barred.

4. Trusts \S 95—**Fraudulently procuring services in consideration of oral contract to convey held not to create trust in land.**

In view of Civ. Code, \S 847, providing that the only trusts in relation to real property are those enumerated under title 4 and section 2217, declaring that an involuntary trust is one which is created by operation of law, and section 2224, providing that one who gains a thing by fraud, etc., the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained for the person who otherwise would have had it, the fact that oral promises by defendant to convey land were made in bad faith and were false and were to deceive plaintiff and to receive the fruits of his labor through fraud did not create a trust, as the thing gained by the alleged fraud was plaintiff's labor, and not title to the land.

5. Trusts ¶17, 18(3), 38—Defendant not made a trustee of an express trust by her declarations.

The contention that the owner by telling plaintiff to take the land, but she would never give him a deed to it, created a trust, was without merit, Civ. Code, § 852, requiring such trust to be in writing, and section 2222 requiring, in order to create, as to the trustee, a voluntary trust, that the trustee must have used such language in writing as would indicate with certainty her acceptance of the trust made upon sufficient consideration of its existence.

On Hearing in Supreme Court.

6. Specific performance ¶49(2)—Inadequacy of consideration not made good by love and affection.

In suits for specific performance, inadequacy of consideration shown by the evidence cannot be made good by consideration of love and affection.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action to compel specific performance by Will Viau against Benjamin H. Viau, administrator of the estate of Mary H. Viau, deceased. From judgment for plaintiff, defendant appeals. Reversed.

Edgar S. Van Meter, O. K. Bonestell, O. M. Oslas, and George Cosgrave, all of Fresno, for appellant.

Gallaher & Simpson, Ray W. Hays, and Ben H. Johnson, all of Fresno, for respondent.

LANGDON, P. J. This is an appeal by the defendant, as administrator of the estate of Mary H. Viau, deceased, from a judgment entered in favor of the plaintiff, who was the son of said deceased.

The complaint alleges on January 2, 1903, Mary Viau, now deceased, acquired title to lots 14 and 15, according to the plat of Orangedale, county of Fresno, Cal., and at said time said property was wholly unimproved except 9 acres planted to young vines; that Mary Viau was the mother of plaintiff, Will Viau, and at the time she acquired title to said property and on other occasions thereafter she promised that, if the plaintiff would remain with her and assist in the planting and improvement of said property and other property then owned by said Mary Viau, she would give said plaintiff the north 20 acres of lots 14 and 15; that plaintiff went on said property in January, 1903, and remained there continuously, supervising and managing and planting and improving said property and working on said land until April, 1918; that frequently during said time he had opportunities to engage in other business undertakings, but was dissuaded from so doing by his mother's promise that, when the property was improved, he should have the

said 20 acres of land; that from January, 1903, to April, 1918, the plaintiff, having confidence in the representations and promises of the said Mary Viau and relying upon the same, and solely and only by reason thereof, devoted his entire time and attention to the improvement of the property above described, and other property owned by said Mary Viau, and during all of said time worked his own horses on the said property for the improvement thereof, and for the benefit and improvement of other property owned and possessed by defendant; and the promises made by said Mary Viau were made in bad faith and were false, and were made with intent to deceive and did deceive said plaintiff; that said land was completely planted and improved by March, 1915; that plaintiff then demanded of his mother a good and sufficient deed to said 20 acres, but said Mary Viau at that time refused to give a deed to plaintiff; that Mary Viau now claims to own the whole of said 20 acres and repudiates said trust and denies that plaintiff has any interest in said property; that said property is of the value of \$20,000.

Plaintiff prayed for a decree adjudging him to be the owner of said 20 acres of land and directing Mary Viau to convey the same to him.

The action was originally commenced against Mary Viau during her lifetime, and during its pendency she died, and the administrator of her estate was substituted in her place and stead. Mary Viau answered the complaint. She denied ever making the alleged promise to plaintiff; denied that he ever remained continuously on the property or that he supervised, managed, or improved any portion thereof; denied that plaintiff was ever dissuaded by her from entering into any business undertaking whatsoever or that any promises were made by her to him regarding the land. Defendant also alleged that plaintiff had done certain work upon the land in common with his three brothers, and that such work was done by him in consideration of his being cared for and partially supported by defendant; denied that plaintiff at any time by reason of any promise or representation of hers devoted any portion of his time or attention to the improvement of the land described, or ever worked any horses belonging to himself or did any other work upon the property.

The trial court found that the allegations of the complaint were true, and that said Mary Viau did, during her lifetime, claim to own the whole of the 20 acres described in the complaint, and did repudiate the trust set forth in said complaint, and did deny that plaintiff had any interest in said property; that the allegations of the answer were untrue; that plaintiff was deprived of the use and occupation of the premises for the years

1916, 1917, 1918, and 1919; that the value of said use and occupation for said period of time was \$8,900. The judgment decreed that the plaintiff was the owner of said 20 acres and directed the administrator to convey the same to him and gave judgment for plaintiff for \$8,900.

The record reveals that the Viau family consisted of the mother, father, and seven children, four of whom were boys. At the time the alleged promise was made to plaintiff in 1903, he was of the age of 23 years, and was living at the family home with his brothers and sisters. Three of the brothers worked on the property, more or less, during these years, and it certainly cannot be said from a reading of the entire record that the plaintiff contributed more of his time and labor than did the other brothers. He was the eldest son, and, naturally, assumed some of the responsibility about the property, especially as his mother and father separated after the property was acquired, and this forced the mother to look more to her sons. However, a detailed discussion of the evidence in the present case is entirely futile, as the appeal presents to this court merely questions of law.

It is contended by the appellant that the elements necessary to support a decree of specific performance of an oral contract for the conveyance of land are neither pleaded nor proven, and therefore the complaint does not state a cause of action nor the proof warrant the judgment entered.

The complaint is totally lacking in any allegation that the consideration received by the defendant was adequate or that the contract as to her was just and equitable. Reliance is placed upon the case of *O'Hara v. Wattson*, 172 Cal. 525, 157 Pac. 608, wherein it is said:

"The cross-complaint will be scanned in vain to discover therein any allegation of the adequacy of the consideration moving from defendant to plaintiff's intestate or of the justness and reasonableness of the contract. Yet from the early case of *Bruck v. Tucker*, 42 Cal. 346, consistently down it has been uniformly held that such averments are essential to a good pleading in equity for specific performance. Only a few of these cases need be cited: *Civ. Code*, § 3391; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *White v. Sage*, 149 Cal. 613, 87 Pac. 193; *Kaiser v. Barron*, 153 Cal. 788, 96 Pac. 806; *Joyce v. Tomasini*, 168 Cal. 234, 236, 142 Pac. 67; *Young v. Mathew Turner Co.*, 168 Cal. 671, 143 Pac. 1029."

[1] While it is true that it is unnecessary to allege in *hac verba* that the consideration for the promise sought to be specifically enforced was adequate, and that the contract was just and equitable, where sufficient facts are alleged from which a court of equity can see that these elements exist (*Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *White v. Sage*, 149 Cal. 616, 87 Pac. 193), in the present case

the complaint does not show facts from which the court could make such deductions. It alleges that the property is worth \$20,000. What the value of farm labor was during the years from 1903 to 1915 is not alleged and is not in evidence; and it is also clear from the evidence that the plaintiff did not work on the ranch continuously during these years, but it appears that he was away on several occasions, that he was ill part of the time, and that he did engage in other business enterprises during part of the time he was at the property. The trial court did not find that the consideration for the alleged promise of Mary H. Viau was adequate, or that the contract was, as to her, just and equitable. Inadequacy of consideration shown by the evidence cannot be made good by considerations of love and affection. *O'Hara v. Wattson*, 172 Cal. at page 537, 157 Pac. 610. In the last-cited case the meaning of section 3391 of our Civil Code was carefully discussed, and it was decided that it is "beyond the reach of successful argument that the laws of the state of California declare to its courts of equity that they shall deny the equitable relief of specific performance when they find an inadequacy of price standing alone. Such has been the universal rule of decision in this state. * * *" Respondent contends, however, that the present case falls within the rule of *Fleischman v. Woods*, 135 Cal. 256, 67 Pac. 276, and that the court will not attempt to place a money value upon the personal services of the respondent, but will presume that a breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. However that may be in the present case, we are not called upon to decide the question, because, if the action is to be regarded as one for specific performance of an oral contract to convey land, it would seem that there is not only the objection to the pleadings and proof above discussed, but also the further objection that such a contract as is here sought to be enforced is within the purview of the statute of frauds.

[2] The fact that plaintiff worked upon the land in partial execution of the oral contract does not furnish the part performance required to withdraw the case from the stringency of the rule requiring such a contract to be in writing. *Davis v. Judson*, 159 Cal. 131, 132, 113 Pac. 147; *Woerner v. Woerner*, 171 Cal. 298, 300, 152 Pac. 919. The plaintiff was never given possession of the land. Mary H. Viau held possession of the same until after the filing of the present action, and plaintiff resided with her in her home, together with her other children.

[3] It is also contended by appellant—and this we think is a decisive attack upon the judgment—that the trial court should have sustained the demurrer to the complaint upon the ground that the action was barred by

the statute of limitations applicable thereto. Section 339, subd. 1, Code Civ. Proc.; *Lowell v. Kier*, 50 Cal. 646. The complaint alleged that Mary Viau repudiated the contract and refused to perform the same in March, 1916, and this action was not brought until February, 1920. This objection is fatal to the judgment if the action be considered as one for specific performance. However, respondent meets it and the other contentions of appellant by contending that the action is one to enforce a trust, and that, under the findings of the court, the property was charged with a constructive trust in favor of plaintiff, and that constructive trusts fastened upon the conscience of a party are not within the statute of frauds. *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171. It is stated in the supplemental brief of respondent that the case is, in no sense an action for specific performance, and it is tacitly admitted that, unless the facts create a trust in the property for the benefit of plaintiff, the judgment must be reversed, as the objections to the showing made for specific performance of an oral contract for the conveyance of land are insuperable.

[4] We are therefore brought to a consideration of this last question as the only real one upon this appeal. Section 847 of the Civil Code provides that the only trusts in relation to real property in this state are those which are enumerated under title 4 of said Code. See, also, *McCurdy v. Otto*, 140 Cal. 48, 51, 73 Pac. 748. Respondent relies upon sections 2217 and 2224 of the Civil Code. Section 2217 declares that "an involuntary trust is one which is created by operation of law," and section 2224, Civil Code, provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." It is his contention that, as the trial court found the allegations of the complaint to be true, and as the complaint alleged that the promises made by Mary Viau were made in bad faith and were false and were made with intent on the part of said Mary Viau to deceive the plaintiff, therefore Mary Viau received the fruits of the labor of plaintiff through fraud. Respondent then contends that this constitutes her a trustee for him in respect to the land on which the labor was expended. Such a contention is not warranted by the language of the Code section above referred to, which provides that the thing gained by fraud (in this case plaintiff's labor, and not the title to the land) shall be charged with a trust in favor of the person from whom it was thus fraudulently obtained. The cases cited by respondent in support of his contention are cases where the real property to

which the trust was held to attach had been acquired by the legal holder by his or her own fraud or undue influence. The situation in the present case does not create a constructive trust attaching to the legal title of this land under our Civil Code or the decisions of our courts.

[5] Upon the oral argument of this cause there was a contention made by respondent that Mary Viau had made herself the trustee of an express trust by her declarations, testified to by plaintiff and denied by Mary Viau, that "she told me to take the 20 acres, but she would never give me a deed to it." This contention is also without merit. There are two objections to it. In the first place, the trust contended for by respondent would be a voluntary trust, as distinguished from an involuntary trust created by operation of law. Such a trust, relating to real property, is required by section 852 of our Civil Code to be in writing. Second, in order to create, as to the trustee, a voluntary trust with relation to real property, the trustee must have used such language (in writing) as would "indicate with reasonable certainty his acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence." Section 2222, Civ. Code. The above-quoted language which plaintiff testified was used by his mother indicates no such acceptance or acknowledgment with reasonable or any certainty.

We are unable to see that the facts of this case raise either a voluntary or involuntary trust with relation to real property under the law of this state. The situation is not within sections 2216, 2222, 2223, or 2224 of the Civil Code, and, as stated before, there are no trusts recognized in this state except those provided for in the Civil Code.

The conclusion is unescapable that this judgment cannot be justified if we view the action as one for specific performance of an oral contract for the conveyance of real property, and assuredly it cannot be justified in an action to enforce the execution of a trust, because the facts do not establish a trust. If Mary Viau breached any contract with the plaintiff, he has an adequate remedy at law, or he would have had such a remedy had he pursued it in time, and, if he has lost it by his own laches, that does not afford a reason for according him a remedy not secured to him by the laws of this state.

The judgment is reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

Opinion of Supreme Court in Bank denying Hearing.

PER CURIAM. The petition for a rehearing is denied.

[6] The opinion of the District Court contains the following statement:

"Inadequacy of consideration shown by the evidence cannot be made good by considerations of love and affection."

In support of this statement the opinion cites *O'Hara v. Wattson*, 172 Cal. at page 537, 157 Pac. 608. The quotation is made from the opinion of Department 2. A rehearing was granted in that case for the purpose of modifying this statement, and the correct rule, as the court finally determined it, is found in 172 Cal. at page 528, 157 Pac. 608, in the opinion of the court in bank.

SHAW, C. J., WILBUR, SLOANE, SHURTFLEFF, and LAWLOR, JJ., and RICHARDS, Justice pro tem., concur.

(57 Cal. App. 183)

MURPHY v. MURPHY et ux. (Civ. 2427.)

(District Court of Appeal, Third District, California. March 27, 1922. Hearing Denied by Supreme Court May 25, 1922.)

1. Judgment \Leftrightarrow 249—Form of pleading or failure to ask appropriate relief will not foreclose a plaintiff disclosing facts entitling to some relief.

The form of the pleading or failure to ask appropriate relief will not foreclose a plaintiff, if, upon the facts disclosed, the plaintiff is entitled to some relief.

2. Fraudulent conveyances \Leftrightarrow 226, 263(1)—Action by judgment creditor to set aside conveyance held to lie; complaint held not sufficient to warrant setting aside conveyances as fraudulent.

Where a daughter obtained a judgment against her father for her maintenance and support, she is entitled, by reason thereof, to maintain an action to set aside a conveyance by her father to defraud her and to subject such property to the judgment lien; but mere allegations of transfers to her stepmother by way of gift, and of the father's ownership of lots at date of judgment sued on, and stepmother's purchase of home residence, without alleging fraudulent transfer, is insufficient as against the stepmother.

3. Appeal and error \Leftrightarrow 195—Sustaining demurrer to complaint without leave to amend cannot be reviewed unless plaintiff asked permission to amend.

To review an assignment that the court erred in sustaining a demurrer to the complaint without permission to amend, plaintiff must have applied for permission to amend.

Appeal from Superior Court, San Joaquin County; H. D. Burroughs, Judge.

Action by Lula Mignon Murphy against S. S. Murphy and wife. From a judgment of dismissal in favor of the wife, Alice K. Murphy, the plaintiff appeals. Affirmed.

Lula Mignon Murphy and J. E. White, of San Francisco, for appellant.

John R. Cronin, of Stockton, for respondents.

BURNETT, J. A general demurrer to the complaint was interposed by the defendants, and it was sustained without leave to amend as to Alice K. Murphy and overruled as to S. S. Murphy. From the judgment of dismissal in favor of said Alice K. Murphy, following the order sustaining her demurrer, the appeal has been taken. From the complaint it appears that plaintiff is the daughter of S. S. Murphy by a former marriage; that on April 26, 1911, she obtained a judgment against him for her maintenance and support in the sum of \$15 per month, and that the amount due under said judgment is \$930, as principal, and \$179.91 interest. The complaint then proceeds:

"That at the time of the filing of the action in said case No. 9896 as per Exhibit A hereto attached, there stood, upon the official records of the above county, recorded in the name of said defendant S. S. Murphy, ten acres of almonds in the Acampo Orchard and nine lots in the town of Lodi, all of which said property is located in the above county.

"That at said time of filing said case No. 9896, said S. S. Murphy received a United States pension of \$12 per month. That since said time said pension has been increased to \$40 per month.

"That at said time of filing said case No. 9896 there stood recorded in the name of the wife of said S. S. Murphy, the above Alice K. Murphy, ten acres of prunes only.

"That after the filing of the said action in case No. 9896, the said almond orchard was recorded by deed of gift into the name of the above Alice K. Murphy, and lots Nos. 4 and 17, block 7, East Lodi addition, were recorded sold.

"That upon January 5, 1912, the time from which said judgment in said case No. 9896 was made final, there stood recorded in the name of the said and above S. S. Murphy lots Nos. 1, 2, 3, 15, 16, 23, and 24 in block 7, East Lodi addition, town of Lodi, as per Book A, vol. 198, p. 431, of the official records of the above county.

"That since said time said lots have been sold and that no other properties have been purchased and recorded in the name of S. S. Murphy.

"That since said time January 5, 1912, there has been purchased in the name of the above Alice K. Murphy the home residence of the above defendants—February 26, 1913, as per Book A, vol. 225, p. 298, of the records of the above county.

"And also ten additional acres of prunes—lot 37 North Acampo Orchard recorded July 30, 1912, in Book A, vol. 218, p. 393. That since said time—January 5, 1912—there has been recorded in the name of the above Alice K. Murphy a mortgage for \$500 against lots 23 and 24, block 7, East Lodi addition, recorded

March 9, 1915, in Book B of Mortgages, No. 124, p. 185, official records of above county.

"That as the husband of the above Alice K. Murphy the said above S. S. Murphy is entitled to and enjoys a community share and interest in the income from all of the above properties which now stand in the name of the above Alice K. Murphy. And that said community interest in said income is subject to the lien of the judgment in the said case No. 9896, Lulu Mignon Murphy v. S. S. Murphy.

"That the properties above described which have been purchased in the name of the above Alice K. Murphy since the date whence the final judgment in the said case No. 9896 commenced, that is, January 5, 1912, and the above mortgage recorded since said time in the name of the above Alice K. Murphy, are incumbered with the lien of said judgment.

"That said above properties are incumbered with the lien of said judgment up to the full valuation of all of the properties sold or conveyed, as above described, out of the name of the above S. S. Murphy since said January 5, 1912, from which said time above plaintiff holds final judgment against the above S. S. Murphy."

The prayer was for judgment against each of the defendants for the amount due in said case No. 9896, and that—

"Said properties and said interest in the income as above set forth be found subject to the lien of the above amounts due under said judgment, * * * for attorney's fees, for costs of court and for \$15 per month pendente lite."

[1] No doubt appellant is right in the contention that—

"The form of the pleading or failure to ask for appropriate relief will not foreclose a plaintiff if, upon the facts disclosed, the plaintiff is entitled to some relief." *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Zellner v. Wassman et al.*, 184 Cal. 80, 193 Pac. 84.

[2] It is true, also, that plaintiff, by reason of said judgment, is entitled to maintain an action to set aside a conveyance made by her father to defraud her of the fruits of her judgment and to subject to the lien of said judgment the property thus fraudulently conveyed. This is a fair inference from the following cases cited by her: *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405; *Sheppard v. Sheppard*, 15 Cal. App. 617, 115 Pac. 751; *Murray v. Murray*, 115 Cal. 266, 47 Pac. 37; *Tully v. Tully*, 137 Cal. 65, 69 Pac. 700; *Clopton v. Clopton*, 162 Cal. 27, 121 Pac. 720. Many other decisions are to the same effect. But there is no allegation in the complaint to bring this case within the operation of such principle. It does not appear that any conveyance was made with intent to defraud any one or to deprive appellant of the opportunity to enforce her judgment. Nor is any fact alleged from which it can be inferred that any transfer to said Alice K. Murphy was fraudulent. As to the almond orchard there is no allegation, in-

deed, of the time when the conveyance was made. It does appear that the deed was recorded after the filing of said action in case No. 9896, but that is unimportant in the absence of other allegations. If it may be said that the averment, "the said almond orchard was recorded by deed of gift into the name of the above Alice K. Murphy," may be construed as an affirmation that said orchard was conveyed to said Alice K. Murphy by deed of gift, there is no allegation of any fraudulent intent or that it was executed in contemplation of insolvency or while the grantor was insolvent.

The succeeding allegation as to lots Nos. 1, 2, 3, 15, 16, 23, and 24 in block 7, East Lodi addition, etc., is not connected in any way with Alice K. Murphy. It does not appear to whom they were sold, but it must be assumed that they were not sold to her or else the pleader would have alleged it. Of course, if said lots were owned by S. S. Murphy at the time said judgment was docketed and they were not exempt from execution, they would be subject to the lien of said judgment for the statutory period of five years (section 671, Code Civ. Proc.); but the complaint herein was filed some seven years after the judgment became final, and there is nothing in the complaint to show why Alice K. Murphy should be brought into the case in connection with them.

As to the home residence and the ten additional acres of prunes purchased "in the name of the above Alice K. Murphy," no fraud is shown, nor does it appear that they were purchased with community funds. We must assume that the purchase was made with her separate estate, and in good faith from a third party. If the allegation "that as the husband of the above Alice K. Murphy the said above S. S. Murphy is entitled to and enjoys a community share and interest in the income from all of the above properties which now stand in the name of the above Alice K. Murphy" by any possibility could be considered as sufficient to show that said property was community estate and subject to execution, nevertheless, for the reason already stated, the lien of said judgment had ceased to be operative, and upon that theory the complaint utterly fails.

[3] Appellant complains that the court abused its discretion in sustaining the demurrer without permission to amend.

But the decisions in this state are uniform that, to make that a subject of review by an appellate court, it must appear that the party against whom the ruling was made has applied to the lower court for permission to amend. *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290.

No such showing was made, and it cannot

be said that the trial court abused its discretion.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 346)

Ex parte CANTUA. (Cr. 1054.)

(District Court of Appeal, First District, Division 2, California. April 13, 1922.)

Habeas corpus §85(1)—Evidence held sufficient to support an order holding accused to answer charge of embezzlement.

On application for a writ of habeas corpus, evidence held sufficient to support an order holding the accused to answer a charge of embezzlement.

In the matter of the application of A. R. Cantua for a writ of habeas corpus. Application for writ of habeas corpus to the Sheriff of Alameda County to secure the release of petitioner, A. R. Cantua, from custody on a charge of embezzlement. Writ discharged, and petitioner remanded.

Louis Glickman, of Oakland, for petitioner.
Charles Wade Snook, Deputy Dist. Atty., of Oakland, for respondent.

LANGDON, P. J. This matter comes before us upon a writ of habeas corpus. The sole question raised by petitioner is that the evidence is insufficient to justify the order holding the petitioner to answer the charge of embezzlement before the superior court.

The record discloses that the petitioner received a piano from the Heine Piano Company under the terms of a written contract. Certain contentions are made by petitioner regarding the legal effect of this contract, but, after a careful reading of the same, we are satisfied that not only in legal effect, but expressly, it consigns all property to be delivered thereunder to the petitioner for the purpose of sale, the title to said property, and to the proceeds thereof to remain in the consignor. The petitioner sold the piano in question, which he had received under this contract, and accepted a cash payment from the purchaser. A demand for the proceeds of the sale, due to the consignor, was made by said consignor. The petitioner failed to pay over said proceeds and admitted that he had converted said money to his own use.

This evidence is sufficient to support the order holding petitioner to answer to the charge before the superior court. The writ is discharged, and the petitioner remanded to the custody of the sheriff.

We concur: NOURSE, J.; STURTEVANT, J.

(57 Cal. App. 218)

CADY v. SANFORD. (Civ. 3870.)

(District Court of Appeal, Second District, Division 2, California. March 30, 1922.)

1. Appeal and error §907(2)—Where appeal contains only documents on motion to enter judgment for defendant on facts found, evidence presumed to sustain findings denying the motion.

Where appeal from an order denying motion to enter judgment in defendant's favor on facts found by trial court comes on bill of exceptions containing nothing but the pleadings, the findings, the judgment, and notice of the motion, it must be presumed that the evidence sustained the trial court's finding.

2. Appeal and error §931(1)—Finding construed to uphold judgment.

The findings must receive such a construction as will uphold the judgment.

3. Highways §184(6)—Details and circumstances of accident presented by findings not inconsistent with general finding of last clear chance and negligence.

Details and circumstances of an accident as presented by the court's findings held not inconsistent with the general finding that defendant had the last clear chance to avoid a collision but negligently failed to do so.

4. Negligence §83—Doctrine of last clear chance inapplicable in case of contemporaneous fault.

The doctrine of the last clear chance does not govern, where the negligence of the plaintiff continues to the moment of the accident and both parties are contemporaneously and actively in fault at the instant of the injury.

5. Highways §175(1)—Neglect of driver at point of collision, discovering peril and able to extricate himself, held to prevent recovery, though other party could have stopped in time.

If the driver of an automobile when he reaches the point of collision and discovers his peril is still in a situation to help himself, and by the use of his faculties is able to extricate himself and avoid injury, his neglect to do so will prevent his recovery, notwithstanding the other party could have stopped in time to avoid the accident.

6. Highways §175(1)—Circumstances as stated under which negligence of injured driver in a collision not proximate cause so as to preclude recovery.

Where an injured automobile driver, because of his heedlessness, has reached a point where he can no longer escape injury by the exercise of any reasonably prudent measures which he may adopt and his peril is discovered by the other driver in season to avoid injury, the negligence of the injured driver in reaching his position of peril becomes the condition and not the proximate cause of the injury and will not preclude recovery.

7. Negligence — 83—Doctrine of "last clear chance" stated.

The doctrine of the last clear chance presupposes negligence on the part of the injured party and proceeds upon the theory that, notwithstanding the question of negligence, if the other party, being cognizant of the negligence and the peril in which the party had placed himself, fails to take the necessary precautions to avoid the injury, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by William H. Cady against G. A. Sanford. From judgment for plaintiff, defending appeals. Affirmed.

See, also, 201 Pac. 951.

Henry T. Gage, Ingall W. Bull, and Harold Larson, all of Los Angeles, for appellant.

E. E. Kirk and Wally Vogel, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action to recover damages for injuries received in a collision between two automobiles, one of which was being driven by plaintiff and the other by defendant. The case was tried by the court without a jury. Besides denying the material allegations of the complaint, defendant's answer alleges contributory negligence on plaintiff's part. The trial court found that plaintiff was negligent at the crossing where the accident happened, but that defendant had the last clear chance to avoid the collision, and upon that ground gave judgment for plaintiff. Defendant, proceeding under section 663 of the Code of Civil Procedure, moved to set aside the judgment and to enter in lieu thereof a judgment in his favor, on the ground that the conclusions of law are inconsistent with and not supported by the findings of fact. The motion was denied. The appeal is from the judgment and from the order denying defendant's motion. The sole point made by appellant is that the doctrine of the last clear chance is not applicable to the facts as found by the trial court.

[1, 2] None of the evidence is before us. The appeal from the judgment is on the judgment roll alone. The appeal from the order denying defendant's motion to enter a judgment in his favor on the facts found by the trial court comes here on a bill of exceptions containing nothing but the documents upon which the motion was made, i. e., the pleadings, the findings, the judgment, and the notice of motion. This being the state of the record here, it must be presumed that the evidence before the trial court was ample to sustain the findings. If appellant would

question its sufficiency for that purpose, or would claim that the evidence, if brought up, would have impaired the correctness of the findings, he should have presented it to us in a bill of exceptions or by the reporter's transcript. Not having done so, the facts as found by the trial court must be regarded as fully supported by the evidence. Moreover, the findings must receive such a construction, if possible, as will uphold rather than defeat the judgment. *Paine v. San Bernardino, etc., Co.*, 143 Cal. 664, 77 Pac. 659.

Coming now to a consideration of the lower court's findings: That court found the facts to be substantially as follows: The accident occurred on January 16, 1920, at about 6 o'clock p. m., at the crossing formed by the intersection of Washington boulevard with Del Rey road, two public highways in the county of Los Angeles, one of which, Washington boulevard, runs in a general northeasterly and southwesterly direction and is intersected at a point between Culver City and the city of Venice by the other highway, Del Rey road, which runs in a general northwesterly and southeasterly direction. On the evening in question, while plaintiff was driving easterly toward the city of Los Angeles along Washington boulevard and on the right-hand or south side thereof, he approached the crossing formed by the intersection of these two highways. At the same time defendant, driving his automobile, was approaching the crossing from the opposite direction, that is, he was traveling westerly along Washington boulevard on the right-hand or northerly side thereof. It was dark when the accident occurred and the headlights of each automobile were lighted.

When defendant reached a point on Washington boulevard about 60 feet easterly of the intersection, he slackened his speed and by raising his arm gave the signal that he intended turning to the left and south into Del Rey road at its intersection with Washington boulevard. At the same time he sounded his horn. Plaintiff did not see the signal nor hear the horn. Defendant continued his course until he came to a full stop immediately before reaching the intersection, when he shifted into low gear and proceeded into the intersection. As defendant started forward from the full stop to which he had come just before reaching the intersection, he saw plaintiff's car approaching from the west and knew that it was traveling at a speed much greater than his own. Defendant's car at this time was traveling at a rate not to exceed 5 miles an hour, while plaintiff's car was approaching the intersection at a speed of about 20 miles per hour. Defendant's car, proceeding into and across the intersection in low gear at a rate of speed not to exceed 5 miles per hour, reached a point

about opposite the center of the intersection, when defendant turned his car to the left and proceeded on a curve southerly, intending to enter Del Rey road. From the time that he started forward from the full stop just prior to reaching the intersection, defendant saw and kept his eyes on plaintiff's car, which, proceeding easterly along Washington boulevard, continued to approach the intersection. When defendant started from the place where he had come to the full stop, plaintiff's car was about 350 feet westerly from the intersection. Upon reaching the place where he commenced to turn to the left, which was about 40 feet from the point where he had come to the full stop, defendant continued on a curve to his left for about 30 feet towards and into the path of plaintiff's car, which, approaching from the west, was struck by defendant's car on its left-hand side, at a point about midway between the motor and windshield.

Immediately before the collision and when defendant was about to cross the pathway of plaintiff's car, plaintiff first observed defendant's car. Thereupon plaintiff turned his car toward the right-hand side of Washington boulevard and slackened his speed to about 18 miles per hour.

The two automobiles approached the place of the collision in such a manner that when defendant's car, while making the turning movement to the left proceeded forward across the path of plaintiff's car, a collision was inevitable unless one or the other of the two cars should come to a stop or otherwise yield the right of way or so alter its course as to avoid a collision. At all times subsequent to the time when defendant's car came to a full stop immediately before reaching the intersection, and up to the moment of the collision, defendant had complete control over the movements of his own car, which, proceeding at a rate of not to exceed 5 miles an hour, could have been stopped almost instantly, or within a distance of a very few feet. Defendant saw plaintiff's car approaching the intersection at a higher rate of speed than his own, and knew that plaintiff's car was in danger of collision with his own if he continued his turn to the left and crossed the intersection ahead and in front of plaintiff's car. Plaintiff did not perceive such danger and was not aware thereof until defendant's car had begun to make the turn to the left across the intersection, directly in front of plaintiff's car. At that moment, owing to the close proximity of the two cars and the greater speed at which plaintiff's car was travelling, there was neither time nor opportunity for plaintiff to come to a stop or so to alter his course as to avoid the collision, and defendant then and there had the last clear chance to avoid the accident, but negligently failed to avail himself thereof.

Plaintiff, so the lower court found, was

negligent in that he entered the intersection and crossed it as far as the place where the impact occurred at a speed greater than 15 miles an hour. The trial court also found that plaintiff was negligent in that he did not yield the right of way to defendant, whose automobile was nearer the point of intersection of the paths of the two vehicles than was plaintiff's car. But this, notwithstanding plaintiff's negligence, so the lower court found, was not the proximate and direct cause of the accident. The direct and proximate cause, according to the findings, was the defendant's negligence in failing to stop his car before the collision, for he saw plaintiff's car prior to the accident, knew that plaintiff was in a situation of danger, and had the opportunity, by the exercise of proper care, to stop his own slowly moving car and avoid the collision and the consequent injury to plaintiff and his automobile.

[3] Such are the facts as found by the lower court. Are the details and circumstances of the accident, as thus presented by the court's findings, inconsistent with the general finding that appellant had the last clear chance to avoid the collision, but negligently failed to avail himself of the opportunity? That is the sole question presented for our determination. To sustain the contention that the doctrine of the last clear chance is inapplicable, it is claimed: (1) That appellant did not know or have the means of knowing that respondent's automobile could not have been slowed down in time to permit appellant to make his turn in safety, and that therefore he never knew that respondent was in a position of peril; (2) that, if appellant was negligent in any particular, his negligence and that of the respondent were contemporaneous and continued actively up to the very moment of the collision, and that therefore the case is governed by those decisions which hold that the last clear chance doctrine does not obtain where both parties are contemporaneously and actively in fault up to the very instant of the accident.

We fail to find any merit in either ground for the asserted inapplicability of the last clear chance doctrine. In support of the first ground it is argued that, because appellant was strictly within his legal rights in attempting to make the turn, he had the right to assume that respondent would decrease his speed and would slow down in time to avoid a collision, and that therefore appellant did not know or have the means of knowing that respondent ever was in a position of peril. This contention is negated by the facts as found by the trial court. It is expressly found that, from the time when he started forward from the place where he had come to a full stop, appellant "saw and kept his eyes on plaintiff's car * * * until the time of the collision," and that—

"At all of said times defendant saw plaintiff's car approaching said intersection at a higher rate of speed than his own, * * * and knew that plaintiff's car was in a situation of danger if defendant should proceed to turn to his left in crossing said intersection ahead and in front of plaintiff's car."

Also that—

"Before the collision defendant saw plaintiff's car and knew that plaintiff was in a situation of danger."

We need not pause to inquire how or why it was that appellant knew that respondent's car was in a situation of danger while the former was making his turning movement into Del Rey road. It is sufficient that the court has so found. Unless the finding that defendant "knew that plaintiff was in a situation of danger" appears to be inherently impossible when considered in the light of the particular circumstances found by the trial court, we are bound to assume that the finding is fully supported by the evidence; for, since the evidence is not before us, we must assume that, if it had been brought up, it would have sufficed to support each and every finding, unless there be some general finding that is directly contradicted by the special circumstances of the accident as disclosed by the more particular findings of the trial court. The question, therefore, to which we must address ourselves, is this: Is the finding to the effect that defendant had knowledge of plaintiff's peril in time to avert the accident inconsistent with all the circumstances as found by the lower court?

According to the findings, appellant not only observed respondent approaching the danger zone, but discovered respondent's position of peril after the latter was actually in the danger zone, i. e., discovered respondent's peril when it no longer was possible for the latter to extricate himself by the exercise of ordinary care on his part, but while it still was possible for appellant to avoid the accident by adopting reasonable means to that end, as, for example, by using all reasonable efforts to bring his own slowly moving car to a stop. We find nothing inherently impossible in this finding, nor any inconsistency between it and the details of the accident as disclosed by the other findings. At some appreciable time prior to the crash plaintiff was in a position of peril. He was in a position of peril at the very instant that he arrived at that point where he no longer could avoid an accident by exercising ordinary care. Then, and not until then, was the last clear chance doctrine applicable. "The last clear chance doctrine," says our Supreme Court in *Young v. Southern Pacific Co.*, 182 Cal. 380, 190 Pac. 40, "was not applicable until he arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care." It will be recalled that

in one of its findings the trial court finds that respondent, just prior to the collision, slightly decreased his speed and turned to the right; and yet, notwithstanding this attempt to avoid the accident, a point had been reached by respondent where it was too late to extricate himself from the peril of a collision with appellant's car. Meanwhile appellant, according to the court's findings, had observed respondent approaching toward and into the intersection. It is quite possible that if the evidence had been brought up it would show appellant to be an experienced automobile driver, whose trained eye can gauge with great accuracy the speed and the distances from him of other automobiles, and whose experience has taught him much about the idiosyncrasies of other drivers. When we bethink ourselves of all the possible facts which may have been disclosed by the evidence, and which would naturally tend to support the findings, we are unable to say that it was not possible for appellant to have discovered that respondent had heedlessly rushed into a position of peril where he was too late to save himself by any reasonable measures that he might adopt, but where it still was possible for appellant to avert a collision by the exercise of reasonable care on his part.

Until respondent arrived at the point where ordinary care on his part could not extricate him from the danger of a collision, appellant had the right to rely upon the presumption that respondent would observe appellant's turning movement and would take reasonable precautions to avoid being struck by appellant's car. But when respondent reached that point where an ordinarily prudent and careful driver, situated as appellant was, and with a knowledge of the circumstances that were known to appellant, would naturally question respondent's ability to avert the collision by the vigilant use of his faculties and strength, it then became appellant's duty to stop his car or to take whatever appropriate measures were reasonably available to avoid running into respondent's car. It was not necessary that appellant should actually know that an accident was inevitable if he failed to exercise care. It is enough if the circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether respondent would be able to escape a collision. In *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 523, 74 Pac. 18, 63 L. R. A. 238, 98 Am. St. Rep. 85, the court says:

"It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part. *Herbert v. Southern Pacific Co.*, 121 Cal. 227. This, however, does not mean, as seems to be contended, that de-

fendant must know that injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position."

We think it quite within the bounds of reason that, under all the circumstances of the case as disclosed by the court's findings, a point was reached by respondent's automobile where, while there still was time for appellant to avert a collision by stopping his slowly moving car, there was conveyed to appellant's mind, while he was observing respondent's automobile, a question as to whether respondent could escape injury by the exercise of ordinary care on his part. If so, appellant had knowledge of respondent's peril and had the last fair chance to avoid the accident by taking all reasonable measures to stop his car before it crashed into respondent's automobile; and his failure to do so was, as the court found, the direct and proximate cause of the injury.

[4] Equally devoid of merit is the claim that, if appellant was negligent, his negligence and that of the respondent were contemporaneous and actively concurrent as the proximate cause of the injury up to the very moment of the catastrophe. Without doubt, the doctrine of the last clear chance does not govern where the negligence of the plaintiff continues to the moment of the accident, and both parties are contemporaneously and actively in fault at the very instant of the injury. But it cannot be said that the facts as found by the trial court in the present case show that the negligence of the plaintiff continued to the moment of the accident, and that both parties were contemporaneously and actively in fault at the time thereof. Respondent unquestionably discovered his dangerous situation just prior to the collision. Upon making that discovery he immediately attempted to save himself as best he could, but it was then too late. The fact that he decreased his speed somewhat and made a turn to the right immediately before the crash, apparently in an effort to avoid the collision, fully justifies the conclusion that he used all reasonable care and made all practicable efforts to save himself as soon as he became alive to his peril, and that therefore he did not continue actively in fault up to the very instant of the injury. His previous negligence ceased when, upon realizing his peril and in an endeavor to avoid the imminent collision, he decreased the speed of his car and turned it toward the right and away from the direction of appellant's approaching automobile. See *Harrington v. Los Angeles Ry. Co.*, supra, 140 Cal. 524, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85.

Moreover, this is not a case where the de-

fendant negligently fails to discover the plaintiff's peril in time to avert the injury. In this case, according to the court's findings, appellant actually discovered the situation and realized the danger while it yet was possible to avert the collision by the use of ordinary care on his part. The case, therefore, is not one where the negligence of the defendant consists merely of an omission of a duty before the discovery of the peril. Here the negligence of the defendant consisted of the omission of a duty after his discovery of the plaintiff's peril. Under the findings we are bound to assume that while he was making his turning movement, meanwhile observing respondent, there arose in appellant's mind, shortly before the impact, a question as to whether respondent could escape the threatened injury. During this interval, short though it may have been, appellant had the power to prevent the accident by simply bringing his slowly moving automobile to a stop before it crashed into respondent's car. Since he saw and knew respondent's position of peril as the latter came heedlessly into the crossing, and could have prevented the collision if he had brought his own car to a stop as soon as he became aware that respondent had entered the zone of danger, appellant ought to have anticipated the accident. He failed to do so, and the legal responsibility is his. His negligence, if not his willfulness and wantonness, continued up to the moment of the impact. Such being the case, appellant, who knew the danger, but, in reckless disregard thereof, continued making his turn toward the south, can find no refuge in the fact that respondent, who was not aware of the danger until it was too late for him to avoid it would have known of his peril had he used reasonable care to ascertain it. "In such a case he who knows of the danger and can avoid it, as against one who does not in fact know thereof, has the last clear opportunity to avoid the accident." *Harrington v. Los Angeles Ry. Co.*, supra, 140 Cal. 526, 74 Pac. 19, 63 L. R. A. 238, 98 Am. St. Rep. 85.

[5-7] If the driver of an automobile, when he reaches the point of collision and discovers his peril, is still in a situation to help himself, and, by the vigilant use of his ears, eyes, and physical strength, is able to extricate himself and avoid injury, his neglect to do so will prevent a recovery notwithstanding the other party could have stopped in time to avoid the accident; and his failure to make such vigilant use of his faculties when he reaches the point of collision is negligence on his part at the very instant of the accident, and constitutes such contemporaneous negligence at the moment of injury as is spoken of in the cases. But where, as in the instant case, the injured driver, because of his own heedlessness, has reached a point where he no longer can escape the injury by the exercise of any reasonably pru-

dent measures that he may adopt, and his perilous position is discovered by the other driver in season to avoid the injury by the exercise of ordinary care on his part, the negligence of the injured driver in reaching his position of peril becomes the condition, and not the proximate cause of the injury, and will not preclude recovery. In such a case the failure of the injured driver to discover his perilous situation in time to avoid the collision is a precedent negligence, and the failure of the other party, who is aware of the peril, to exercise ordinary care to prevent the injury, is a new and independent negligence and the proximate cause of the injury. This, in substance, is the rule as stated in *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722, quoted by our Supreme Court in the *Young Case*, 182 Cal. 369, 190 Pac. 360. The doctrine of the last clear chance presupposes negligence on the part of the injured party, and proceeds upon the theory that, notwithstanding this negligence, if the other party, being cognizant of that negligence and of the peril in which the party had placed himself, fails to take the necessary precautions to avoid the injury, he is liable on the theory that he had a fair chance to avoid the catastrophe by the use of ordinary care; and his failure to exercise it is, under such circumstances, the proximate cause of the injury. In such cases, the defendant's neglect to use ordinary care to avoid the injury, after discovering the plaintiff's peril, is a negligence that differs in every essential from the mere continuation of the plaintiff's original negligence, and is the negligence for which the defendant is held liable.

The authorities cited by appellant present the case where neither party discovered the plaintiff's position of peril until it was too late to avert the injury, or where the plaintiff had a better opportunity than the defendant to anticipate the accident. But that is not the case presented by the findings before us here. In the instant case defendant was negligent in failing to take proper precautions after he discovered plaintiff's position of peril. The following quotation from *Brugeman v. Illinois C. R. Co.*, 147 Iowa, 187, 123 N. W. 1007, Ann. Cas. 1912B, 876, is a correct statement of the rule that obtains in those cases where, as here, the defendant has neglected to avail himself of reasonable precautionary means to avert the accident after he has discovered plaintiff's peril:

"It is one thing to hold that the continuing negligence of a plaintiff will prevent a recovery for a negligent omission of defendant to discover his peril, and quite another to hold that plaintiff's continuing negligence will prevent a recovery for the negligence of the defendant in failing to take proper care to avert the accident after the plaintiff's danger had been discovered and ought to have been appreciated.

If each party is negligent in failing to discover the danger, then the negligence is ordinarily concurring, and the doctrine of last fair chance does not apply. But if defendant discovered plaintiff's negligence and his peril in time to have avoided the injury, and did not take the necessary means to do so, then the doctrine does apply in full force; for in such cases the defendant has the last opportunity of avoiding the collision."

See, also, *Wilson v. Illinois C. R. Co.*, 150 Iowa, 33, 129 N. W. 340, and note thereto in 34 L. R. A. (N. S.) 687.

The same idea is expressed by our own Supreme Court in the following:

"This doctrine [the last clear chance doctrine] applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury." *Arnold v. San Francisco, etc., Ry.*, 175 Cal. 4, 164 Pac. 798.

The judgment and the order appealed from are affirmed.

We concur: WORKS, J.; CRAIG, J.

(57 Cal. App. 307)

ERICKSON MOTOR CO. v. RUSSELL.
(Civ. 4087.)

(District Court of Appeal, First District, Division 1, California. April 10, 1922. Hearing Denied by Supreme Court June 8, 1922.)

Subrogation — Assignor of contract guaranteeing payment was subrogated to assignee's rights upon payment.

Under Civ. Code, § 2788, plaintiff seller, assigning a contract of sale calling for payment in installments and guaranteeing payment, upon subsequently paying the amount due, became subrogated to the assignee's rights, and was entitled to reimbursement from defendant buyer; and hence, where plaintiff alleged such facts, plaintiff's further allegation that "it is now the owner and holder" of the contract was not a mere conclusion of law rendering the complaint demurrable, but the complaint, as a whole, sufficiently alleged ownership.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the Erickson Motor Company against A. S. Russell. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Cunyngnam and H. H. McPike, both of San Francisco, for appellant.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment in an action by plaintiff, a guarantor, against the defendant, its principal, for reimbursement, and is taken upon the judgment roll after a trial upon the merits. The sole question to be decided is whether or not the court erred in overruling defendant's general demurrer to the complaint.

The complaint alleges that the plaintiff and defendant entered into a conditional contract for the purchase by defendant from plaintiff of a certain Moon automobile, by the terms of which portions of the purchase price were to be paid monthly; that said contract also provided that, if the purchaser failed to perform any of its terms or conditions, the seller might declare the entire purchase price to be due and payable; that subsequent to the making of said contract it was assigned by the plaintiff to the Merchants' Security Company, the former guaranteeing the prompt payments by defendant of the sums due thereunder; that defendant paid to said assignee six of the monthly installments due under the contract, but has failed and refused to pay those later falling due; that thereafter upon demand the plaintiff paid to the Merchants' Security Company the balance due; and that "It is now the owner and holder of the aforesaid contract of conditional sale."

It is to this last allegation quoted from the complaint that the defendant's objection runs, he contending that it is but the statement of a conclusion of law, and does not amount to an allegation that the contract was reassigned to plaintiff, and that therefore the demurrer to the complaint should have been sustained, for where an action is brought upon an assigned contract such assignment must be alleged. Sutherland, Code Pleading, § 3274.

The point would appear to be well taken if this were the only allegation in the complaint upon the subject of the plaintiff's ownership of the chose in action sued upon (Curtin v. Kowalsky, 145 Cal. 433, 78 Pac. 962), but it is also alleged therein that upon assigning the contract to the Merchants' Security Company the plaintiff guaranteed its prompt payment, and that, the defendant having failed to make certain of the payments provided for, the plaintiff upon demand did so. It is clear that when plaintiff, the guarantor, paid to the Merchants' Security Company, the guarantee, the amount due, it became subrogated to the rights of the latter, and to reimbursement of the amount so paid. "When a guarantor pays his principal's matured debt he at once has a right of action against him to be reimbursed for the amount so paid, whether there is an express agreement by the principal to indemnify him or not." 20 Cyc. 1495. "A

person may become guarantor even without the knowledge or consent of the principal." Civ. Code, § 2788. This allegation of payment by plaintiff, the guarantor, taken in connection with the averment that plaintiff is the owner and holder of the contract, was sufficient to show ownership by plaintiff of the outstanding rights thereunder. It was entitled therefore to maintain this action for the recovery from the defendant of the money paid by it to the Merchants' Security Company as a consequence of the defendant's default. Eames v. Crosier, 101 Cal. 260, 35 Pac. 873.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 333)

WALLACE v. OSWALD (LEE, Intervener).
(Civ. 4164.)

(District Court of Appeal, First District, Division 1, California. April 12, 1922.)

1. Evidence \S 354(22)—Book entries by decedent admissible against executor, though not made at time of transaction.

Under Code Civ. Proc. § 1853, and section 1870, subd. 2, entries made by a decedent in account books were admissible against his executor and successors in interest, though not made at or near the time of the transaction; section 1946, requiring entries to be made at or near the time of the transaction, applying only to entries by strangers.

2. Appeal and error \S 1056(4)—Exclusion of evidence prejudicial when nonsuit granted.

The exclusion of evidence offered by plaintiff, consisting of book entries made by defendant's testator, was prejudicial where a nonsuit was subsequently granted.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Anna T. Wallace against Edmund F. Oswald, as executor of Van Alstine Wallace, deceased, in which Evelyn Jane Lee intervened. From an adverse judgment, plaintiff appeals. Reversed.

A. M. Free and F. H. Bloomingdale, both of San Jose, for appellant.

Rodgers & Smith and Frederick Schneider, all of Palo Alto, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff against the defendant as executor of the last will and testament of Van Alstine Wallace, deceased, to recover the sum of \$1,929.76 alleged to be due from the deceased upon an open, mutual, and current account.

The complaint sets forth an itemized statement of the account, charging deceased with certain items of rents collected and received

by him from properties of plaintiff during the period from 1911 to 1919, and crediting him with expenses incurred by him for repairs upon plaintiff's said properties, together with taxes and insurance premiums and various remittances made by him to plaintiff during said period. The answer of the defendant consists in general of a denial upon information and belief of the allegations of the complaint, and sets forth a counterclaim upon a mutual, open, and current account between said decedent and plaintiff for services of decedent in caring for the properties, and for commissions on collection of rents during the period set forth in the complaint. The intervener, Evelyn Jane Lee, filed a complaint in intervention, setting forth substantially the same matters of defense against plaintiff's claim as are contained in said answer. Upon the trial of the cause plaintiff offered in evidence certain entries made by the deceased in account books kept by him in his own handwriting, showing items of rents received by him from properties of the plaintiff. None of these entries were made at or near the time of the transaction, many of them having been made five or six months, and some as late as two years, after the transactions which they purported to record, and upon objection by the defendant the court excluded them upon this ground. The respondents justify this ruling of the trial court by citing the provisions of subdivision 1 of section 1946 of the Code of Civil Procedure. The section in its entirety reads as follows:

"The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

"1. When the entry was made against the interest of the person making it.

"2. When it was made in a professional capacity and in the ordinary course of professional conduct.

"3. When it was made in the performance of a duty specially enjoined by law."

[1] In excluding the offered entries the trial court, we think, committed error. When a party litigant seeks to establish his case by the introduction in evidence of his own books of account, he must lay the usual foundation, showing, among other things, that the entries sought to be introduced were made at the time of the transactions recorded. But the entries here in question constituted admissions or declarations of the decedent against his interest, and as such were admissible against the defendant independently of the provisions of the section of the Code above quoted, the effect of which is to broaden rather than to narrow the availability as evidence of writings of the character described. When a party to a civil action has made admissions of facts material to the is-

sue, they are as a rule admissible against him. Code Civ. Proc. § 1870, subd. 2. Entries in account books tending to establish a liability are, like other admissions, evidence against the party making them. Jones on Evidence, § 236. Section 1853 of the Code of Civil Procedure reads as follows:

"The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

The defendant in his capacity as executor and the intervener are successors in interest of the deceased. *Stoddard v. Newhall*, 1 Cal. App. 113, 81 Pac. 666. The provisions of section 1946 of the Code of Civil Procedure are inapplicable to the facts of this case. That section is an adoption in part of the well-established rule by which admissions, declarations, and entries made by strangers to the litigation who are since deceased may under certain conditions be admitted in evidence therein. We have no doubt that under that rule and under the provisions of this section entries in books of account made by a person since deceased may be received in evidence in an action between other parties, if it appear that the person making the entry had knowledge of the facts declared and that the entry was against his interest. *Zimmerman v. Bloom*, 43 Minn. 163, 45 N. W. 10; *Corp. Jur.* p. 892, § 1089. The principle is thus stated by Mr. Jones in his work on the law of Evidence (section 323 [2d Ed.]):

"*Declarations of Deceased Persons Against Interest—In General.*—In several of the preceding sections the discussion has related to the admissibility of declarations or entries made in the regular course of business and as part of the res gestæ. In another chapter we discussed the admissibility of declarations of parties and those identified in interest with parties—that is, admissions. We now come to the consideration of an entirely different class of declarations which should not be confused with those already mentioned, namely, declarations made by strangers, that is, by persons not in privity with the parties to the suit; declarations which are not necessarily made in the regular course of business, but which are received on the ground that they were against the interest of such stranger and irrespective of the fact whether any privity exists between the person who made them and the party against whom they are offered. It has long been settled as one of the exceptions to the general rule excluding hearsay that the declarations of persons since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if it was opposed to his pecuniary or proprietary interest. Thus in a leading case on the subject an entry of a charge for services made in a ledger on a certain day by a man midwife for attendance upon a woman when she was delivered of a child was admitted to show the age of such child. It is a fair presumption that men will

neither falsify accounts nor commit mistakes, when such falsehoods or mistakes would be prejudicial to their own pecuniary interests. This consideration, together with the facts that the declaration is not admissible during the lifetime of the author, that any fraudulent motive for making the entry may be shown, and that such declarations are frequently the only mode of proof available, are deemed of sufficient force to justify the admission of such declarations, although, the sanction of an oath and the test of cross-examination are wanting."

[2] This quotation from the work of Mr. Jones and section 1946 of our Code of Civil Procedure evidently refer to the same rule of evidence, and make it apparent that the admissibility in evidence of the book entries rejected by the trial court is not governed by such rule, but must be referred rather to the rule stated in section 1853 of the Code of Civil Procedure above set forth. In refusing to admit such entries, therefore, the trial court committed error; and, as it subsequently granted the defendant's motion for nonsuit, it is evident that the exclusion of this evidence was prejudicial to the appellant.

The judgment should therefore be reversed; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 134)

MORGAN v. CITY OF LONG BEACH.
(Civ. 3711; L. A. 7306.)

(District Court of Appeal, Second District, Division 1, California. March 20, 1922. Hearing Denied by Supreme Court May 18, 1922.)

1. Municipal corporations §220(1) — Employee who rendered services without confirmation of appointment as required by city charter could not recover therefor.

Where city charter requires appointment of employee by a commissioner to be confirmed by other commissioners, an employee whose appointment by such commissioner was not confirmed by other commissioners could not recover for services rendered.

2. Municipal corporations §120—In absence of facts showing urgency, city council's declaration of urgency not sufficient to render ordinance immediately operative.

In the absence of facts showing urgency the mere declaration of urgency by city council will not render an ordinance immediately operative.

3. Municipal corporations §122(2) — City council's declaration of urgency prima facie evidence of existence of emergency.

In the absence of evidence to the contrary, the court will presume that the city council in making declaration of urgency acted upon sufficient inquiry as to whether or not an emergency existed; the declaration of urgency being

prima facie evidence of the existence of an emergency.

On Hearing in Supreme Court.

4. Appeal and error §1178(8) — Defendant permitted to amend answer on new trial following reversal of judgment.

Where judgment for defendant is reversed because of defendant's failure to prove certain facts, and a new trial is necessary, the defendant should be permitted to amend its answer and to prove such facts.

5. Municipal corporations §244(1)—If declaration of urgency was unfounded, contract pursuant to ordinance made within 30 days after its passage would be unauthorized, but is valid if made after 30 days.

If there was no foundation for city council's declaration of urgency, so that ordinance did not take effect until 30 days after its passage, a contract made within the 30 days would be unauthorized; but any contract, whether express or implied, made thereafter, would be valid.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Cora M. Morgan against the City of Long Beach. Judgment for defendant, and plaintiff appeals. Reversed.

Cora M. Morgan, in pro. per.

George L. Hoodenpyl, of Los Angeles, and Bruce Mason and Charles F. Cook, both of Long Beach, for respondent.

SHAW, J. The complaint herein contains two counts. In the first thereof plaintiff alleged that on the 7th day of July, 1915, she was employed by defendant to perform services for it and on its behalf to install a filing system, to do stenographic, secretarial, and general office work, and to provide for installing and carrying on the clerical work of the department of public affairs for the city of Long Beach, at a compensation of \$300, to be paid plaintiff by defendant for the term of said employment, commencing on July 7, 1915, and ending on the 2d day of November, 1915, and that pursuant to said agreement of employment plaintiff did during the whole of said term perform such services for and on behalf of defendant. In the second count it is alleged that on the 9th day of February, 1916, defendant employed plaintiff to perform services for it and on its behalf as a laborer in the charity department of said city at an agreed price of \$2 per day for each and every day of such labor performed, and that pursuant to said employment plaintiff herein, between February 9, 1916, and March 22, 1917, performed 288½ days' labor at \$2 per day, aggregating the sum of \$576.50. These allegations as to the employment of plaintiff by defendant were denied in the answer, and as to both thereof

the court found adversely to plaintiff, who appeals from the judgment entered thereon in favor of defendant.

The sole question presented is whether or not such findings are supported by the evidence. It appears that at the times in question the city of Long Beach was a municipal corporation operating under a freeholders' charter which provided for a commission form of government, under which the legislative department of the city consisted of five commissioners. Section 15 of article 4 of the charter provides that—

"The legislative body may from time to time, by a majority vote, create or discontinue offices and municipal employments and prescribe and alter the compensation of any officer or employee of the city, except the elective officers."

Pursuant thereto the commissioners, on July 6, 1915, adopted an ordinance designated as No. B-1, whereby the office of secretary to the commissioner of public affairs of the city was created, the duties of which officer were declared to be those of a private secretary, stenographer and clerk, together with such other duties as might be required by the commissioner of public affairs, and fixing the salary of such official at \$75 per month. Under said section 15 of the charter, such commissioner is empowered to nominate persons to fill all offices created therein, which nominations, in order to be effective, as provided by section 16 of the charter, "must be confirmed by the votes of at least three commissioners. Said appointees so elected by the commissioners shall hold office for a period of two years, and subject to removal at any time by a vote of four-fifths of all the commissioners, except those under civil service." It further appears that Frank M. Cates was commissioner of public affairs, and that as such commissioner he, on July 6, 1915, appointed plaintiff to fill the office of secretary, stenographer, and clerk in his department, which office was created by ordinance No. B-1. It further appears that Commissioner Cates and plaintiff sought to have her appointment as such subordinate official confirmed by the board of commissioners, but they steadfastly refused to confirm the appointment, and informed both Cates and plaintiff that they would not confirm the same, notwithstanding which fact plaintiff performed the duties of the office for the term named. It conclusively appears that the position held by plaintiff under Commissioner Cates and the duties performed by her were those of the office created by ordinance No. B-1, to which, by reason of the refusal of the commissioners to confirm the nomination, she was never legally appointed.

[1] It follows that, since the employment was unauthorized, she is not entitled to recover from defendant for the services ren-

dered under the purported appointment made by Cates as commissioner. To uphold plaintiff's asserted right to recover, under the circumstances, would be tantamount to a disregard of the clear provisions of the city charter. The purported appointment was a nullity and, in contemplation of law, plaintiff was not in the employ of the city. *Santa Cruz R. P. Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863; *Times Publishing Co. v. Weatherby*, 139 Cal. 618, 73 Pac. 465. We therefore conclude the evidence justifies the finding attacked to the effect that plaintiff was not employed by defendant to perform service for it as alleged in the first count of the complaint.

As to the second count, it appears that Frank M. Cates, as commissioner of public affairs, had charge of the department of public charities of the municipality; that in such capacity he, on February 9, 1916, employed plaintiff for an indefinite period to perform services in connection with and incidental to the business thereof, at the rate of \$2 per day; and that between February 9, 1916, and March 22, 1917, she performed 288½ days' service, amounting to \$576.50. It is the contention of plaintiff that authority for the act of Cates as such commissioner in employing her is found in ordinance No. B-100, adopted on January 28, 1916, and declared by the legislative body to be an emergency measure. Section 5 of this ordinance provided:

"That the commissioner of public affairs is hereby authorized to employ ten laborers, for such work as may be required in the department of public charities, or for any work that the commissioner of public affairs may deem necessary for the carrying on of the work of the charity department, * * * at a compensation not to exceed \$2.00 per day each."

That the services performed by plaintiff under this employment were those specified in section 5 of the ordinance is clearly shown. Nevertheless, respondent insists that, though the ordinance was adopted on January 28th and contained a declaration of its urgency, by reason whereof under the provisions of section 3 of article 22 of the charter it became immediately effective, it did not in fact become operative until thirty days after its passage, as provided in cases where ordinances are adopted without a declaration of urgency. Its contention is that at the time of the adoption of the ordinance no facts existed showing that it was necessary for "the immediate preservation of the public peace, health and safety"; and hence the mere declaration of urgency by the commissioners, when there was no urgency, is insufficient to render such an ordinance immediately operative.

[2, 3] We quite agree with respondent that, in the absence of facts showing urgency, the mere declaration of a city council so declar-

ing in an ordinance will not render it immediately operative. In *re Hoffman*, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75; *Wheeler v. Chubbuck*, 16 Ill. 361. In the absence of evidence to the contrary, however, we must assume that the council acted upon sufficient inquiry as to whether or not an emergency existed. The declaration is prima facie evidence of such fact. In the instant case, other than the fact that at the time of the adoption of ordinance No. B-100 there existed an ordinance relating to the charity department of the city, which was repealed by the later ordinance, no evidence whatever is presented tending to show that no facts existed constituting a reason for the declaration of the commissioners as to the declared urgency. Under the old ordinance, No. B-8, a department of public charities was created, in which provision was made for the appointment of a secretary of charities, who, under the supervision and direction of the commissioner of public affairs, had charge of charities, and whose salary was fixed at \$50 per month. The new ordinance enlarged the functions of the department, provided for the disposition of charity donations received and the disbursement thereof, and authorized the commissioner of public affairs to employ such persons, not exceeding ten, as he might deem necessary in conducting the work of the department. The nature of the conditions in Long Beach at the time of the adoption of the ordinance might have been such as to render it immediately expedient to adopt these measures, and particularly to provide for an increase in the number of employees in conducting the affairs of the department. We cannot say by a mere comparison of the two ordinances that no facts existed which were sufficient to warrant the act of the municipal legislative body in declaring the urgency measure. However this may be, and assuming, as claimed by respondent, that no facts existed justifying the declaration of urgency contained in the ordinance, it was not void by reason of such fact, but, at most, its operative effect was postponed until thirty days had elapsed, to wit, until February 28th. *Michelson v. City of Sacramento*, 173 Cal. 108, 159 Pac. 431. Hence, since under the ordinance the commissioner of public affairs was authorized to employ plaintiff in the department of charities at \$2 per day, and did employ her, she would in any event be entitled to recover compensation for the services rendered at the per diem specified, based upon the number of days' work performed after the ordinance became operative, and this right would be unaffected by the fact (if it be a fact) that at the time she entered upon the employment the ordinance was not in effect. As stated, the employment was for an indefinite period at \$2 per day, and conceding the ordinance did not go into effect

until February 28th, her continuance in the work thence on, with the knowledge and consent of the commissioner of public affairs, who at such time was, by a valid ordinance, authorized to employ her, entitled her to recover for the services rendered.

Our conclusion is that the finding of the court upon the issue presented by the second count of the complaint is not supported by the evidence.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. The petition for a rehearing in this court is denied.

[4, 5] The judgment being reversed and a new trial in the court below being necessary, the defendant should have leave to amend its answer, and should be allowed to prove such facts as may exist tending to show that there was no foundation in fact for the statement in the ordinance of January 28, 1916, that the ordinance "is urgently required for the immediate preservation of the public peace, health and safety." If the court should find that there was no such foundation, the declaration would be ineffectual to bring about the immediate taking effect of the ordinance, and it would not take effect for 30 days after its passage, in which event any contract made within the 30 days would be unauthorized. Any contract, whether express or implied, made thereafter in pursuance of the ordinance, would be valid.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SLOANE, and SHURTLEFF, JJ., and RICHARDS, Justice pro tem., concur.

(57 Cal. App. 191)

SMITH v. ROSS et al. (Civ. 3653.)

(District Court of Appeal, Second District, Division 2, California. March 27, 1922.)

1. Costs §199—As affecting claim for costs judgment is not rendered until entered in clerk's minute book.

Under Code Civ. Proc. § 1033, providing that a successful party claiming costs must deliver to the court and serve on the adverse party within five days after the verdict or notice of the decision of the court a memorandum of items of his costs and necessary disbursements, where findings of fact were waived, the entry of the court's decision in the clerk's regular minute book—not in the courtroom clerk's so-called rough minutes—constituted the rendition of the judgment.

2. Costs §199—"Decision" as used in statute relating to memorandum of costs defined.

Under Code Civ. Proc. § 1033, providing that a party in whose favor a judgment is ren-

dered in claiming costs must deliver to the court and serve upon the adverse party within five days after the verdict or notice of the decision of the court a memorandum of the items of his costs and necessary disbursements, and defining the "decision of the court" to mean the signing and filing of the findings of fact and conclusions of law, where written findings have not been waived, the "decision" referred to means the signing and filing of the findings of fact and conclusions of law, but where findings are waived, as permitted by section 634, a minute order, directing judgment for one of the parties, constitutes the "decision."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decision.]

3. Costs §199—Party not required to file cost bill until five days after notice of minute entry of clerk.

Under Code Civ. Proc. § 1033, requiring a party in whose favor a judgment is rendered to serve or file his memorandum of costs "within five days after . . . notice of the decision" in a case in which findings were waived, as permitted by section 634, there was no decision until the clerk made his minute entry, and the winning party was not required to serve and file a cost bill before receiving notice of the minute entry.

4. Costs §199—Memorandum of costs held filed in time.

Under Code Civ. Proc. § 1033, providing that a party in whose favor a judgment is rendered must serve or file his memorandum of costs within five days after notice of the decision, in a case in which findings were waived, as permitted by section 634, though the trial court orally announced from the bench "that in its opinion judgment should be for plaintiff," there was no entry of judgment until an order directing judgment was entered in the minute book, and though this was under date of November 30th, the day of the statement by the trial court, where plaintiff did not receive a notice of the entry of judgment on the clerk's minute book until December 20th, a memorandum of costs, served December 21st and filed December 22d, was within five days after notice of the decision, as required by section 1033.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Hazel Smith against James Ross and others. Judgment for plaintiff. From an order striking out plaintiff's memorandum of costs, plaintiff appeals. Reversed.

Preisker, Preisker & Goble, of Santa Maria, for appellant.

C. U. Armstrong and Fred A. Shaefer, both of Santa Maria, for respondents.

FINLAYSON, P. J. This is an appeal from an order striking out plaintiff's memorandum of costs. The sole question is: Was the memorandum served and filed in time?

The action was brought to recover possession of an automobile. It appears from the

bill of exceptions that at the conclusion of the trial on November 30, 1920, "the court announced that in its opinion judgment should be for the plaintiff for the return of said property or the value thereof, found to be \$750, and for costs of suit." It further appears that findings were waived by defendant. Thereafter, but how soon does not appear, the clerk made an entry in the minute book, under date of November 30, 1920, which, after reciting that the cause had been tried, argued, and submitted, and that the court had duly considered the evidence, states that—

The court "now renders its decision from the bench and orders that judgment be entered herein in favor of the plaintiff and against the defendant for the recovery of the possession of the automobile described in the complaint or \$750 in lieu thereof, and for costs of suit. Findings waived in open court. Let judgment be entered accordingly."

The entry mentioned in the final sentence of this minute entry refers, of course, to an entry of the judgment in the judgment book. The formal judgment which was signed by the trial judge, was filed on December 4, 1920, and was entered in the judgment book on December 6, 1920. Plaintiff's memorandum of costs, in due form, was served on December 21, 1920, and was filed December 22, 1920. Within five days thereafter defendants served and filed a notice of motion to strike the memorandum of costs from the files on the ground that it was not filed within the time allowed by law. From an affidavit filed by one of plaintiff's counsel it appears, without contradiction, that not until December 20, 1920, did plaintiff or her counsel have any knowledge of the minute entry of the order directing that a judgment be entered in favor of plaintiff.

Respondents contend that appellant had notice of the "decision" when the court, in the presence of appellant's counsel, orally announced from the bench "that in its opinion judgment should be for plaintiff." For appellant it is claimed that, because findings were duly waived in open court, no judgment was "rendered" and no "decision" was made until the clerk had made his minute entry of the order, directing that a judgment be entered in the judgment book in favor of plaintiff; also that she had no notice of the "decision" until December 20, 1920, when, for the first time, her counsel learned of the entry of the minute order directing that judgment be entered in her favor. This information came to appellant's counsel within five days prior to the time when her cost bill was served and filed. We think appellant's contention must be sustained.

Section 1033 of the Code of Civil Procedure provides:

"The party in whose favor the judgment is rendered, and who claims his costs, must deliver

to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court * * * a memorandum of the items of his costs and necessary disbursements. * * * By the decision of the court * * * is meant the signing and filing of the findings of fact and conclusions of law."

It will be noted that, according to the wording of this Code section, it is only the party in whose favor "the judgment is rendered" who is entitled to costs; also that one so entitled, if the case be tried without a jury, is not required to serve or file his cost bill until "after * * * notice of the decision of the court."

[1] Where, as in the present case, findings are waived, the entry of the court's decision in the clerk's minutes constitutes the rendition of the judgment. Until the minute order is entered in the clerk's regular minute book—not in the courtroom clerk's so-called "rough minutes"—no judgment is "rendered." *Crim v. Kessing*, 89 Cal. 488, 26 Pac. 1076, 23 Am. St. Rep. 491; *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91. In *Crim v. Kessing*, the court said:

"* * * Under the provisions of the Code of Civil Procedure, whenever findings are required there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system."

[2] So, also, with respect to the "decision." Where written findings have not been waived, the "decision" referred to in section 1033 means the signing and filing of the findings of fact and conclusions of law. But findings may be waived (section 634, Code Civ. Proc.); and where they are waived, as they were in the present instance, a minute order, directing judgment for one or the other of the parties, constitutes the "decision." Until such entry has been made in the minute book there is no "decision," as that word is employed in section 1033 of the Code of Civil Procedure. *Collins v. Belland*, 37 Cal. App. 139, 173 Pac. 601.

[3, 4] Since section 1088 does not require

the party in whose favor the judgment is rendered to serve or file his memorandum of costs until "within five days after * * * notice of the decision," and since in this case there was no "decision" until the clerk had made his minute entry, it follows that plaintiff was not required to serve and file her cost bill until she had received notice of that minute entry. It does not follow that plaintiff's counsel had notice of the "decision" simply because they were present when the court orally announced from the bench that "in its opinion judgment should be for the plaintiff." No findings being required (they having been waived), and the court having merely made an oral statement that it was its *opinion* that judgment should be for the plaintiff, it might have changed its opinion at any time before the clerk's entry in the minute book of the order directing judgment for plaintiff. Until such entry, the oral order or announcement from the bench was in the breast of the court and subject to change. *Brownell v. Superior Court*, *supra*.

It is possible that some days may have elapsed between the time when the court orally announced that it was of the opinion that judgment should pass for plaintiff and the time when the clerk entered in his minute book the order directing that a judgment for plaintiff be entered in the judgment book. Such lapse of time is possible notwithstanding the fact that the minute entry bears date as of the day of the court's oral announcement—November 30, 1920. It required some time for the clerk to record the day's proceedings in his minute book. So that, assuming, for the purpose of this decision only, that plaintiff would have been charged with notice of the "decision" if her counsel had been present when the clerk made his minute entry and had actually seen it entered, still there is nothing here to indicate that plaintiff or any of her counsel had any knowledge or notice of the minute entry until, as stated in the affidavit of one of her attorneys, the latter received a copy of the formal judgment from a court attaché on December 20, 1920, which was less than five days before the cost bill was served and filed. For these reasons we think appellant's memorandum of costs was served and filed in time, and that the order striking it from the files should be reversed. It is so ordered.

We concur: WORKS, J.; CRAIG, J.

(57 Cal. App. 340)

MESSICK v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SAN JOAQUIN COUNTY. (Civ. 2460.)

(District Court of Appeal, Third District, California. April 12, 1922.)

1. Indictment and Information \Leftrightarrow 110(34)—
Sufficient to charge destruction or injury of fence in language of statute.

Pen. Code, § 602, subd. 8, as amended by St. 1917, p. 319, making it a misdemeanor to willfully open, tear down, or otherwise destroy any fence on the inclosed land of another, states every material element of the crime, and a complaint following its language is sufficient, notwithstanding the word "malicious" in the headnote to the section.

2. Indictment and Information \Leftrightarrow 110(34)—
Complaint in language of statute held to sufficiently charge opening and destruction of fence was malicious; "malice."

In view of Pen. Code, § 7, subd. 4, defining "malice" as an intent to do a wrongful act, a complaint charging, in the language of Pen. Code, § 602, subd. 8, as amended by St. 1917, p. 319, that defendant did willfully and unlawfully open, tear down, and destroy a fence sufficiently charged malice if a material element of the charge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

Chester W. Messick was convicted of an offense, and the judgment was affirmed by the Superior Court of California in and for San Joaquin County, and he applies for a writ of certiorari. Alternative writ discharged, and peremptory writ denied.

Walter F. Lynch, of Stockton, for petitioner.

Edward Van Vranken, of Stockton, for respondent.

BURNETT, J. Petitioner was convicted in the justice court of Douglas township, county of San Joaquin, of the offense charged in a complaint as follows:

"The said Chester W. Messick did, at and in the county and state aforesaid, willfully and unlawfully open, tear down and destroy a fence on the inclosed land of another, to wit, a line fence between the lands of Chester W. Messick and one Edward J. Hughes, situate, lying, and being in the northwest one-quarter of section 3, township 2 north, range 8 east, Mt. Diablo base and meridian."

[1] He was sentenced to pay a fine of \$50, and, in case of default in the payment, to be imprisoned in the county jail until the fine should be satisfied at the rate of \$2 per day. He appealed upon questions of law alone to the superior court of said county wherein the judgment was affirmed. Thereafter he petitioned this court for a writ of certiorari, claiming that no offense was stated in said

complaint by reason of the failure to allege that the act was done maliciously. It is to be observed that the charge is in the language of subdivision 8 of section 602 of the Penal Code, as amended in 1917 (Stats. 1917, p. 319), but it is the claim of petitioner that the "headnote to the section (malicious injury to freehold) must be deemed a part of the substance of the act, and accorded the same effect as though written into the body of the law." This is a rule of general application recognized by the authorities, and ordinarily there is no question about its pertinency in order to determine the intention of the Legislature, but herein there are nine subdivisions of said section embracing various acts, some of which are not injuries to the freehold at all; and it may be doubted whether the said headnote was intended to be anything more than an arbitrary generalization of the scope of the section. It is not unreasonable to say that what the Legislature meant is that the various acts enumerated should be deemed equivalent to a "malicious injury" to the freehold, and to charge said offense it would be sufficient to follow the language of the particular subdivision under which the case should fall. Some of these acts, indeed, were assuredly intended to be penalized although not done maliciously, such as "entering any inclosure belonging to, or occupied by another, for the purpose of hunting, shooting, killing, or destroying any kind of game within such inclosure, without having first obtained permission from the owner of such inclosure." It is proper to observe also, that in only one of these various subdivisions is the term "maliciously" employed to characterize the offense, and from this, under a familiar rule of construction, it might be plausibly argued that it was not intended as a qualification of the other acts.

The true situation seems to be that every material element of the crime committed by petitioner is comprehended by this express language of said section: "Every person who willfully commits any trespass by * * * willfully opening, tearing down, or otherwise destroying any fence on the inclosed land of another * * * is guilty of a misdemeanor"—and it is sufficient by appropriate allegations in the complaint to set forth that condition.

[2] This was assuredly done, but, if it be conceded that malice is a material element in the charge, then such requirement is satisfied by the terms that were employed in the complaint. The word malice implies "an intent to do a wrongful act." Subdivision 4, § 7, Pen. Code; *People v. Ah Toon*, 68 Cal. 326. The expressions "willfully and unlawfully" used in the complaint are equivalent to an allegation that the act was done with such intent. It was so expressly held in the

matter of Application of Ahart, 172 Cal. 762, 159 Pac. 160, wherein it is said:

"Turning next to the complaint: It alleges that the defendant 'willfully and unlawfully' transported the intoxicants. 'Willfully,' of course, imports no more than a design to do the specific act. But the charge is also that the act of transportation was unlawfully performed. This employment of the word is not merely epithetical but is sufficient to charge the defendant with the performance of this act with a wrongful intent, and is thus sufficient to justify his being placed upon trial."

In *Blise v. United States*, 144 Fed. 374, 74 C. C. A. 1, 7 Ann. Cas. 165, it was declared by the Circuit Court of Appeals, Eighth Circuit, that the words, "unlawfully and feloniously" mean "that the act which they characterize proceeded from a criminal intent and evil purpose and thus exclude all color of right and excuse for the act," citing cases.

Petitioner refers to certain decisions from other jurisdictions apparently in conflict with the foregoing, but they are not controlling herein. As the question was directly decided by the highest court of this state in the Ahart matter it is unnecessary to discuss the subject further.

The alternative writ is discharged, and the peremptory writ denied.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 343)

GROFF et ux. v. DU BOIS et al. (Civ. 4205.)

(District Court of Appeal, First District, Division 1, California. April 13, 1922.)

Limitation of actions § 31—Action for miscarriage resulting from attempted eviction is barred in one year.

An action by a tenant and his wife to recover damages for miscarriage of the wife, resulting from an attempt by the landlord to evict the tenants from the premises, in which no physical violence was employed toward the wife, is an action for personal injury caused by the wrongful act of another, which is barred if not commenced in one year by Code Civ. Proc. § 340, subd. 3.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by W. C. Groff and wife against E. B. Du Bois and others, to recover damages for personal injuries growing out of an alleged trespass. Judgment for plaintiffs, and named defendant appeals. Reversed.

H. V. Keeling, of Lakeport, and Edgar D. Pelxotto, of San Francisco (Cleveland R. Wright, of San Francisco, of counsel), for appellant.

W. H. Hazell, of Lakeport, for respondents.

TYLER, P. J. This action was one brought to recover damages for injuries growing out of an alleged trespass on the part of defendants. The complaint was filed on the 13th day of March, 1920, and it alleges that about the 1st day of August, 1917, and while plaintiffs were in lawful and peaceful possession of certain real property, defendants unlawfully, and in a malicious and offensive manner, attempted to evict them therefrom, together with their personal belongings. The complaint contains an allegation that at such time plaintiff Helen E. Groff was in a delicate physical condition, and that such act on the part of defendants caused her to suffer a miscarriage. No actual damage was alleged, but plaintiffs claimed exemplary damages in the sum of \$5,000. A demurrer was interposed pleading the statute of limitations. It was claimed that, the action being one for injury caused by wrongful act of another, it should have been commenced within one year as prescribed by subsection 3 of section 340, Code of Civil Procedure. The demurrer was overruled, and defendants, answering, denied plaintiffs' allegations, and alleged that the defendant Du Bois was the owner of the premises, and that he and the other defendants lawfully entered thereon, and that the plaintiff Helen E. Groff, without cause or reason threatened to shoot them unless they departed. Denial is made that plaintiffs suffered any damage, and it was prayed that they take nothing by their action. Trial was had by jury.

From the evidence it appears that defendant Du Bois was the owner of a fruit ranch in Lake county, and that plaintiff W. C. Groff and his family were located thereon under a working arrangement. On the 1st day of August, 1917, defendant Du Bois, in company with the other defendants, went upon the premises and removed certain personal property out of a shed and from the porch of the house occupied by plaintiffs. Helen E. Groff, the wife of plaintiff, came out of the door with a shotgun and ordered defendants to refrain from removing any of the property. Defendants desisted, and they then left the premises. Subsequently, on August 13, 1917, Helen E. Groff suffered a miscarriage. It further appeared that defendants were civil and respectful upon the occasion, and that no force or violence whatever was used by them. As before stated, no actual damage was prayed for, and none was proven. At the conclusion of the trial a verdict was rendered in favor of plaintiffs for \$100 actual and \$2,500 exemplary damages. Defendant Du Bois moved for a new trial. The motion was denied in the following language:

"It appearing to the court that the judgment in the case is excessive, but the plaintiff having offered to remit \$1,686.60 of the amount of the

verdict rendered and the judgment entered for plaintiff herein, and the defendant having failed to accept such offer, it is ordered that the defendant's motion for a new trial herein be, and the same is hereby, denied."

Defendant appeals from the judgment. As grounds for reversal it is alleged: (1) That plaintiff's cause of action is barred by the statute of limitations; (2) that plaintiff was not entitled to recover exemplary damages, for the reason that the acts of defendant were not malicious or wanton, and because of the fact that no actual damages were pleaded or proven; (3) that the court believing the verdict excessive, it was its duty to grant a new trial.

We are of the opinion that appellant's first contention disposes of the case. The action is clearly one brought for injury to the person caused by wrongful act, and exemplary damages are prayed for by reason of this alleged injury. The only evidence upon the subject is that plaintiff Helen E. Groff suffered a miscarriage. There is no evidence in the record to show that the acts of defendant caused such injury. Even if we assumed that the miscarriage was brought about through the acts complained of, it is clearly a case within the purview of subdivision 8 of section 840, Code of Civil Procedure, requiring such actions to be brought within one year. Defendants by demurrer and answer interpose the statute as a shield. These pleadings should have been sustained.

This conclusion makes it unnecessary to discuss the other questions raised. The judgment is reversed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(57 Cal. App. 257)

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, et al. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 4080.)

(District Court of Appeal, First District, Division 1, California. April 5, 1922. Rehearing Denied May 3, 1922.)

Master and servant — 419—Disability held "new and further disability" within Compensation Act, and not continuing illness.

Where, as a result of an employee's efforts to work following his disability, for which he had received compensation, new complications in his physical condition, traceable to the original injury set in, and his nervous system was broken down so that he was incapacitated for his duties, his condition constituted a "new and further disability," within Workmen's Compensation Act, § 11c, and not a mere "continuing illness."

Application by the Employers' Liability Assurance Corporation, Limited, of London, England, and the C. N. Whitmore Company for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries to J. T. Souza. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

KNIGHT, Justice pro tem. This is a proceeding to review and annul an award of \$267.81 granted by the Industrial Accident Commission to J. F. Souza on account of injuries sustained by him while in the course of his employment. The issue presented is whether or not Souza's claim is barred by the period of limitation prescribed by the Workmen's Compensation Act (St. 1913, p. 279, as amended by St. 1917, p. 831), and the determination of that question depends upon whether or not the disability for which the claim is presented was a "new and further disability" within the meaning of that term as it is used in said act.

On September 10, 1920, Souza fell from a wagon and sustained a fractured skull. Medical and hospital treatment were supplied by the insurance carrier, and on November 22, 1920, Souza returned to work for his former employer at apparently as good wages as he had previously received, but, on account of a still weakened condition, he was assigned to lighter work. On November 28, 1920, a payment of compensation was made to Souza by the insurance carrier in the sum of \$44.27. About January 1, 1921, Souza complained to his employer that he was unable to continue the work, and was thereupon, by the direction of the physician who had previously treated him, placed in the hospital for 10 days. He was incapacitated for work this second time on account of his injury until about the end of March, 1921.

On June 4, 1921, Souza filed this application for an award, which was granted, in the sum of \$267.81, upon the ground, as respondent contends, that the original injury to Souza had caused "new and further disability."

Section 11 (c) of said Workmen's Compensation Act provides, among other things, that an injured employee "may institute proceedings for the collection of compensation within 245 weeks after the date of the injury upon the grounds that the original injury has caused new and further disability," but in said section it is further provided that "proceedings . . . must be commenced within six months from the date of the injury . . . or . . . six months from the date of the . . . last payment of . . ."

compensation." If, therefore, on January 1, 1921, at the time Souza was again compelled to quit his employment, he was suffering from a "new and further disability" resulting from the original injury, his claim was filed within 6 months of date of the new disability, and consequently is not barred.

We are entirely satisfied, after examining the record before us, that Souza's case comes within the "new and further disability" clause above mentioned. When Souza was discharged from the hospital the first time he was released and required to resume his work too soon after the injury. He was subject to spells of dizziness. In this respect his physician testified:

"As a matter of fact he never had done his full quota of work since he had been out of the hospital, from his first injury, and I will say, in justice to the man, that I turned him loose too soon. I think I had him report back to work too soon. Mr. Whitmore is a good man to work for and I didn't want to put the insurance company to any more expense than possible, and Mr. Whitmore has favored him or did favor him in his work, but Mr. Whitmore has told me since that he wasn't able to do his full quota of work."

The evidence may be further fairly summarized as showing that after Souza was sent back to work his dizziness increased to such an extent that his nervous system was finally broken down and he virtually suffered a relapse. His physician further testified that, on January 1, 1921, the trouble with Souza was dizziness, and that "he was inclined to have an autointoxication, fill up with toxins, poisons"; that "his nervous system was pretty badly shot to pieces at that time, too," and that such a condition very often follows a fracture of the skull or concussion of the brain; that "you get these traumatic conditions, and it shocks the nervous system, upsets the nervous system very much."

The petitioners contend that Souza's case merely shows a "continuing illness," from which it is argued that no "new and further disability," is shown. In this respect we think the petitioners are confusing the meaning of the word "illness" with the word "disability." The purpose of the Compensation Act is to give compensation for "disability" proximately caused by injury. Under the provisions of section 9 (b) of said act, compensation is not due for temporary disability after an employee returns to work at full wages, and it follows that when Souza returned to work at full wages there was no "compensable disability." As a result of his efforts to work from November 22, 1920, to January 1, 1921, new complications in his physical condition set in, his nervous system was broken down, and he was finally compelled to quit work. These facts are appar-

ent from the testimony of the physician as hereinabove quoted.

Under these circumstances, we are of the opinion that the situation here presented fully and fairly comes within the intent and meaning of the "new and further disability" clause of said Workmen's Compensation Act, and for that reason the award is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

(57 Cal. App. 278)

ROYAL GROCERY CO. v. OLIVER.
(Civ. 4135.)

(District Court of Appeal, First District, Division 1, California. April 7, 1922.)

Landlord and tenant §—86(2)—Option to renew if notice "within" 90 days prior to expiration is given requires 90 days' notice.

In a provision of a lease giving the lessee the option to renew if notice of intention to exercise the option was given within 90 days prior to the expiration of the term, the use of the word "within" does not entitle the lessee to give the notice at any time less than 90 days before the term expired, as it might if the provision read "within 90 days of the expiration," since the word "within," when used in connection with the word "before" or "prior" can be construed as meaning not later than, or at any time not less than.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Within.]

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by the Royal Grocery Company against Lillie F. Oliver, as executrix of D. Franklin Oliver, deceased, for specific performance of a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

O. G. Foelker, of Oakland, for appellant. Morrison, Dunne & Brobeck, and J. F. Shuman, all of San Francisco, for respondent.

KNIGHT, Justice pro tem. This is an appeal by plaintiff from a judgment sustaining a demurrer to plaintiff's complaint, without granting leave to amend, in an action brought for specific performance growing out of an option for the renewal of a lease of real property.

On January 15, 1919, the defendant, as lessor, entered into a lease with plaintiff, as lessee, whereby defendant leased to plaintiff a store in the city of Oakland, for the term of two years commencing on February 1, 1919, and ending on January 31, 1921. The lease gave the lessee an option to renew the same, with changed rentals, for a further period of three years, the new term to commence on January 31, 1921, but with respect to this renewal the lease provided:

"It is further agreed and understood, however, that, in the event the lessee herein shall fail to give the lessor herein a written notice of its election to exercise this option for a 3-year renewal of this lease within 90 days prior to the expiration of this lease, this option for a 3-year renewal shall thereafter be and become null and void, and of no further force and effect, without notice from the lessor."

Notice of the exercise of the option to renew the lease was given to the lessor on November 13, 1920, which was 79 days before the lease expired.

The controversy between the parties arises over the construction which shall be given to the term "within 90 days prior to the expiration of this lease." Appellant's contention is that it had the right at any time during the 90 days next preceding the expiration of the lease to serve the notice of the exercise of the option. Respondent's claim is that said notice should have been served at least 90 days prior to the expiration of the lease.

Viewing the option in the light of other options such as are customarily used in leases, we can arrive at no other conclusion than that it was the intention of the parties here that the lessee should give the lessor at least 90 days' notice of its intention to continue the tenancy. To hold otherwise would, in our opinion, be giving the option an unreasonable and unjust interpretation.

The usual purpose of requiring the lessee in any case to give notice of the exercise of an option to renew the lease is that the lessor may not be compelled to wait until the last day of the term of the lease before he may know whether or not the lessee desires to continue to occupy the premises for a further term, and thereby take the risk of having his premises remain idle for an indefinite period in the event that said option to renew the lease is not exercised. If appellant's contention be sustained, it would mean that appellant was not permitted to notify the landlord at any time during the year and nine months it occupied the premises that it desired to and would continue its tenancy after the original term fixed in the lease, but that it was required to wait until 90 days of the expiration of the lease before it could serve such notice. Such a limitation would obviously be to the disadvantage of both parties to the lease, and there appears to be no reason in law or fact why such a provision should have been made. If the option had read "within 90 days of the expiration of the lease," then there would be some force in appellant's contention; but the presence of the words "prior to" clearly indicates, we believe, that it was the clear intention of the parties that the notice should be served at least 90 days prior to the date on which the lease expired.

The question of such a pleonasm as ap-

pears in this option has been before the courts of other jurisdictions in a few cases, and the rule of those cases is that the word "within," when used in connection with the word "before," should be construed as meaning "not later than" or "at any time not less than." *United States v. Sena*, 15 N. M. 187, 106 Pac. 384; *Hammond v. Connolly*, 63 Tex. 62; *Colonial Trust Co. v. Wallace* (C. C.) 183 Fed. 897. We are of the opinion that such a construction must be adopted here.

Judgment affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

(28 N. M. 129)

MORRISON v. FIRST NAT. BANK OF TAOS. (No. 2535.)

(Supreme Court of New Mexico. Feb. 21, 1922. Rehearing Denied June 10, 1922.)

(Syllabus by the Court.)

1. Trial \S 156(3) — A demurrer to the evidence admits its truth and waives all objections to its admissibility.

A demurrer to the evidence admits the truth of the testimony, every conclusion which it tends to prove, and every inference which may reasonably be drawn therefrom, and waives all objections to the admissibility of such evidence.

2. Appeal and error \S 733—Assignments directed to judgment defects held sufficient.

Assignments of error challenging defects which inhere in the judgment itself are sufficiently specific.

3. Judgment \S 52—Warrant of attorney permits judgment against maker without process.

A warrant of attorney in a promissory note permits the holder to take judgment against the maker thereof without service of process upon him, although he was within the jurisdiction of the court and could have been served.

4. Principal and agent \S 181—Agent's fraud upon or concealment from principal not available to latter as against party dealing with agent in good faith.

Knowledge of the agent is to be imputed to the principal, and, where the agent knew and understood the conditions upon which his principal was to be released from certain indebtedness, his concealment from or fraud upon his principal is not available to the principal against one dealing with the agent in good faith.

Appeal from District Court, Taos County; Leib, Judge.

Action by Harry Morrison against the First National Bank of Taos, N. M., to set aside and vacate a judgment obtained by the

defendant bank against the plaintiff. From a judgment dismissing the complaint, the plaintiff appeals. Judgment affirmed.

H. M. Dow, of Roswell, for appellant.
Laughlin & Barker, of Santa Fé, for appellee.

RAYNOLDS, C. J. Appellant Morrison, as maker and indorser, was indebted to the First National Bank of Taos in the sum of \$9,324.20 on four promissory notes. One Fortner was the maker of three of these notes and indorser on the fourth, which was signed by Morrison as maker. When the notes became due, payment was demanded by the bank, and an arrangement was entered into by the parties by which Morrison understood that on giving two new notes for \$3,000 each he was to be released from his liability. The negotiations were carried on by Fortner and a representative of the bank. The bank claimed that the balance or the \$9,300 was to be taken up by a note signed by J. H. Vaughn, and that Fortner was to get this note from Vaughn, but Morrison apparently did not so understand it. The note from Vaughn was never made. Upon receipt of the two \$3,000 notes from Morrison, the bank credited his account with them to that amount and sent him canceled notes on which he was liable to that amount. The two notes for \$3,000 each were judgment notes. The bank subsequently obtained judgment on these two notes against Morrison under a warrant of attorney contained therein, issued execution, and sent it to the sheriff of Chaves county. Morrison did not take any action in Taos county, where the judgment was rendered, toward setting it aside or securing stay of execution, but obtained an injunction in the district court of Chaves county against the sheriff from making a levy. At this stage of the proceeding a writ of prohibition was issued by the Supreme Court against the action of the court of Chaves county in enjoining the sheriff of said county from levying the execution. The levy was afterward made in Chaves county.

The present suit was filed for the purpose of setting aside and vacating the judgment obtained by the bank on the two \$3,000 judgment notes in Taos county on the ground that the judgment was procured by fraud, the notes having been delivered conditionally, and there being no liability thereon. After issue was joined, the case was tried, a demurrer to the evidence at the close of plaintiff's case was sustained, and the complaint dismissed. From the action of the trial court sustaining the demurrer and dismissing the complaint, the plaintiff, Morrison, appeals to this court. He assigns as error that the district court erred in sustaining the demurrer to the evidence, rendering judgment against appellant in favor of the bank.

[1] It seems to be conceded that, when a demurrer to the evidence is sustained, the testimony introduced on behalf of the plaintiff is deemed true, and every conclusion which it tends to prove must be admitted, and that such demurrer waives all objections to the admissibility of evidence and amounts to an admission that every inference which may be reasonably drawn from the evidence is true. *Collins v. Schump*, 16 N. M. 537, 120 Pac. 331; *State v. Ogden*, 20 N. M. 636, 151 Pac. 758.

[2] Appellee in the first instance challenges the assignments of error on the ground that they are not sufficiently specific. As, however, they are directed to defects which inhere in the judgment itself, we deem them sufficient, under *Kershner v. Trinidad Milling & Mining Co.*, 28 N. M. 73, 189 Pac. 658.

[3] Appellant urges upon us that such judgment notes—that is, notes with a warrant of attorney—cannot be properly used to procure judgment without process, where in a case like the present one service could have been made upon the debtor. This point has been decided adversely to the contention of the appellant by the case of *First National Bank of Las Cruces v. Baker*, 25 N. M. 208, 180 Pac. 291.

[4] The trial court, as shown by a statement made by him at the close of plaintiff's evidence, took the view that, although there had been a mistake as to the agreement in regard to the surrender of Morrison's notes, there was no actual fraud on the part of the bank which necessitated the court setting aside the judgment. We have carefully read the record of testimony, and it shows to our mind that Fortner acted as agent of Morrison in procuring this agreement; that the bank understood they were to release Morrison's indebtedness if the full amount of it was taken care of by these two notes of \$3,000 each, and the note of J. H. Vaughn for the balance. Morrison apparently did not understand the arrangement this way, but presumed that he was to be released upon signing the two \$3,000 notes. Taking the most favorable view of the testimony for the plaintiff, it is apparent that the bank's action did not amount to procuring these two \$3,000 notes by fraud, nor were they conditionally delivered to the bank. Fortner was the agent of Morrison, and not of the bank. If there was any misrepresentation, it was not upon the part of the bank, but on the part of Fortner towards Morrison. In fact, this is admitted by Morrison in his testimony. Knowledge of the agent is to be imputed to the principal, and, where the agent knew and understood the conditions upon which his principal was to be released from certain indebtedness, his concealment from or fraud upon his principal is not available to the principal against one dealing with the agent in good faith.

We believe the court came to a correct conclusion upon the evidence at the close of plaintiff's case and properly sustained the demurrer to it and dismissed the cause.

The judgment is therefore affirmed; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate.

(28 N. M. 117)

STATE v. CASAD. (No. 2594.)

(Supreme Court of New Mexico. April 26, 1922. Rehearing Denied June 9, 1922.)

(Syllabus by the Court.)

1. Homicide \S 339—Sustaining objection to question as to deceased's reputation for violence when angry held harmless, where witness stated that his reputation for violence was bad.

It is harmless error to sustain an objection to a question as to the reputation of deceased as a man of violent character or otherwise, "when angry," where witness was asked as to the reputation of deceased for peace and quietude, or for violence, and answered it was bad, and the jury had before it other evidence showing the alleged angry and violent actions of the deceased at the time of the homicide.

2. Homicide \S 171(2)—Evidence as to condition of alfalfa crop, alleged negligent care of which was the cause of the trouble, held properly admitted.

Alleged error as to the admission of certain evidence considered.

3. Criminal law \S 805(1), 829(4)—Homicide \S 303—Instruction on the right to resist trespass on real property held properly refused; defendant may not complain that instruction gave a wrong impression, without the giving of requested erroneous instruction; defendant may not complain of failure to give a requested instruction on matters properly covered by one given.

Instructions as to the rights of defendant upon his own property, and as to who was the aggressor in the affray, considered and held correct.

4. Criminal law \S 829(1)—Court is not bound to give a requested instruction, even if correct, if merely cumulative.

The court is not bound to give a requested instruction, even if correct, which is merely cumulative, and states in another form a proposition of law already given to the jury.

Appeal from District Court, Doña Ana County; Ed Mechem, Judge.

C. Darwin Casad was convicted of manslaughter, and he appeals. Affirmed.

Holt & Sutherland, of Las Cruces, for appellant.

A. M. Edwards, Asst. Atty. Gen., for the State.

RAYNOLDS, C. J. Appellant was indicted for the murder of one Antonio Bermudes, found guilty of manslaughter, and sentenced to five to six years in the penitentiary. From this judgment sentencing him, the appellant appeals to this court.

The testimony of the prosecution showed that, on the evening of May 25, 1916, the deceased, who was a tenant of the appellant, was returning to the farm with his baling outfit and crew; that he was handling the appellant's farm on shares; that, for a number of days prior to the killing, he had been engaged in baling alfalfa for a neighboring farmer, whose property was adjacent to that of the appellant; that appellant had protested to the deceased that he was neglecting appellant's alfalfa and that deceased promised he would commence baling appellant's alfalfa on the day of the killing; that appellant went to El Paso on that day and, upon his return, discovered that deceased had not begun baling the alfalfa; that the appellant thereupon nailed up the wire gate which had been theretofore used as a means of egress and ingress from and to appellant's land; that, having nailed up the gate, appellant sat down on the ditch bank which is just inside his property near the gate, and awaited the arrival of the deceased and the baling outfit and crew, having seen the party approaching as he finished nailing up the gate. When the baling crew approached the gate, appellant forbade deceased to enter the premises. Deceased protested and declared he would enter. Deceased removed the three lower wires of the gate from one of the posts, and, having done so, stooped under the top wire and stepped in the direction of the appellant who, meanwhile, had remained seated on the ditch bank and had told deceased not to enter; that, as deceased stepped from the gate in the direction of the appellant, the latter pulled his pistol and fired the fatal shot.

The testimony for the defense was to the effect that various members of the baling crew were armed with pitchforks and other implements; that the deceased was armed with a large Stillson wrench, which he used in breaking the wires loose from the post; that, as he went under the top wire, he advanced upon the defendant in a threatening and menacing manner, exclaiming, "I will kill you, cabron"; that the defendant believing himself to be in imminent danger then fired the fatal shot. The witnesses for the defendant testified that, within 10 or 15 minutes after the shooting, they saw the Stillson wrench lying on the ground near the body of the deceased, but did not know what became of it. They were the first persons who arrived at the body after the killing. One of them, a brother of the appellant, who arrived at the scene of the shooting

within three or four minutes after it occurred, testified the following conversation occurred between him and his brother, the appellant; that witness said: "What have you done?" and the appellant replied, "I have killed Antonio." The witness said, "You have played hell;" and the appellant replied, "I had to do it, or he would have killed me."

This testimony further showed that there was a controversy between appellant and deceased over deceased's neglecting to bale appellant's alfalfa, and that appellant had stated he would bale it himself, unless deceased began baling on the day of the killing; that, when appellant found on his return from El Paso that deceased had not kept his promise, he got some staples and nailed up the wire gate above mentioned; that he sat down on the ditch bank to await the arrival of the deceased for the purpose of forbidding him access to the premises; that, when deceased arrived, he told him that he had previously told him he need not come back to the ranch, and he then forbade him to enter. Deceased then asked: "Where shall I go through?" and appellant replied, "You can go around by the road;" that deceased then said, "I will show you where I will go through," and thereupon began to break off the wires with a wrench; and appellant then stated, "Don't do it; don't go through there, Antonio;" to which deceased replied, "I will show you;" and that after he had broken off three lower wires he grabbed the top wire, ducked under it, and then said to the appellant, "I will kill you, cabron," advancing upon the appellant; that appellant at that moment pulled his pistol and fired the fatal shot, because he thought deceased was going to kill him.

[1] Appellant urges upon us numerous grounds of error of the lower court for reversal, but relies principally upon the exclusion of a question to the general reputation of the deceased for peace and quietude or violence when angry. The transcript shows the following:

"Q. Did you know his general reputation in the community in which he lived as being a man of violent character or otherwise, when he was angry?

"Mr. Hamilton: Object; that is not the proper question.

"The Court: Objection sustained.

"Mr. Holt: Exception.

"Q. Did you know his general reputation in the community in which he lived for peace and quietude or for violence? A. I knew his reputation; yea.

"Q. Well, what was that reputation—good or bad as to peace and quietude or violence? A. Well, he, when he got angry—

"Mr. Hamilton: Object; and ask that it be taken from the jury.

"The Court: Objection sustained. Gentlemen of the jury, you will disregard the last answer of the witness.

"Mr. Holt: Exception.

"Q. Now, Mr. Casad, answer the question as to his general reputation, whether it was good or bad in those respects that I have mentioned. A. Bad."

Appellant contends that the court erred in refusing to allow the question to be asked as it was first asked, and that, by limiting the proof of the deceased's reputation to the general question, error was committed. The general rule is undoubtedly to the effect that proof of character of the deceased in prosecutions for homicide is not confined to general reputation, that his character under special and exceptional circumstances may be shown, where such circumstances appear to have existed at the time of the affray in which the killing took place. See note to *State v. Feeley*, 3 L. R. A. (N. S.) 351. The jury had before it the fact that the reputation of the deceased for peace and quietude or violence was bad. It also had before it the circumstances of the controversy out of which the killing arose, the angry actions of the deceased, according to the testimony of the appellant and his witnesses. If the general reputation of the deceased for peace and quietude was bad, it is difficult to see how it would be different if he were angry. The appellant apparently seeks to intensify the reputation of the deceased as a man of violence. The admission of the answer to the question as asked, and excluded, would have added nothing to the jury's information, and its exclusion deprived the appellant of no material evidence, nor under the circumstances of this case did it prejudice him. Theoretically, adhering to the strictest technical rules, the question was proper, and the answer thereto should have been admitted. We are aware that this court has held that the doctrine of harmless error, in a criminal case, is dangerous (*State v. Chesher*, 22 N. M. 319, 325, 161 Pac. 1108), but it would be indulging in refinements too subtle for practical application, to hold that the exclusion of such an answer, under the circumstances of this case, is prejudicial and reversible error.

[2] 2. The defense put in evidence the fact that the deceased had neglected the alfalfa, by allowing it to lie on the ground 10 or 12 days after cutting, and to bleach and lose weight, as a reason why the defendant had declared deceased's lease forfeited, and as accounting for defendant's conduct in closing up the entrance to the field and forbidding deceased to enter with his hay-baling outfit. In rebuttal, the prosecution showed over objection, which is now urged as error, that the hay was not damaged by the delay in baling, seeking thereby to draw the inference that defendant's motive in closing the entrance and forbidding deceased to enter was not as claimed by him. In surrebuttal, defendant shows that the hay was greatly

damaged by the delay in baling. This testimony all reflected upon the good faith of the defendant in his conduct immediately preceding the homicide, and we fail to appreciate the objection urged by counsel for the defendant. Of course the real question was not what the actual condition of the hay was, but what defendant reasonably believed it to be on account of deceased's delay. But the circumstances were such that the defendant claimed to know the condition of the hay, which could only be true by examination by him, and the real fact as to such condition reflected directly upon his claim to know such condition.

[3] 3. Defendant's requested instruction No. 1, was properly refused. It was as follows:

"You are instructed that, if you believe from the evidence, that, prior to the shooting alleged in the indictment in this case, the deceased had committed a breach of his contract with the defendant by willfully failing, neglecting, or refusing to bale the alfalfa on the Casad ranch at the proper time, or within the proper time after the same had been cut, then, as a matter of law, defendant had a lawful right to terminate the existing contractual relations between himself and deceased, and to forbid him again to bring his baling outfit on the premises and to deny him the further use of the entrance to said premises, near which the aforesaid shooting occurred; and that defendant had a lawful right to resist any forcible attempt upon the part of the deceased to effect an entrance to defendant's premises through said gate, with such degree of force as was, or to the defendant appeared to be, necessary to repel such attempted forcible entrance upon the part of the deceased."

This instruction brings into the case the question of the right to resist trespass upon real property, and does not give the law upon the subject. The instruction, as presented, would authorize the jury to believe that the defendant was justified in killing deceased, in resisting his entrance upon the land. The law was correctly given in instruction No. 12½ as follows:

"You are instructed that the defendant had a lawful right, upon his own premises, in a peaceable manner, to inform the deceased of defendant's desire to terminate the existing contract between the deceased and the defendant; and, if you believe from the evidence, that, at the time of the shooting, the defendant was upon his own premises, engaged in the peaceable mission of informing the deceased of defendant's desire to terminate such existing contract, and that there was no overt act by the defendant until the instant when the fatal shot was fired by defendant, under the circumstances and in the belief testified to by defendant, then, under such circumstances, the defendant would not in law be regarded as the aggressor; but it is for you to determine, in the light of all the testimony in the case which you believe to be true, as to who was the ag-

gressor at the time of the fatal encounter; and, before you can find that the defendant was the aggressor, you must be convinced of such fact by the evidence which you believe to be true, beyond a reasonable doubt."

The portions of instruction No. 12, objected to by the defendant, were not improper. Counsel admitted the correctness of the same, in so far as they explained the law of self-defense, but insisted they gave the jury a wrong impression without the giving of requested instruction No. 1 in connection therewith. As before seen, requested instruction No. 1 was erroneous, was properly refused, and the defendant is not in a position to assign error for that reason. But the instruction complained of in connection with instruction No. 12½, above set out, was in no sense misleading. The latter instruction fully and specifically advised the jury that, if the facts were as claimed by the defendant, he would not be the aggressor, and would not, by reason of having nailed up the gate and having forbidden deceased to enter, be deprived of the right of self-defense.

[4] 4. The requested instruction No. 3 was fully covered by instruction No. 12, and was properly refused. The court is not bound to give requested instructions which are merely cumulative. A careful reading of all the instructions and those requested convinces us that the case was fully and fairly presented to the jury.

The judgment is therefore affirmed, and it is so ordered.

PARKER and DAVIS, JJ., concur.

(24 Ariz. 108)

ATCHISON, T. & S. F. RY. CO. v. HOPKINS.
(No. 2006.)

(Supreme Court of Arizona. May 28, 1922.)

1. Death ~~§~~95(3)—Damages under federal act measured by loss of expected pecuniary benefits.

Federal Employers' Liability Act April 22, 1908 (U. S. Comp. St. §§ 8657-8665), § 1, was enacted to provide for the making of compensation by way of damages to the members of the classes mentioned for the pecuniary loss caused by the wrongful death of an employee, and such damages are measured by the benefits of which they have been deprived, being such pecuniary assistance or support as they might reasonably have expected to receive had the employee lived.

2. Death ~~§~~18(3)—Recovery may be based on moral obligation to support.

Recovery for death under the federal Employers' Liability Act April 22, 1908, § 1 (U. S. Comp. St. § 8657), for the benefit of defendants, may be founded upon a merely moral obligation resting upon decedent to render pe-

pecuniary aid or support as distinguished from a legal duty so to do.

3. Death §18(3)—“Dependent” within federal Employers’ Liability Act defined.

To authorize recovery for death under federal Employers’ Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665), for the benefit of next of kin “dependent” on the deceased, a showing of partial dependency for support is sufficient, but the circumstances must show some disability or incapacity coupled with lack of property means from which arises a need for support with a recognition of that need by the deceased either by actual contributions or a fixed purpose to render such contributions to the extent that there existed a reasonable expectation of the derivation of pecuniary benefits from the continuance of the life of the deceased.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depend-ent.]

4. Death §77 — Finding of “dependency” within federal Act sustained.

In an action for death under the federal Employers’ Liability Act of April 22, 1908, § 1 (U. S. Comp. St. § 8657), for the benefit of decedent’s minor brothers and sisters, the dependent next of kin, evidence of a necessitous want on their part, contributions actually made for their support, and expressions of purpose to continue such contributions held to justify a finding of dependency within the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depend-ency.]

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Action by J. O. Hopkins, as administratrix of the estate of Roy James Shomber, against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by J. O. Hopkins, as administrator of the estate of Roy James Shomber, deceased, against the appellant railroad company under the provisions of the act of Congress commonly known and referred to as the federal Employers’ Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665), to recover the damages sustained by the dependent next of kin by reason of the death of the decedent. Upon the trial it was stipulated that the decedent came to his death on July 9, 1920, while in the employ of the appellant company, as a brakeman, in the operation of a train of cars engaged in an interstate shipment of freight, and that his death occurred under such circumstances “as will authorize his administrator, the plaintiff in this action, to recover a judgment against the defendant company, if the evidence discloses that said deceased left next of kin dependent upon him as alleged in the complaint. It is understood that defendant does not admit that deceased left

any next of kin dependent upon him, that fact being a matter in issue under the pleadings.”

Upon the issue thus made the parties went to trial to a jury, which returned a verdict in favor of the plaintiff. From the judgment entered on such verdict, this appeal is taken.

The contentions of the appellant are based upon the asserted insufficiency of the evidence to support the judgment, and a somewhat full statement of the testimony is required in order to present the questions for decision.

At the time of his death the decedent was 18 years of age, and unmarried. His father had died in October, 1919, and his mother in March, 1920. For four or five years prior to his death decedent had been out of school, during which time he was working, and was practically self-supporting. The testimony discloses that he was a steady boy, of good habits, a good worker, fully developed, and in good physical condition. About two years prior to his death he had been employed by the appellant as a freight trucker at Walton, Kan., and as car sealer and yard switchman at Ash Fork, Ariz., and later as brakeman between Ash Fork and Phoenix. After his father’s death his mother asked him to come to Walton. In response to this request, and about March 1, 1920, he obtained a leave of absence and went to Walton for the purpose of assisting his mother, and helping her to care for his four minor brothers and sisters, by continuing his father’s business of driving a truck between Newton and Walton, expecting to return to his railroad employment in Ash Fork “if he could not make it go” in Walton. At decedent’s death the Shomber family consisted of the following members, brothers and sisters: Clarence, aged 31, living in Boston with his wife; Ernest D., aged 29, who had married about 8 years before, and was residing at Blythe, Cal.; Ethel Hopkins, wife of the appellee, Hopkins, a telegraph operator, who had been married 5 years, and was living at Ash Fork, Ariz. with her husband and two young children; Ruby, a trained nurse aged 22 years, who had married after her mother’s death; Ada Egbert, who had been married for more than 3 years, and who had been living at home with her mother. Then followed, in the order of age, after the deceased, Roy James Shomber, the four minor brothers and sisters, beneficiaries herein: Lawrence William, aged 15 years, Frank Henry, aged 13 years, Nora Ann, aged 11 years, and Zena, aged 8 years.

Following the funeral of Mrs. Shomber, which was attended by appellee and all the Shomber children, excepting Clarence, the disposition to be made of the four younger children was discussed by the deceased with his brother Ernest and the appellee, in the presence of Lawrence. Arrangements were

made whereby the appellee and his wife took Nora with them to Ash Fork, Ernest took Frank and Zena to Blythe, and Lawrence remained at Walton, where he has since lived with his sister, Mrs. Egbert, who remained in the old family home. During the conversation referred to Roy expressed his intention of returning to Prescott to resume his railroad employment as soon as he could obtain transportation, and to assist the others financially in taking care of the children, and stated to Mrs. Hopkins that "he was satisfied that he could help us to the extent of at least \$25 a month for each of the children, and agreed to contribute what he could, which he thought would be" the amount mentioned. The deceased remained at Walton until May 1st, reached Ash Fork May 3d, and resumed his railroad employment on May 6th, continuing in such work until he was killed on July 9th following. His earnings during this period of 64 days aggregated \$414.33, of which amount \$75.60 was "back pay" adjustment, earned but not drawn during his life. Of \$173.87 earned for the month of May he had been paid \$143.33, and of \$173.52 for the month of June he had received \$141.28, a total of \$284.61.

Before resuming his railroad work the deceased had some further discussion with the appellee and Mrs. Hopkins regarding the four children, concerning which appellee testified:

"He came into my office the night before he left Ash Fork, inquired how Nora was getting along, and said he was going to work, and just as soon as he got straightened out he would start in to send us money and help take care of them."

Mrs. Hopkins testified:

"He said he wanted Nora and the children (mentioning Nora especially, because she was with me) to have a good education, something he hadn't had, and was willing to sacrifice himself so that they might have an education."

During the month of June he paid the appellee \$25 on Nora's account and gave Nora \$2 in cash, some candy, and shoes. During the same month he sent Lawrence \$20 in cash. The testimony further shows that to various witnesses the deceased repeatedly stated that it was his intention to assist his dependent brothers and sisters in a pecuniary way. As we have indicated, the testimony fairly shows that the placing of the children with the various sisters and brothers was in pursuance of the agreement of the parties to provide for the support of the children, to aid in the accomplishment of which the promise of deceased was made.

The objections made raise the questions whether any of the minor children were in fact dependent upon the deceased at the time of his death, within the meaning of the act of Congress, and whether such evidence justifies a finding that any of the beneficiaries

in whose behalf damages were awarded sustained any actual pecuniary loss through the death of the deceased. The amount awarded was by the jury apportioned amongst the minor children as follows: Lawrence William Shomber, aged 15, \$540; Frank Henry Shomber, aged 13, \$900; Nora Ann Shomber, aged 11, \$1,260; Zena Shomber, aged 8, \$1,800; a total of \$4,500.

Paul Burks, of Los Angeles, Cal., Norris & Norris, of Prescott, and Chalmers, Stahl, Fennemore & Longan, of Phoenix, for appellant.

O'Sullivan & Morgan, of Prescott, for appellee.

FLANIGAN, J. (after stating the facts as above). The decision of the case calls for a construction of Act Cong. April 22, 1908, 35 Stat. 65, ch. 149, commonly known as the Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), to determine whether the four minor children may properly be said to be "next of kin dependent upon such employee," within the meaning of the act, of which the part pertinent to this case is section 1 (section 8657), reading as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or Territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, which was an action brought by the administrator for the benefit of the surviving widow of decedent, the court, speaking of the nature of the liability under this act, said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. * * * This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the de-

cedent. It is therefore a liability for the pecuniary damage resulting to them and for that only."

American R. Co. of Porto Rico v. Didrickson, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, was an action brought by the administrator for the benefit of the parents, and the court said:

"But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained."

To the same effect are the decisions in *Gulf, Colo. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, and *Garrett v. Louisville, N. R. Co.*, 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. 242.

From these decisions it appears that—

The damages allowed "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived." *Michigan Cent. R. Co. v. Vreeland*, supra.

See, also, *Dooley v. Seaboard Air Line R. Co.*, 163 N. C. 454, 79 S. E. 970, L. R. A. 1916E, 185; *Pittsburgh, C., C. & St. L. Ry. Co. v. Collard's Adm'r*, 170 Ky. 239, 185 S. W. 1108, L. R. A. 1918E, 273, and *Moffett v. B. & O. R. Co.*, 135 C. C. A. 607, 220 Fed. 39.

[1, 2] The construction of the act in the cases cited leaves no room to doubt that the statute was enacted to provide for the making of compensation by way of damages to the members of the classes mentioned for the pecuniary loss they may suffer by the wrongful death of the employee, and that such damages are measured by the benefits of which they have been deprived, being such pecuniary assistance or support as they might reasonably have expected to receive had the employee lived. And it would simply be an attempt to demonstrate what is obvious to argue the patent proposition that such expectation entertained by certain of the persons in the classes mentioned as surviving parents or collateral heirs, husband, or adult children, may be founded upon a merely moral obligation resting upon the decedent to render such aid, as distinguished from a legal duty so to do. See *Michigan Cent. R. Co. v. Vreeland*, *Dooley v. Seaboard Air Line R. Co.*, supra, and *Seaboard Air Line v. Kenney*, 240 U. S. 489, 36 Sup. Ct. 458, 60 L. Ed. 762.

So, if in this case it appears that at the

time of the decedent's death there existed the required relationship with dependency on the part of the surviving relatives, and a reasonable expectation that the decedent would fulfill the purely moral obligations arising out of such conditions to support his kinsfolk, recovery may be had accordingly.

No question is made as to the existence of the required relationship of the minor children named, but the controversy arises as to the meaning of the term "dependent," it being asserted by appellant that the minor children were not in fact such dependents under the terms of the act of Congress, and strenuously insisted:

"That within the purview of the act such condition of dependency is not established by the showing of a voluntary unexecuted oral promise, prompted by fraternal instincts on the part of the deceased, to make future contributions to the extent of his ability towards the education and support of such children, even though such promise was followed by occasional gifts or contributions."

[3] However varying may be the connotations of the term "dependent" in different relations of contract or status, we think that for the purpose of this case it is sufficient to point out that there is denoted in the legal and customary use of the term the idea of the sustaining or support of one person by another, or the reliance by one upon another either wholly or partially for support. It has been said that, generally speaking, a dependent is one who is sustained by another, or relies for support upon the aid of another. *Murphy v. Nowak*, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (N. S.) 393.

In *Keller v. Industrial Commission*, 291 Ill. 314, 126 N. E. 162, a dependent is defined as follows:

"In law, a 'dependent' is one who is sustained by another or relies for support upon the aid of another; who looks to another for support and relies upon another for reasonable necessities consistent with the dependent's position in life."

It seems to be settled that, under compensatory and beneficiary provisions of law or contract in favor of dependents, generally speaking, it is not contemplated or required thereby that an entire dependency exist, but it will be sufficient if the need is partial, if it is a substantial need. *McCarthy v. New England Order of Protection*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637. For cases under the act in question see *Pittsburgh, C., C. & St. L. Ry. Co. v. Collard's Adm'r*, supra; *Dooley v. Seaboard Air Line R. Co.*, supra; *Moffett v. B. & O. R. Co.*, supra. See, also, *Bruckshaw v. Chicago, R. I. & P. Co.*, 173 Iowa, 207, 155 N. W. 273, and *Richelleu v. Union Pac. R. Co.*, 97 Neb. 360, 149 N. W. 772, in both of which cases recovery was allowed under the Employers' Liability Act upon a showing of par-

tial dependency; in the *Richelieu Case*, in behalf of a sister, and in the *Bruckshaw Case* in behalf of a sister and a niece.

The meaning of the term "dependent" as it is used in the *Employers' Liability Act* was very fully considered in *Southern R. Co. v. Vessell*, 192 Ala. 440, 68 South. 336, Ann. Cas. 1917D, 892, which was an action brought under the *Employers' Liability Act* for the benefit of a sister of the decedent. The court in that case followed the decision in *Bortle v. Northern Pac. R. Co.*, 60 Wash. 554, 111 Pac. 789, Ann. Cas. 1912B, 732, which construed a statute of the state of Washington, and applied the construction made in the *Bortle Case* to the federal act. Although the decision was adverse to the claim made on behalf of the sister, we think the language quoted with approval from *Duval v. Hunt*, 34 Fla. 85, 15 South. 876, quite clearly states the rule to be followed:

"We think that, when the suit is brought by a person who bases his right to recover upon the fact that he is a dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for support. There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support from the deceased."

[3] The circumstances must show some disability or incapacity of the character referred to, from which arises a need for support on the part of the next of kin, with a recognition of that need by the deceased, to the extent that there existed a reasonable expectation of the derivation of pecuniary benefits from the continuance of the life of the decedent. In fine, the question in this case is: Was there a necessitous want on the part of these minor children for support, and was this want recognized by the decedent either by actual financial contributions or by fixed purpose to render such contributions, so that it could be said there was a reasonable expectation that such assistance would have been given had he lived?

[4] In the application of this rule to the case here we may remark that the facts shown distinguish it broadly from the *Bortle* and *Vessell Cases*, and in some respects from all other cases that have been cited to us or that we have found. The decedent, very shortly after recognizing the actual need of his minor brothers and sisters for substantial aid and support, and after promising to assume the responsibility of contributing to such support, came to his death within the short space of 64 days after taking up a lucrative employment. In addition to this, at

the family conference held at the time of the mother's funeral the promise of the deceased was made in effect to those who, like himself, were under an obligation to take care of these children, and, from the moral standpoint, at least, the other brothers and sisters, performing the duties they had assumed under the dictates of fraternal affection, were entitled to rely upon decedent's help in accordance with his undertaking. It is not to be doubted that there existed a condition of necessitous want on the part of such minors. This need was recognized by the decedent and the other members of the family, who took upon themselves the obligation of providing therefor. Decedent did in fact begin to fulfill his promise by making actual contributions in money. That such contributions were not made regularly or punctually at stated times does not seem to us to be of controlling importance. If a longer time had elapsed before his death, during which remittances had been made by him at irregular intervals, or not at all, or, on the other hand, he had fulfilled his promise, it could, of course, be more definitely known in what measure he intended to respond to the obligations of his fraternal relationship. But, as the case had necessarily to be decided on the facts arising during the short time the decedent lived, it appears to us that the circumstances under which the promise was given, the contributions actually made soon afterwards, and decedent's expressions of purpose to continue them might well justify a jury in finding that in all reasonable probability the deceased would continue to respond to the moral obligations he had recognized and assumed.

It is thus seen that we cannot accede to the appellant's contention that a mere unexecuted oral promise, not confirmed or carried out by actual contribution, is without value as showing dependency within the meaning of the act. Bearing in mind that the purpose of the statute, under the authorities cited, is to provide for compensation by the wrongdoer to those who had a reasonable expectation of pecuniary benefit in the continuance of the life of the deceased, and that a condition of dependency may be inferred from a necessitous want on the part of the next of kin, with a recognition of that want on the part of the employee and his purpose to contribute substantially to relieve the need, we cannot hold that the jury was not warranted in finding that a pecuniary loss was actually suffered by the minor heirs, including those to whom no contributions had actually been made.

In appellant's reply brief exception is taken to the statement in the brief of appellee that the minor children upon the death of the mother were left without estate or means of support, wherefrom, with other premises, appellee deduced the conclusion that the evidence was legally sufficient to

justify the finding of dependency. Appellant asserts that no evidence was introduced to the effect that the four minors were without estate. While the assignments of error raise the broad question of the sufficiency of the evidence to establish dependency, no specific point was made nor argument offered in connection therewith that the evidence was insufficient for lack of a showing in the respect mentioned. But, were the matter open for determination under the assignments of error, we should not be inclined to hold that the evidence was insufficient to establish that the minor children were in fact without means of support because they had property of their own. The evidence is consistent only with the conclusion that these children were without means excepting such as might be supplied to them by their elder brothers and sisters, who actually took this duty upon themselves.

In this state of the record we think it would be unfair to the appellee to accord the proposition the weight which might properly have been given to it had the question been made, relied upon, and presented in both courts.

For the reasons we have given, the judgment must be affirmed.

ROSS, C. J., and McALISTER, J., concur.

(23 Wyo. 496)

BARRETT v. WHITMORE et al. (No. 1053.)

(Supreme Court of Wyoming. May 23, 1922.)

1. Appeal and error \S 776—One coparty may dismiss appeal as to himself.

Except under special circumstances making it inequitable for the coparties, one of the parties who desires to dismiss an appeal as to himself may do so.

2. Abatement and revival \S 4—Subsequent action abated on ground of prior action pending.

A subsequent suit in courts of original jurisdiction may generally be abated on the ground of the pendency of a prior action between the same parties on the same cause.

3. Abatement and revival \S 15—Where first suit dismissed before hearing on abatement, plea fails.

After a second action is begun, where the first suit is dismissed, whether before or after the beginning of the second suit and at any time before the hearing of a plea of abatement, the plea fails.

4. Appeal and error \S 1—Proceeding in error new suit.

A proceeding in error is in the nature of a new suit.

5. Abatement and revival \S 14—First suit, if ineffective, no bar to second one.

The first suit in courts of original jurisdiction is no bar to the commencement of a second suit, if the first suit is ineffective.

6. Appeal and error \S 13—Rule as to abatement of second appeal where first pending stated.

Where it does not appear that a second proceeding in error was vexatious, it should not be dismissed even though the first proceeding was still pending when the second was instituted and was not dismissed until after a plea in abatement or motion of dismissal was filed, provided such first proceeding was dismissed before the submission of the plea.

7. Appeal and error \S 13—On dismissal of first appeal, not necessary to return papers to district court for recertification for second appeal.

Where a second appeal was filed while the first appeal was pending, on dismissal of the first, it was not necessary to return the papers filed in the first appeal to the district court for recertification for use in the second appeal.

Error to District Court, Sweetwater County; Volney J. Tidball, Judge.

Action between Mary Barrett and Tom Whitmore, as administrator of the estate of Mary Barrett, deceased, and others. From the judgment Mary Barrett brings error. On motion to consider record in former appeal as record in second appeal and on motion to dismiss. Motion to use papers sustained; motion to dismiss overruled.

Kinkead, Ellery & Henderson, of Cheyenne, Herbert Van Dam, Jr., of Salt Lake City, Utah, and P. W. Spaulding, of Evanston, for plaintiff in error.

T. S. Tallafarro, Jr., and W. A. Muir, both of Rock Springs, and N. R. Greenfield, of Rawlins, for defendants in error.

BLUME, J. On June 8, 1921, there was pending in this court a proceeding in error, No. 1027, fully perfected, entitled Mary Barrett, Patrick C. Barrett, and Joseph E. Barrett, Plaintiffs in Error, v. Tom Whitmore, as Administrator of the Estate of Mary Barrett, Deceased, James Barrett, Union Pacific Coal Company, a corporation, E. E. Peters, and G. C. Gray, Defendants in Error. The only difference in the titles of this case, No. 1053, and of No. 1027, is that in the latter Patrick C. Barrett and Joseph E. Barrett are coplaintiffs in error, whereas in No. 1053 they are, instead, made codefendants in error. On January 8, 1921, there was filed in said cause No. 1027 a motion by James Barrett to dismiss the proceeding, alleging among other reasons that the assignments of error are joint, and that it appears that Patrick C. Barrett and Joseph E. Barrett disclaim any interest in the subject-matter. Thereupon on June 8, 1921, plaintiffs in error

therein filed a motion for permission to amend the petition in error. Tom Whitmore, as administrator, on June 8, 1921, filed a motion therein to strike said motion of plaintiffs in error. Thereupon, on June 8, 1921, without said motions having been acted on, this proceeding in error, No. 1053, was instituted. An order for the original papers and entries was duly issued, directed to the clerk of the district court of Sweetwater county, who subsequently, on August 6th, certified that all of the original papers and files called for had been transmitted by him to this court in connection with case No. 1027, and that he, therefore, could not transmit the same as commanded. The truth of this certificate is not questioned, and it seems the papers asked for are the same as those so theretofore transmitted. Thereupon, on October 6, 1921, there was filed in the present cause a motion by Mary Barrett, plaintiff in error, that said original papers and files theretofore transmitted to this court in connection with cause No. 1027 be considered and used by the court as the original papers in this cause No. 1053. This motion has been duly argued and submitted in connection with the motion to dismiss hereinafter mentioned.

In the meantime, and on August 29, 1921, said Tom Whitmore filed herein his plea in abatement, the substance of which is, so far as material here, that there is another action, namely, No. 1027, pending between the same parties, involving the same issues. Thereupon, on September 27, 1921, there was filed in this court by the plaintiffs in error, through their attorneys, Kinkead, Ellery & Henderson, a motion to dismiss said cause No. 1027, setting forth, among other things, that Mary Barrett at all times was and is the real and only party in interest so far as plaintiffs in error are concerned; that cause No. 1053 was instituted for the purpose, not of delay, but to correct errors in the prior proceedings; that the motions to dismiss and strike the motion to amend, filed in cause No. 1027, were apparently confessed; that the latter cause was not dismissed, when cause No. 1053 was instituted, by inadvertence of counsel, although they then had a formal dismissal, signed by counsel of record in cause No. 1027 in their hands for the purpose of filing it. This motion, so signed by the counsel of record in the latter cause, is attached, and the allegations are supported by the affidavit of one of the attorneys of record in cause No. 1053. Notice of the hearing of this motion was duly given, and, no objections having been filed, cause No. 1027 was dismissed without prejudice by this court on October 3, 1921. Thereafter and on November 19, 1921, James Barrett, one of the defendants in error herein, filed in cause No. 1053 his motion to dismiss the same for the reason that at the time of the commencement thereof another action, involving the same subject-matter, was pending. This motion

has been submitted in conjunction with the motion for the use of the original papers above mentioned, and is now up for disposition.

[1] Some contention is made that no authority is shown from Patrick C. Barrett and Joseph E. Barrett for dismissal of cause No. 1027. Attention is called to the fact that Mary Barrett filed in said cause on August 13, 1921, her authority for the appearance of Kinkead, Ellery & Henderson in said cause and in any subsequent proceeding. We can see no force in the contention. The rule is that except under special circumstances making it inequitable for the coparties, which circumstances do not appear to exist in this case, one of the parties who desires to dismiss an appeal as to himself may do so. 4 C. J. 564; *Field v. Kenneweg*, 218 Ill. 366, 75 N. E. 986; *Thorp v. Thorp*, 40 Ill. 113. Again, Patrick C. Barrett and Joseph E. Barrett do not question the authority of the attorneys to dismiss the cause, and we do not think that any other person has the right to do so. So we shall proceed to determine as to whether or not cause No. 1053 should be dismissed on account of the pendency of cause No. 1027 when the former was instituted.

We are cited to a number of authorities which hold that a second appeal cannot be brought while a valid appeal between the same parties and involving the same subject-matter is pending, and wherein the motion to dismiss the second appeal was sustained. The California cases to that effect are based on *Hill v. Finnigan*, 54 Cal. 311, where the court said that the second appeal was a nullity, "for there was nothing then pending in the district court from which an appeal could be taken." So in *State ex rel. v. King*, 6 S. D. 297, 60 N. W. 75, the court said that under such conditions the second appeal was nugatory. "There was nothing for it to act upon—nothing that he could bring to this court by appeal. *Hill v. Finnigan*, 54 Cal. 311." So the Iowa Supreme Court in *Pilking-ton v. Potwin*, 163 Iowa, 86, 144 N. W. 39, following an earlier case as well as *State ex rel. v. King*, supra, said:

"It is not disputed by appellant that, where a proper notice of appeal has been served and the appeal perfected, the lower court loses jurisdiction and the cause is transferred to this court. It has been held that a subsequent appeal by the same party, while such former appeal is pending, is nugatory."

The reasoning in *Reichenbach v. Lewis*, 5 Wash. 577, 32 Pac. 460, 998, is about the same. The theory, however, upon which such holding appears to be predicated, is more plainly stated in *Daly v. Kohn*, 230 Ill. 436, 83 N. E. 328, where the court said:

"An appeal is a continuation of the same case, and when the case is transferred to an appellate tribunal by appeal there is no case pending in the trial court upon which a writ of er-

ror will operate at the suit of the party prosecuting the appeal until the case gets back into the trial court in some regular way."

On the other hand, the Supreme Court of Nebraska holds that both a proceeding in error as well as an appeal may be instituted, but that an election upon which the party relies must be made before the final submission of the case. *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059; *Jones v. Danforth*, 71 Neb. 130, 98 N. W. 668. In *Loneragan v. Peebles*, 74 Fla. 123, 76 South. 694, a second appeal was instituted while another valid appeal was pending. On the return day for the second appeal, the first was dismissed. It was held that the motion to dismiss the second appeal should be overruled. In *Gould v. United States*, 205 Fed. 883, 126 C. C. A. 1, the Circuit Court of Appeals, speaking through Judge Sanborn, held that, where two writs of error were sued out, both should, under the circumstances, stand, and the case be heard upon both writs. The first writ was not considered ineffective. The court said, in part:

"The United States Circuit Courts of Appeals were established to provide, not to prevent, reviews of challenged rulings of the courts below. While the parties in these cases seem to have treated the first writs as though they were abandoned at the time that the second writs were issued, they were not dismissed by order of court, nor was any motion to dismiss them made by either party and before they expired by limitation the transcript and return to each of them was filed. In this state of the case the records in these cases fail to convince that the first writs have ever become ineffective. And to the end that there may be a full and fair review of all the challenged rulings of the court below let an order be made that the motion to dismiss the second writs is denied."

The reasoning of the California, South Dakota, Iowa, and Illinois cases is apparently based on the theory that, jurisdiction of the cause having been removed to the Supreme Court by the first appeal, there is nothing remaining in the lower court; that, the judgment being removed therefrom, it is, so far as that court is concerned, a nullity—not in existence, and hence there is nothing upon which a second appeal or proceeding in error can be based. That same argument was made in the case of *Jenney v. Walker*, 80 Ohio St. 100, 88 N. E. 123, where the court, disapproving of that reasoning as applied to a case where a proceeding in error and an appeal were both instituted, said, in part:

"The error of such contention or claim is found in the fallacy of the premise upon which it rests, namely, that the appeal cancels and destroys the judgment. The effect of the appeal is not, as assumed by counsel, to vacate and destroy the judgment appealed from, but its only effect is to suspend such judgment, and to stay proceedings to enforce its execution. It does not operate to annul the judgment; or

to otherwise impair its vitality and obligation than by merely suspending its enforcement during the pendency of the appeal."

We held in the recent case of *Finley v. Pew* (Wyo.) 205 Pac. 310, that though one of the parties to a case bring the cause here by direct appeal, the other, complaining of the same judgment, may, nevertheless, bring it here by proceedings in error. It is difficult to conceive that if an appeal so completely removes a judgment, and the proceedings in connection therewith, that a subsequent proceeding in error cannot operate thereon, how our holding in the foregoing case could be sound. The Illinois Supreme Court, in *Daly v. Kohn*, supra, holds that the two theories do not conflict, but that statement is not convincing to reason. A review in an appellate court is sought from a judgment that has been rendered, and a cause that has been decided. The lower court, upon the institution or perfection of the proceedings for review, may lose control over that judgment and the cause, and may have no further jurisdiction, while such proceeding for review is pending in the appellate court, to do anything in connection therewith; but, nevertheless, the judgment remains, and it retains, though jurisdiction over it is removed to the Supreme Court, at least a potential vitality sufficient to permit such proceedings in error.

Some of the cases cited by counsel can further be understood on account of the fact that the courts, deciding them, hold that dismissal is, generally speaking, equivalent to an affirmance of the judgment. That appears to be the rule in California and Georgia. *Boner v. Bank*, 25 Wyo. 260, 168 Pac. 726. In such case no second proceeding could be of any avail. It is held in South Dakota that a dismissal is equivalent to an affirmance, unless the dismissal is made by the court without prejudice, which is in effect an order granting the right for a second appeal. *Carlberg v. Fields*, 38 S. D. 410, 146 N. W. 560. In such case, too, we can readily understand why a court should hold that, in the absence of such order without prejudice, a second proceeding for review, commenced while the first is still pending, may be held to be void. We, however, held in the case of *Boner v. Bank*, supra, that a dismissal is not, of itself, equivalent to an affirmance of the judgment, and that where a case is dismissed in this court, without having passed on the merits, a second proceeding for review may, within the time provided by law, be prosecuted. We adhere to the holding of that case, and that implies that this court is inclined favorably to reviewing a case, other necessary requirements being complied with, where a case has not in this court been disposed of on its merits. Should the technical oversight of not having the case dismissed on June 8, 1921, before commencing the second proceeding in error, be held one of the "other necessary requirements"? We think

we can answer this by considering other well-established principles of law.

[2] A subsequent suit in courts of original jurisdiction may generally be abated on the ground of the pendency of a prior action between the same parties on the same cause. The rule is based on the principle that multiplicity of suits should be avoided and a party should not harass another with unnecessary litigation. 1 C. J. 45. And this principle applies in appellate proceedings as well as in actions in courts of original jurisdiction. Elliott, Appellate Procedure, § 528. The rule at common law was that, where a suit was commenced while a prior suit was pending, the pendency of such prior suit was good ground for a plea in abatement, although the prior suit was subsequently dismissed. This is substantially the rule which is sought to be applied in this case, for the effect of a plea in abatement and the motion to dismiss on the ground of the pendency of another action is, of course, the same. See Elliott, Appellate Procedure, § 528. The common-law rule mentioned was applied in a few of the earlier decisions in this country, but, with the exception of Georgia, seems to have been abandoned. Thus that rule was announced in Wisconsin in the case of *Le Clerc v. Wood*, 2 Pin. (Wis.) 37. But the Supreme Court in that state reversed itself in the case of *Bates v. Chesebro*, 32 Wis. 594, where the court said, in part:

"It seems to us that to enforce the rigid rule contended for by the counsel in a case like this, when judgment of dismissal has been entered by the court and the defendant's costs taxed and received by him, is really to sacrifice the substantial rights of parties to a mere technicality. We are not disposed to sanction such a rule of practice. If we could see that the defendant was prejudiced in any substantial right by the course adopted by the plaintiff, the case would be different. As it is, he has suffered no practical wrong; he has his costs; and we therefore think that the court properly denied the nonsuit for the mere reason that the former action was pending when the present one was commenced."

[3] And it is now the general rule that where the first suit is dismissed, whether before or after the beginning of the second suit, and at any time before the hearing of the plea of abatement, the latter will fail. 1 R. C. L. 11; 1 C. J. 94. Some of the courts have expressed themselves cautiously. Thus it was said in *Wilson v. Milliken*, 103 Ky. 163, 44 S. W. 660, 42 L. R. A. 449, 82 Am. St. Rep. 578:

"The more modern rule seems to be that the objection of a former suit pending is removed by its dismissal or discontinuance, even after plea in abatement in the second suit. * * * We think this is a more just and reasonable rule, and so hold to be the law, but we would not be understood as holding this to be inflexible and to be applied in all cases. The reason of the rule in the beginning that a plea of former

action pending would abate the second action, is just as good to-day as when the rule was adopted, i. e., that vexatious litigation would not be permitted, and if it appears that the second action was brought for the purposes of vexation, rather than to seek legal rights, the plea should be sustained."

The Supreme Court of Connecticut, in the case of *Hatch v. Spofford*, 22 Conn. 485, 494 (58 Am. Dec. 433), speaking of the nature of the rule that a second action should be abated, said, in part, as follows:

"The rule * * * is not a rule of unbending rigor, nor of universal application, nor a principle of absolute law—it is rather a rule of justice and equity. * * * It is obvious then, a second suit is not, of course, to be abated and dismissed as vexatious, but all the attending circumstances are to be first carefully considered, and the true question will be, what is the aim of the plaintiff? Is it fair and just, or is it oppressive? * * *"

[4-6] We see no reason, both from the standpoint of applying principles uniformly whenever that can be done, or from the standpoint of justice, why the principles of law applicable to the pendency of another suit in actions in courts of original jurisdiction should not be applicable to proceedings in error. We need not determine anything as to appellate proceedings by direct appeal. But a proceeding in error is in the nature of a new suit. 3 C. J. 304; *Levering v. Bank*, 87 Ohio St. 117, 100 N. E. 322, 43 L. R. A. (N. S.) 611, Ann. Cas. 1913E, 917. See *Lobell v. Oil Co.*, 19 Wyo. 170, 115 Pac. 69. We have seen that the principle that a litigant should not be harassed by a second or subsequent suits, between the same parties, and involving the same subject-matter, applies here as well as to actions below. Further, it is evidently the common-law rule, above mentioned, first applied to actions in courts of original jurisdiction, that was adopted by courts later in cases of appeal. Again, there is another rule relating to this subject, namely, that the first suit in courts of original jurisdiction is no bar to the commencement of the second suit if the former is ineffective. 1 C. J. 91. This principle, too, is applied in appellate proceedings as shown by some of the cases cited on this hearing. And so we find the principles applicable to second suits in courts below applied to appellate proceedings in various ways. We think we should apply them here, and accordingly feel constrained to hold that, in cases where it does not appear that the second proceeding in error is vexatious, the latter should not be dismissed, even though the first proceeding was still pending when the second was instituted, and was not dismissed until after a plea in abatement or motion of dismissal was filed, provided such first proceeding is dismissed before the submission of the plea in abatement or the equivalent thereof. We find nothing in this case that would cause us

to think that cause No. 1053 was instituted for purposes of vexation, and the motion to dismiss it must be accordingly overruled.

[7] The motion of plaintiff in error to be permitted to use in this case the original papers now in this court in connection with cause No. 1027 must be sustained. That was ruled in *Boner v. Bank*, supra. The plaintiff in error herein asked for certain specified papers, and the clerk of the district court certified that these identical papers were in this court. It would subserve no good purpose to simply send these papers back and have them recertified. The clerk certified, in connection with cause No. 1027, not only the original papers, but the journal entries, required in this case, as well. While counsel probably intended to move that said journal entries as well as the original papers be used in this case, the motion covers only the original papers. Counsel may, if they desire, amend the motion so as to apply to said journal entries, and, if so amended, the same will be sustained as so amended.

There are some other points mentioned in the briefs, but these are not controlling on this hearing.

Motion to dismiss overruled.

Motion to use papers sustained.

POTTER, C. J., and KIMBALL, J., concur.

(47 Nev. 65)

STATE ex rel. FOWLER, Atty. Gen., v.
MOORE et al. (No. 2531).*

(Supreme Court of Nevada. May 31, 1922.)

1. Appeal and error \S 95—Order revoking order for publication of summons and quashing service is an appealable order.

An order of the lower court revoking and annulling an order for publication of summons and quashing service thereof is an appealable order.

2. Attorney General \S 8—Office has all powers belonging to it at common law besides those conferred by statute.

The office of Attorney General has all the powers belonging to it at common law and, in addition, those conferred by statute.

3. Divorce \S 3—Law of marriage and divorce as administered by ecclesiastical courts is a part of common law, except as altered by statute.

The law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as altered by statute.

4. Divorce \S 11—Attorney General is unauthorized to intervene in divorce suit; "interest."

The Attorney General has no power to intervene in a divorce suit or to bring an independent action to set aside a decree of di-

vorce for fraud or collusion, either under the common law, or under the state statutes, including Rev. Laws, \S 4133, giving the Attorney General the right to commence suit or make a defense where he deems it in the "interest of the state"; for the word "interest" must be taken in its common acceptance as relating to the interest of a party in the ordinary sense of the word.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

5. Divorce \S 11—The court represents the state's interest in divorce proceedings.

In divorce cases the court represents the state's interest throughout the proceedings, either in the presence of a statute authorizing some law officer to appear or in the absence of such statute.

Appeal from District Court, Douglas County; Frank P. Langan, Judge.

Suit by the State of Nevada, on the relation of Leonard B. Fowler, duly elected, qualified, and acting Attorney General, against Gladys M. Moore, otherwise known as Gladys M. Fairbanks, and O. E. Moore, otherwise known as Owen E. Moore, to set aside a decree of divorce, and, from an order revoking and annulling any and all service of summons by an order of publication issued, the relator appeals. Order affirmed.

Leonard B. Fowler, Atty. Gen., and Robert Richards and Homer Mooney, Deputy Attys. Gen., for appellant.

Gavin McNab, of San Francisco, Cal., and P. A. McCarran, of Reno (Nat Schmulowitz, of San Francisco, Cal., and Gray Mashburn, of Reno, of counsel), for respondent Gladys M. Moore.

DUCKER, J. This is a suit to set aside a decree of divorce.

The appellant's opening brief contains a concise statement of facts, which, with some slight changes, we will adopt.

The respondent, Gladys M. Moore, as plaintiff, on the 1st day of March, 1920, filed in the district court of the First judicial district of the state of Nevada, in and for Douglas county, a complaint against O. E. Moore, as defendant, for divorce, and thereupon summons were issued, which said summons and complaint on said last-named date were served upon said O. E. Moore in Douglas county by the sheriff thereof. On the 2d day of March, 1920, said O. E. Moore, through his attorneys, caused to be filed to said complaint his answer upon the merits, to which said answer there was annexed his power of attorney to said attorneys executed before the clerk of said court on said 1st day of March, A. D. 1920. Thereafter, on the 2d day of March, 1920, said action was tried and decided by said court, and pursuant thereto findings were filed and decree of

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied June 30, 1922.

divorce was entered in favor of plaintiff and against the defendant.

On the 16th day of April, 1920, Leonard B. Fowler, the duly elected, qualified, and acting Attorney General of the State of Nevada, filed in the First judicial district court of the state of Nevada, in and for the county of Douglas, in behalf of the state, a complaint against Gladys M. Moore, known as Gladys M. Fairbanks, and O. E. Moore, known as Owen E. Moore, defendants, and thereupon summons was issued in said action, which said complaint prayed for judgment and decree in favor of plaintiff and against defendants in said action; that the decision, findings of fact, and conclusions of law, and said decree in said action entitled Gladys M. Moore, Plaintiff, v. O. E. Moore, defendant, as aforesaid, be declared, adjudged, and decreed to be and to have been made, filed, and entered therein without and in derogation of the jurisdiction of said court, and, accordingly, that the same and each of them were at all times and now are null, void, and of no force and effect whatsoever; that the same and each of them be annulled, vacated, set aside, and held for naught; and that plaintiff be granted and awarded such other and further relief as may be agreeable to equity. The complaint is unverified.

Thereafter, on the 28th day of April, 1920, the appellant, by and through its relator, filed in said action his affidavit for an order for the publication of the summons so issued, and thereupon the court signed an order for the publication thereof, and pursuant to said order, on the 3d day of May, 1920, in the county of Los Angeles, state of California, said summons, together with a certified copy of said complaint, was personally served upon Gladys M. Moore, known as Gladys M. Fairbanks, by a deputy sheriff in the county of Los Angeles, state of California.

And thereafter, on the 11th day of June, 1920, said Gladys M. Moore, known as Gladys M. Fairbanks, caused to be served and filed in said district court her motion and notice of motion for an order, judgment, and decree vacating, annulling, and declaring void said order for the publication of summons, and quashing the service of summons upon her, which said motion was heard by the court on the 27th day of November, A. D. 1920, and thereupon argued and thereafter briefed by respective counsel; and theretofore having been submitted, said motion on the 25th day of June, A. D. 1921, was decided by the court in favor of said Gladys M. Moore, respondent herein, and in accordance with said decision the court entered its order as follows:

"It is the order of this court that the order for publication of summons heretofore made in this cause be and the same is hereby revoked and annulled and any and all service of summons made upon the defendants or ei-

ther of them by reason of said order for publication is hereby quashed and set aside."

To which said order the plaintiff duly excepted, and it is from this order that this appeal is prosecuted.

[1] The main question involved is the power or authority of the Attorney General of the State of Nevada to institute and maintain this action. On account of the importance of the question we will deal with it directly, passing by all other contentions made by the respondents, except the objection that the order appealed from is not an appealable order. We deem this objection settled adversely to respondents in the case of Tiedemann v. Tiedemann, 35 Nev. 259, 129 Pac. 313, and hold that the order of the lower court revoking and annulling the order for publication of summons and quashing the service thereof is an appealable order.

[2] The Attorney General contends that, as the chief law officer of the state, he is empowered to intervene in its behalf in a divorce suit, and is likewise empowered, on relation of the state, to maintain the present action to vacate and set aside the decree in the case of Moore v. Moore. He claims that the office of Attorney General was clothed with this power at common law, and that, as it is a constitutional office in this state, it retains all of its common-law powers and duties.

He contends further that his authority in this respect is also derived from the statute.

We are in accord with his contention that the office of Attorney General in this state has all of the powers belonging to it at common law, in addition to those conferred by statute; but we are of the opinion that the Attorney General had no power to intervene in a divorce suit, or to bring an independent action to set aside a decree of divorce on behalf of the government under the common law.

Prior to 1858, and from a very remote period in England, the ecclesiastical tribunals had exclusive jurisdiction over divorce, except that divorces a vinculo matrimonii were occasionally granted by special acts of Parliament during that time.

[3] The common law which we received in this country from England was the common law as it existed when this jurisdiction still belonged to the ecclesiastical courts, and it has been held by this court that the law of marriage and divorce, as administered by the ecclesiastical courts, is a part of the common law of this country, except as it has been altered by statute. *Wuest v. Wuest*, 17 Nev. 217, 30 Pac. 886.

[4] By an act of Parliament passed in 1857, and by its provisions made effective in 1858, known as the Matrimonial Causes Act, the jurisdiction of the ecclesiastical courts over divorce was transferred to a

court established by the same act and called "The Court for Divorce and Matrimonial Causes." 20 and 21 Vict. c. 85.

Subsequently, in 1860, this act was amended so as to permit the Queen's Proctor, under the direction of the Attorney General, and by leave of the court, to intervene in divorce suits for the purpose of preventing collusion. 23 and 24 Vict. c. 144. This amendment is, of course, no part of the common law received in this country, and, even if it were, it would not enable the Attorney General to intervene, for obviously it only invests the Attorney General with discretion to direct another officer to intervene. If the Attorney General was authorized under the common law of England to intervene in divorce suits, it is evident that the act of 1860 divested him of this power and conferred it upon another. But, notwithstanding an extensive research, aided considerably by the able and exhaustive briefs of counsel, we have been unable to find any evidence of authority on the part of the Attorney General to participate on behalf of the government in divorce suits in the ecclesiastical courts having been exercised or claimed in England. If there is any decision recognizing or declaring such right, either in England or in this country, it has escaped our attention, and the attention of the lower court, and counsel as well.

The decisions from the different states of the Union which hold that the office of Attorney General is clothed with all its common-law powers do not generally attempt to specify them. In *People v. Miner*, 2 Lans. (N. Y.) 396, however, the court enumerates a number of the common-law powers of the Attorney General, and it is to be noted that the right claimed does not appear in this enumeration. Nowhere in the excellent works of Mr. Bishop and Mr. Nelson on *Marriage and Divorce*, or in any of the books of the law-writers on this subject which we have examined, has power of this character been stated to belong to the Attorney General, at common law. Some of the states, for example, Washington, Oregon, Indiana, and Kentucky, have adopted legislation authorizing and requiring the district attorneys of the respective states to appear and defend in divorce suits, in so far as it may be necessary to prevent fraud and collusion. This legislation in itself indicates a conviction in these states that without it the state could not intervene in divorce suits by any of its law officers, either under the common law or by statute. In this regard the Attorney General insists that the duties and powers granted district attorneys by such legislation are cumulative only, and independent of the duties and powers of the Attorney General of the several states derived from constitutional, statutory, and common-law sources. If the power exists under the common law, or under some general statute, why has it never

been exercised, either in England or this country? It is urged that there has never been such a flagrant case as this before. This is a broad statement, but it seems to us that a power so potential for the preservation of the general welfare ought to be exercised whenever there is reasonable ground to believe that there is an attempt to dissolve the marriage relation contrary to public policy. While it is within the range of possibility, it is still highly improbable that, during all the years in which an aggrieved spouse could obtain a judicial separation or a dissolution of the marriage bonds under the laws of England or of this country, the authority of the Attorney General over divorce suits has remained dormant for want of a proper occasion to call it into activity.

The power of a law officer of the state to intervene in its behalf in a divorce suit, if it exists at common law, has been of no benefit to the public either in this country or in England, the home of the common law. As no evidence of any rule of the common law, or practice of the ecclesiastical courts connecting the Attorney General of England with authority in divorce suits on behalf of the government can be found, we must hold that such power does not exist, and it remains to be determined whether it has been conferred on the Attorney General of this state by statute. We must also answer this question in the negative. There is no special statute in this state conferring authority on any law officer to intervene in divorce suits, as in the states mentioned.

Section 4133 of the Revised Laws of Nevada is the statute which it is asserted empowers the Attorney General with the authority he claims over divorce suits. There is no other statute which gives any ground for argument in this regard. The section reads:

"Whenever the Governor shall direct, or in the opinion of the Attorney General, to protect and secure the interest of the state, it is necessary that a suit be commenced or defended in any court, it is hereby made the duty of the Attorney General to commence such action, or make such defense; and such actions may be instituted in any district court in the state, or in any justice's court of the proper county."

The basis of the Attorney General's claim of power conferred by this statute rests in the peculiar nature of a divorce suit, presenting as it does a triangular aspect as to parties. The state, or sovereign, is deeply concerned in maintaining the integrity and permanence of the marriage relation, on which depends so much the happiness of the people and the progress of civilization.

"In every enlightened government," said the court in *Noel v. Ewing*, 9 Ind. 37, "it [marriage] is preeminently the basis of civil institutions and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of

pecuniary consideration. It is a great public institution, giving character to our whole civil polity."

Speaking of this interest of the state in Campbell's Case, decided in Maryland in 1829, Chancellor Bland said:

"A contract of marriage is, in many respects, so highly important in its nature as not only to involve the interests and happiness of the immediate parties, and to require the free consent of a man and woman who have a perfect bodily and mental capacity to contract; but it is a contract to which society is a party, and in which it has a deep interest." 2 Bland, 209, 235, 20 Am. Dec. 360, 376.

In the Supreme Court of the United States, the court, speaking through Mr. Justice Field, said:

"Other contracts may be modified, restricted, enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity, the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

The foregoing excerpts of decisions deflect the universal judicial view of the importance of the marriage relation to the state. This court has expressed the same view. Danforth v. Danforth, 40 Nev. 444, 166 Pac. 927; Ex parte Sheldon, 44 Nev. 268, 193 Pac. 967.

While the state, from considerations of public policy, is unquestionably interested in maintaining the marriage status, we do not think an interest in this sense is comprehended within the meaning of the general statute on which the Attorney General relies. In the first place, no authority has been cited, and we feel safe in asserting that none can be found, construing this, or any similar statute, as conferring authority on the Attorney General in divorce cases. In the state of Michigan a statute defining the general duties of the Attorney General of that state reads:

"The Attorney General shall prosecute and defend all actions in the Supreme Court, in which the state shall be interested, or a party; and shall also, when requested by the Governor, or either branch of the Legislature, appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party, or interested." 1 Howell's Mich. Statutes (2d Ed.) § 612.

Yet, notwithstanding this statute, the Supreme Court of Michigan has determined in Baugh v. Baugh, 37 Mich. 59, 26 Am. St. Rep. 495, that none but the parties can intervene in a divorce suit. This was a suit in which the infant children of divorced parties, by their maternal grandmother, filed a

bill to set aside the divorce and to have a second marriage of the father declared null and void. The court said:

"The jurisdiction over divorce is purely statutory, and the legislative authority has not seen fit to allow any but the parties to intervene in such suits. The husband and wife are the only persons recognized as parties. * * * It is for the Legislature to determine to what extent public policy requires the power of intervention to be vested in any but the parties to divorce suits. * * * In the meantime the courts have no right to sanction any such intervention. It is expected of all divorce courts that they will be vigilant in examining the circumstances of all cases before them, and not allow any decree without a full scrutiny. The means furnished for this purpose are adequate for most cases."

It is a most natural conclusion to reach that, if the Legislature had intended to confer upon the Attorney General a power so great as to enable him to intervene in any divorce suit, it would have expressed its purpose in a special statute and would not have included it in such a general term as "interest of the state." Moreover, wherever the power has been specially conferred upon a law officer of any state, it has been expressly or impliedly limited by the statute. Lee v. Lee, 19 Wash. 355, 53 Pac. 349; De Foe v. De Foe, 88 Or. 549, 169 Pac. 128, 172 Pac. 980.

But in the instant case, if the Attorney General's contention should be recognized, his right to intervene or bring an independent action to set aside a decree of divorce is, by this general statute, less restricted than that of an ordinary party in interest. One who is a party in the ordinary sense of the word is not given the right to intervene in an action under any general statute, but by a special statute, limiting the time of such intervention, and outlining the procedure. When the Legislature has been careful to make special provisions for intervention in cases of pecuniary importance, how can it be inferred that it intended to bestow upon the Attorney General, by the general statement, "interest of the state," in section 4133, the right to intervene or attack a divorce decree, at his option, when the consequences might far transcend any pecuniary considerations?

That the district attorneys of the counties of the state have not construed this statute as conferring authority upon the Attorney General to appear for the state in divorce proceedings may be inferred from the fact that they have never deemed it improper to represent a husband or wife in a divorce proceeding. We apprehend that the district attorneys would not have assumed this position in opposition to the state's interest, if they were of the opinion that in such a suit they might at any time be confronted by the chief law officer of the state representing its interests. The spectacle of these different law officers arrayed for and against the state

in a divorce suit would be an anomaly of unusual absurdity; yet not at all improbable under the Attorney General's contention.

As far as we can inform ourselves, the present Attorney General is the first one to construe the statute as conferring authority on that official in divorce suits. If, as he contends, it clothes him with authority, is it not his duty to investigate every divorce suit brought in any of the seventeen jurisdictions in this state, to the end that fraud and collusion be not practiced on the court? Under the present state of the law, could this duty be effectively performed? No provision of law is made for the service of summons in a divorce suit upon the Attorney General. The clerks of the district courts, in whose offices divorce suits are filed, are under no legal obligation to give him notice of the filing of such a suit. Is it not reasonable to assume that, if the Legislature had intended to charge the Attorney General with any duty in divorce suits, it would have provided some method of giving him notice of the filing of such a suit, to enable him to effectively discharge his duty?

The word "interest," as employed in section 4133, must be taken, in its common acceptance, as relating to the interest of a party in the ordinary sense of the word, and, as so construed, cannot be held to include the peculiar interest which the state has in the matter of granting a decree of divorce.

Section 4133 names the general duties of the Attorney General, and is merely a statutory expression of his common-law powers, which, as we have seen, does not embrace the power asserted.

It would result in an unwarranted extension of this opinion to analyze the cases cited and discussed by the Attorney General which he claims support his contention that he can maintain this action in the name of the state. The decisions referred to have no analogy with the present case. In these decisions the Attorney General's right to maintain the particular action was sanctioned either by virtue of his common-law powers, or by statute. In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747, quoted from extensively, in which the authority of the Attorney General of the United States to initiate and control the suit was upheld, a property right of the government was, in effect, alleged to be prejudiced by the fraud of its own officers. It must be readily recognized that the government's interest in a suit of this kind is extremely dissimilar to the interest of the state in a suit for divorce.

[5] But notwithstanding the fact that the Legislature has not empowered the Attorney General or the district attorneys to appear for the state in divorce suits, its interest is not therefore unrepresented. In divorce suits the court represents the state's interest throughout the proceedings, either in the presence of a statute authorizing some law

officer to appear, or in the absence of such a statute. *Yeager v. Yeager*, 43 Ind. App. 313, 87 N. E. 144.

In *Danforth v. Danforth*, supra, this court said:

"As said in *Ribet v. Ribet*, 29 Ala. 348, actions of this nature are of a triangular sort, and such a cause is never concluded as against the court, and it may and usually does satisfy its conscience regardless of the pleadings."

Again, in *Ex parte Sheldon*, 44 Nev. 268, 193 Pac. 967, it was said:

"The court represents this interest of the state in divorce actions, and is in duty bound to scrutinize the testimony and proceedings with more care than in ordinary civil actions, to the end that collusion of the parties may not effect a dissolution of the marriage relation, when the real facts of the case, if known, would forbid it."

It is a doctrine of general acceptance that the court represents the interest of the state in divorce suits. *Baugh v. Baugh*, supra; *Powell v. Powell*, 80 Ala. 595, 1 South. 549; *Rehfuß v. Rehfuß*, 169 Cal. 86, 145 Pac. 1020; *People v. Case*, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; *Yeager v. Yeager*, 43 Ind. App. 313, 87 N. E. 144; 2 *Bishop on Marriage, Divorce and Separation*, §§ 496, 498, 663. In the work cited last above, the eminent law-writer says:

"The judge, sitting in a divorce cause, deems himself under a sacred obligation to look after the interests of all who cannot be present, yet who may be prejudiced by the sentence prayed. And establishing the justice of the plaintiff's complaint, not merely as between the parties of record, but as between them and the community, including persons specially interested yet not before the court, is what is frequently termed satisfying the conscience of the court." Section 496.

Again, in section 663, Mr. Bishop says:

"The public, which we have seen to be a party in all divorce suits, occupies a unique position, sometimes embarrassing to the court. It does not ordinarily appear by counsel, and when without counsel does not plead. As against this party, when only thus represented by what is called the conscience of the court, the plaintiff is entitled to the decree on his case being duly and fully proved. But this party, unlike the others, never loses a right by laches; and so, whenever a defense comes out in the evidence, whether alleged or not, it is fatal to the proceedings. A maxim in these suits, therefore, is that a cause is never concluded as against the judge; and the court may, and to satisfy its conscience sometimes does, of its own motion, go into the investigation of facts not contested by pleadings."

And in section 664, he says:

"The limit to the right of the public to be protected while thus disregarding the just and common practice of the court cannot be precisely defined by rule. The judge, keeping in view the precedents, with his 'conscience' always awake, shall see that while the record

parties are not deprived of the justice of the law, the public good, which suffers from every dishonest divorce, and from every one not as well within the spirit of the statute as its terms, is not sacrificed. A rule more exact than this does not appear to be in the nature of the case possible."

It is evidently the opinion of Mr. Bishop that the duty of the court to represent the state's interest in divorce suits is exclusive, except in those states where the prosecuting officer is charged by statute with a like duty, for in section 498 he states:

"It (a divorce suit) affects in a special way the interests of the entire community, and the separate private interests of a considerable number of third persons not nominally parties. For the protection of those interests, the judge assumes that the public is a party, not in the sense of either asking or opposing the divorce, but as seeking justice for itself and for all interested private persons who are not before the court; and he looks after those interests as far as his other functions of administering judicial justice permit. *In a few of the states, the prosecuting officer appears in the divorce cause for the protection of those interests, but such is not the common course in our tribunals.*" (The italics are ours.)

It is contended by the Attorney General that the allegations of the complaint charging that the divorce suit was entered and the decree obtained in pursuance of a fraudulent and collusive scheme concocted and consummated by the respondents and those acting with them, whereby the jurisdiction of the court was wrongfully invoked, are admitted by the motion to the order for publication and service of summons, and therefore manifest, and appalling injustice will be permitted against the sovereign state, if he be not allowed to maintain this action in its behalf. Be that as it may, we cannot legislate a remedy. Until the Legislature acts and empowers the Attorney General, or other officer, to represent the state's interest in divorce suits, the duty must remain where it has been always exclusively lodged, in the court sitting in the cause. As said in Baugh v. Baugh, supra:

"In the best circumstances justice will sometimes miscarry, but this is not peculiar to divorce cases, and it will not do to resort to unauthorized measures to redress legal misfortunes or wrongs. It would not be desirable, in order to get rid of some unjust judgments, to destroy the force of judgments generally, and allow them to be attacked by third parties where the legal rules which have been established to determine their effect have not permitted it."

As the Attorney General had no authority to institute this action, it follows that the order appealed from should be affirmed.

It is so ordered.

SANDERS, C. J., and COLEMAN, J., concur.

(46 Nev. 25)

STATE ex rel. PHILLIPS v. SECOND JUDICIAL DIST. COURT IN AND FOR WASHOE COUNTY et al. (No. 2541.)

(Supreme Court of Nevada. June 5, 1922.)

1. Mandamus \Rightarrow 10—Issues only if relator has legal right to have court do what it refuses to do.

Before the Supreme Court will issue a writ of mandamus to an inferior tribunal, relator must, under Rev. Laws, § 5695, establish facts sufficient to show that he has a legal right to have something done which the inferior tribunal has refused to do.

2. Mandamus \Rightarrow 42—Decision on motion for leave to sue as pauper cannot be reviewed by mandamus.

The judge of the lower court before whom an action was pending had jurisdiction to hear a motion for leave to sue as a poor person, and his decision that upon the showing made plaintiff had failed to bring himself within the rule of the common law was a judicial act which cannot be reviewed by writ of mandamus.

Original petition for mandamus by the State, on the relation of Melvin F. Phillips, against the Second Judicial District Court of the State of Nevada in and for the County of Washoe and another. Petition denied, and proceeding dismissed.

J. W. Dignan, of Reno, for relator.

George B. Thatcher, of Reno, for respondents.

SANDERS, C. J. Melvin F. Phillips, a citizen of this state, sued Thomas Ginocchio and D. F. Capps, police officers of the city of Reno, to recover the sum of \$10,000 as damages for his alleged unlawful arrest and imprisonment. Upon request of plaintiff the court set the case for trial before a jury on the 17th day of January, 1922. Thereafter, on, to wit, the 12th day of that month, the plaintiff made a motion for leave to further prosecute his action in forma pauperis. His motion was based on his affidavit, stating, in addition to his declaration of poverty, that he had a good and meritorious cause of action, and had been so advised by his attorney, and that no person, other than himself, had any interest in the prosecution of his action. The motion came on to be heard upon the pleadings and oral testimony of plaintiff and his attorney in support of his affidavit. The court denied the motion, whereupon plaintiff moved for an order to vacate the setting of the case for trial before a jury, and asked that the court refrain and desist from taking any further proceeding in the case until such time as plaintiff could sue out of the Supreme Court of the state of Nevada a writ of mandamus commanding the presiding judge to permit him to further prosecute his action as a pauper. This motion

was also denied, whereupon plaintiff made application to this court for a writ of mandamus. Upon consideration of his petition for the writ, this court made an order, commanding Hon. George A. Bartlett, as judge of the district court of Washoe county, to refrain and desist from any further proceeding in the action of Melvin F. Phillips against Thomas Ginocchio and D. F. Capps, and to permit plaintiff to further prosecute his action without the payment of legal fees, or show cause before this court on the day fixed by its order why he should not do so.

[1] The question is whether a writ of mandamus may be predicated upon such a return. The rule established by a number of decisions of this court relative to cases in which the writ of mandamus may issue is that before the relator can obtain the writ he must establish sufficient facts to show that he has a legal right to have something done by the inferior tribunal which it has refused to do. Section 5695, Rev. Laws; State v. Wright, 10 Nev 174

[2] The return does not show that the judge refused or denied to the petitioner the right to further prosecute his action as a poor person, but that in the judgment of the court, upon the showing made, plaintiff had failed to bring himself within the rule of the common law, if the same, as contended for by petitioner, prevails in this jurisdiction. As the judge had the power to hear the motion, his determination upon the hearing thereof was necessarily a judicial act. It is difficult to perceive how mandamus will lie to review his action. To grant the writ would be in effect to review a judicial decision, which is not the function of mandamus.

It is argued that the ruling complained of was such a flagrant abuse of discretion as that it amounts to the petitioner being precluded from the enjoyment of his legal right to further prosecute his action as a poor person. Adopting the language of this court as used in State v. District Court, 40 Nev. 163, 161 Pac. 510, the respondent assumed jurisdiction, entertained the motion, heard the evidence in support of petitioner's contention, and rendered a determinative judgment based upon the showing made, and either a correct or incorrect interpretation of the law applicable to the specific question in furtherance of which the showing was made. In that case McCarran, J., asked:

"What more could the lower court do if the writ were to issue now? Would it reverse its judgment entered upon the showing made? Would it take a different view of the law arising upon the case? Is it the function of the writ of mandate to review errors of discretion or judgment and reverse decisions based thereon?"

Speaking for the court, the learned judge said:

"An answer to such query is found in the established principles of law applicable to the function of this extraordinary writ, which may be stated thus: The acts or duties, the performance or nonperformance of which rests in whole or in part on the discretion or judgment of the inferior tribunal, board, or officer, will not be required by the writ of mandamus."

The question underlying this proceeding is whether, in the absence of statute, the petitioner has the right to proceed with the prosecution of his action in the district court without the payment in advance of the legal fees. We merely state the question in order that it may not be thought by our conclusion that we decide it.

Our conclusion is that return to the order to show cause does not show facts upon which a peremptory writ will lie. The petition for the writ is therefore denied, and the proceeding dismissed.

DUCKER and COLEMAN, JJ., concur.

(71 Colo. 416)

WHITESCARVER v. INTERSTATE TRUST CO. et al. (No. 10298.)

(Supreme Court of Colorado. May 1, 1922.
Rehearing Denied June 5, 1922.)

1. Fraudulent conveyances §269(1) — Husband's representations that he was owner of property fraudulently conveyed to wife held competent against latter regardless of estoppel.

In a suit to cancel a deed to grantor's wife on the ground of conspiracy to defraud creditors, evidence of grantor's representations, to obtain credit, that he was the owner of the property, was relevant and competent against defendant wife, though estoppel was not pleaded.

2. Appeal and error §1009(3)—Decree based on conflicting evidence not disturbed.

A decree based on conflicting evidence will not be disturbed.

Department 2.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Suit by the Interstate Trust Company and another against Rosa B. Whitescarver. Decree for plaintiffs, and defendant brings error, and moves for supersedeas. Supersedeas denied, and judgment affirmed.

John T. Bottom, of Denver, for plaintiff in error.

Dines, Dines & Holme, Robert E. More, Paul P. Prosser, and Symes & Wingren, all of Denver, for defendants in error.

DENISON, J. The Interstate Trust Company and others were plaintiffs below, and had a decree canceling a certain deed from

Charles A. Whitescarver to his wife, Rosa B. Whitescarver, as fraudulent. She brings error, and moves for supersedeas. The matters relied in for reversal amount to two: (1) That evidence of estoppel was received although estoppel was not pleaded; and (2) that the evidence does not support the decree.

[1] 1. Upon the first point: The evidence was of representations made by the husband, for the purpose of obtaining credit, that he was the owner of the property conveyed. This was competent and relevant to the allegation of the complaint that he and his wife, plaintiff in error, had conspired to defraud of which there was some evidence; his statements in pursuance of the conspiracy were competent against her, therefore, regardless of the question of estoppel.

[2] 2. As to the second point: The evidence was conflicting.

Supersedeas denied, and judgment affirmed.

TELLER, Acting C. J., and WHITFORD, J., concur.

(71 Colo. 410)

SIGEL-CAMPION LIVE STOCK COMMISSION CO. v ARDOHAIN et al.
(No. 10094.)

(Supreme Court of Colorado. May 1, 1922.
Rehearing Denied June 5, 1922.)

1. Principal and agent §99—"Implied agency" defined.

An "implied agency" is created by the act of the parties and is deduced from proof of other facts, and may exist without knowledge of its existence by one dealing with the agent.

2. Principal and agent §137(1)—"Agency by estoppel" defined.

An "agency by estoppel" is created by operation of law and is established by proof of such acts of the principal as reasonably lead to the conclusion of its existence, but an agency by estoppel requires knowledge by the person relying on it of the facts on which it is based.

3. Principal and agent §189(4)—Agency by estoppel must be specially pleaded.

Where the seller relied upon the apparent authority of an agent because of a long course of dealing between the agent and his principal, such an agency is an agency by estoppel, and must be specially pleaded.

4. Principal and agent §148(2)—Seller held to have been put on inquiry as to extent of agent's authority.

Where agent for defendant was in correspondence with defendant by letter and telegram and the agent told plaintiff that he was wiring prices to defendant, plaintiff was put upon inquiry as to the extent of the agent's authority, and should have investigated before making the contract.

Department 3.

Error to District Court, City and County of Denver; C. C. Butler, Judge.

Action by John Ardohain against the Sigel-Campion Live Stock Commission Company and W. E. Emerson. From judgment for plaintiff, defendant Sigel-Campion Live Stock Commission Company brings error. Reversed and remanded, with directions.

L. F. Twitchell, of Denver, for plaintiff in error.

William W. Garwood, Omar E. Garwood, and George Oliver Marra, all of Denver, for defendants in error.

BURKE, J. Defendant in error Ardohain brought suit against plaintiff in error (hereinafter referred to as "the company") and defendant in error Emerson for \$7,764 and interest as the purchase price of certain sheep alleged to have been sold by Ardohain and shipped from California, and which, upon arrival in Denver, it was said the company wrongfully refused to receive or pay for. By replication Ardohain admitted that these sheep were later sold in Omaha for \$5,126.35, hence reduced his demand to \$2,637.65 and interest, a total of \$2,987.65, for which amount an instructed verdict was returned. To review the judgment thereupon entered, the company prosecutes this writ. Just how the company gets rid of Emerson as a codefendant and shifts him to the other side of the cause in this court is not clear, neither is it material. A default having been entered against him below, he appeared at the trial as the principal witness for Ardohain, who gave no evidence in person or by deposition.

That Ardohain intended to charge both the company and Emerson with participation in the purchase is certain, but in what capacity is doubtful. The language of the complaint is:

"During all of the times hereinafter mentioned and for many years prior thereto, the defendants have been jointly engaged in the business of buying and selling cattle and sheep for and on account of the defendant the Sigel-Campion Live Stock Commission Company; the details of said joint agreement are unknown to plaintiff, but plaintiff alleges that the defendant Emerson is and during the past 12 years was purchasing agent, 'scalper' and buyer for the defendant the Sigel-Campion Live Stock Commission Company.

"That on, to wit, the 17th day of June, 1919, at or near the city of Fresno, Cal., plaintiff sold and delivered to the defendants, at their special instance and request, 866 head of yearling wethers at and for the agreed price of \$9 per head, or the total sum of \$7,764, which sum was due and payable on delivery. Thereupon the plaintiff delivered to the defendants said 866 head of sheep, and the same were shipped to defendant the Sigel-Campion Live Stock Commission Company at Denver, Colo."

The company admitted its refusal to receive and pay for the sheep, alleged that Emerson's purchase was not only without its knowledge and consent, which fact it avers was known to Ardohain, but that such purchase was likewise contrary to its direction, and that the consignment by Emerson and the drawing of a draft on the company in payment for the sheep were also without authority.

[1] To minutely review the evidence in this transaction would serve no good purpose. It establishes beyond question that Emerson's purchase of the Ardohain sheep was without authority of the company and contrary to its direction. The judgment, if upheld, must therefore rest upon an implied agency arising from a course of dealing, and this is the theory of counsel for Ardohain. The learned trial judge thus correctly stated the issue:

"The only question now is as to whether or not there is an authority derived from a course of dealing."

He thereupon holds that such authority existed. His error arises from a failure to distinguish between "implied agency" in its true sense and "agency by estoppel." The confusion is common in the authorities and seems due to the fact that in many cases the distinction is immaterial.

An "implied agency" is real but not apparent. It is created by act of the parties and is deduced from proof of other facts. The principal, having voluntarily assumed its obligations, cannot complain that he is bound thereby. Hence it is immaterial that one who seeks its protection did not know of its existence at the time of the transaction. Irrespective of a prior course of dealing which might otherwise tend, in the instant case, to establish such an agency, the undisputed evidence before us shows that Emerson's sole authority was to investigate and report. He could then buy only upon specific approval by the company of the particular purchase proposed. This, then, is not a case of implied agency.

[2] An "agency by estoppel" is apparent but not real. It is created by operation of law and established by proof of such acts of the principal as reasonably lead to the conclusion of its existence. Created for the protection of him who in good faith has relied upon it, the acts of the principal which

support it must, at the time of the transaction, have been known to him. 2 C. J. 444, § 42.

One dealing with an agent may show actual authority, though this was not known to him when he dealt, or he may show apparent authority and that he has relied upon appearances, and support this under the doctrine of estoppel. *Columbia Mill Co. v. National Bank*, 52 Minn. 224, 228, 229, 53 N. W. 1061.

A principal may bind himself by causing others to believe the agent's authority to be greater than actually exists, but such acts of the principal must be known to and proved by the party relying thereon. He cannot claim reliance upon what he did not know. *Merchants' Bank v. Nichols & Shephard Co.*, 223 Ill. 41, 50, 79 N. E. 38, 7 L. R. A. (N. S.) 752.

[3] In this respect the evidence does not support the judgment. Assuming, but not deciding, that the course of dealing relied upon was established, no knowledge thereof was brought home to Ardohain, and there is a total absence in the record of any evidence to show that he dealt with Emerson as the agent of the company. Moreover, such an agency rests upon estoppel which must be pleaded and there is no such plea.

[4] Again, we are confronted by a still more serious defect in the case made by plaintiff below. The evidence shows that Emerson and the company were in correspondence by letter and telegram. Emerson's letters show that he told Ardohain he was wiring the company certain prices on these sheep. The fact is undisputed. It thus appears Ardohain had full notice that Emerson could not purchase for the company without express acceptance as to price. The evidence shows no such acceptance. These facts being known to Ardohain, no reliance by him upon an agency implied from a course of dealing could be upheld. The least that can be said on this phase of the case is that Ardohain was thus put upon inquiry as to Emerson's real authority and was bound to ascertain the extent of his agency.

The judgment is reversed, and the cause remanded, with directions to enter judgment for the company.

TELLER, Acting C. J., and BAILEY, J., concur.

(71 Colo. 394)

GLENN v. MITCHELL et al. (No. 10027.)(Supreme Court of Colorado. May 1, 1922.
Rehearing Denied June 5, 1922.)

1. Wills \S 260—Under statute giving county courts jurisdiction in probate matters, such court has jurisdiction of will contest after one year from probate.

Under Const. art. 6, \S 23, giving county courts jurisdiction of probate matters, Rev. St. 1908, \S 7096, providing that in actions wherein the succession and contents of a will are brought into question the record of the probate of the will shall be conclusive proof of the execution and of the legality and validity of the contents in so far as it was determined at the probate, and giving any interested person not summoned by actual service of process, and not appearing at the probate, a right to contest its validity within a year after it is admitted to probate, is regulatory, and does not prevent the court's hearing a contest after the one-year period.

2. Judgment \S 340—County courts held courts of record.

County courts are courts of record, and have powers incident to such courts, including the right to vacate judgments obtained by fraud.

3. Wills \S 221—County court may revoke probate of will.

A county court, acting as a court of probate, may revoke the probate of a will on proper grounds.

4. Wills \S 221—Will may be contested for fraud in county court after being admitted to probate; "determined."

Under Rev. St. 1908, \S 7096, providing that in actions wherein the execution of a will may be brought in question the record of the probate of the will shall be conclusive proof of the execution and of the legality and validity of the contents thereof in so far as the same were determined at the probate, and section 7097, providing that, if on probate of a later will or on rehearing in the county court it shall be judicially determined that any writing admitted to probate is not the last will of decedent, the probate of the will shall be revoked, a will may be contested on the ground of fraud after being admitted to probate, since upon probate its execution is not called into question, and the legality and validity of its contents in regard to fraud were not determined at the probate; "determined" meaning adjudicated on an issue presented.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Determine.]

Burke, J., dissenting.

En Banc.

Error to County Court, City and County of Denver; Ira C. Rothgerber, Judge.

Action by Hannah E. Glenn against John C. Mitchell and others. From judgment for defendants, plaintiff brings error. Reversed and remanded.

N. Walter Dixon and Thomas J. Dixon, both of Denver, for plaintiff in error.

Lewis & Grant, Dines, Dines & Holme, and Walter M. Appel, all of Denver, for defendants in error.

TELLER, J. Plaintiff in error on November 14, 1918, filed her petition in the county court to vacate an order entered November 22, 1915, admitting to probate the will of Dennis Sullivan, deceased.

It is alleged in the petition that the testator had executed a will in 1913 whereby the petitioner and her sister were made residuary legatees of the estate of said Sullivan; that thereafter the said John C. Mitchell and others associated with him, by fraud and misrepresentation, induced the said Sullivan to make a new will whereby the said John C. Mitchell, as residuary legatee, received the bulk of the estate of the said testator, while the petitioner and her sister received but a small legacy each.

A demurrer to the petition was sustained, the petitioner elected to stand upon her petition, and judgment was entered in favor of the defendants.

Counsel agree that the demurrer was sustained under the provisions of section 7096, R. S. 1908, but differ as to the real ground of the court's ruling.

[1] For plaintiff in error it is contended that the court held the suit barred by the statute, because not begun within one year from the order of probate, while counsel for defendants in error insist that the only question raised under the statute and determined by the court was that of jurisdiction. Said statute reads as follows:

"In all actions wherein the execution or contents of any last will may be brought in question, the record of the probate of such will, or an exemplified copy of such record, shall be conclusive proof of the execution and also of the legality and validity of the contents thereof, in so far as the same were determined at the probate, both as against the persons summoned and appearing at the probate thereof and as against all other persons: Provided, that any heir at law, legatee, devisee, or other person interested to prove or contest the said will, who was not summoned by actual service of process, and who did not appear at the probate of such will, may at any time within one year after the admitting of such will to probate, appear in the county court of the county wherein such will was presented for probate, and contest the validity of such will, or propound the same for probate as in an original proceeding for probate; but if no such person shall appear within the time aforesaid, the probate, or refusal thereof, shall be forever binding and conclusive on all the parties concerned saving to infants, or persons non compos mentis, the like period after the removal of their respective disabilities."

Counsel for defendant in error assert that this statute is so like the Illinois statute on

the same subject that a construction of the latter statute by the Supreme Court of Illinois determines this case. They cite *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166, a case in which a will was attacked on the ground that the testator was induced by fraud to make it. We do not agree with counsel either that the laws are similar, or that the Illinois case is authority on the question now before us.

The Illinois statute provided that, if within three years of the probate of a will in the county court, a contest thereof was begun in the county court by a bill in chancery, an issue of law should be made up and tried by a jury in the circuit court.

In the case cited the court held that, inasmuch as the general jurisdiction of courts of equity does not, independent of statute, extend to the probate of wills, or the setting aside of wills, the statute in question gave to the circuit court jurisdiction only for the period limited by its terms; that of contest begun after the lapse of the three years after probate the circuit court had no jurisdiction. The situation here is very different. The county court is given jurisdiction of probate matters by section 23 of article 6 of the Constitution, and the statute now under consideration involves no question of jurisdiction. It is merely regulatory, determining the period in which an order of probate may be attacked, under circumstances named, and the conclusiveness of such probate, if not so questioned.

[2] Our county courts are courts of record, and "of superior or general authority." *Hughes v. McCoy*, 11 Colo. 591, 19 Pac. 874. They have the powers incident to such courts, including the right to vacate judgments obtained by fraud.

In *Lusk v. Kershaw*, 17 Colo. 481, 30 Pac. 62, speaking of the county court, it is said:

"It is a court of general jurisdiction, and this jurisdiction is unlimited in the determination of matters growing out of the settlements of estates."

In *Clemes, Adm'r, v. Fox*, 25 Colo. 39, 53 Pac. 225, this court said:

"Whatever may be the law in England, or in other states of the Union, we are clearly of the opinion that, under our Constitution and statutes, the county court, in all matters pertaining to probate business, has as ample powers and as full jurisdiction with respect thereto as have the district courts of this state over matters within their jurisdiction. Constitution, art. 6, § 23; *Mills' Annotated Stat. § 1054*; *Schlink v. Maxton*, 153 Ill. 447."

This power is recognized in other jurisdictions as belonging to county courts generally and as courts of probate.

In the Matter of the Estate of Fisher, Deceased, 15 Wis. 511, it is expressly held that—

"The county court, sitting as a court of probate, may at any time, in furtherance of justice, revoke an order which has been irregularly made or procured by fraud."

In *Marston v. Wilcox*, 1 Scam. (Ill.) 60, the Supreme Court of Illinois held that the circuit court erred in reversing a court of probate which had revoked letters of administration obtained by fraudulent representations. The court said that, if letters be obtained by a fraudulent representation, to inquire whether any fraud has been practiced is a necessary incident to the court's right to hear and determine questions arising upon administration.

In *Wright v. Simpson*, 200 Ill. 56, 65 N. E. 628, it is held that an order of probate of a will, made in fraud of a party interested, may be set aside after the term. The court said:

"Upon proof of fraud or collusion in the procurement of a judgment such judgment may be vacated at any time."

In *Adams v. Adams*, 21 Vt. 162, it is said that a probate court has the power, and it is its duty, upon proof of fraud, accident, or mistake in the entry of an order, to set such order aside.

In *Worthington v. Gittings*, 56 Md. 542, the court, while affirming an order of the orphans' court denying an application to vacate the probate of a will, said:

"From what we have said, however, it must not be inferred that parties interested may not impeach the probate for fraud and collusion in obtaining it, and, upon making it clearly to appear that it was so obtained, to have it revoked. The law so abhors fraud that it is tolerated in no form or character of judicial proceeding. 'Fraud is an extrinsic, collateral act,' says Lord Chief Justice De Grey, in delivering the opinion in the *Duchess of Kingston Case*, 2 Sm. L. Cas. (4th Am. Ed.) 508, 'which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.' * * * And that revocation of the probate of a will may be obtained, upon showing fraud or collusion in procuring the probate, though it be taken in solemn form, is abundantly established by authority. 1 Wms. on Ex'rs (3d Am. Ed.) 473. But, in order to procure such revocation, it must be by direct application for that purpose, and the fraud or collusion, with all the particulars, must be distinctly charged."

[3, 4] It must, then, be regarded as settled that the county court, as a court of probate, may, on proper grounds, revoke the probate of a will. Except, therefore, for the statute in question, there would be no doubt of the petitioner's right to have her cause determined on the facts alleged. Does this section, as a statute of limitation, bar this suit?

"It is a familiar principle that a statute of limitations should not be applied to cases not clearly within its provisions." 25 Cyc. 990.

Applying it according to the plain import of its terms, it cannot be said to bar this suit. It applies "in all actions wherein the execution or contents of any last will may be brought in question." No question is here made that the will was not executed as required by the law, nor is it claimed that its contents render it invalid. The purpose of the statute is further indicated by the fact that by it an order of probate is made conclusive proof, not of all questions which may arise concerning the will, but only of its "execution," and "the legality and validity" of its contents, and that only "so far as the same were determined at the probate." Observe that it is not the validity of the will in all respects which is thus established. The closing words, which make the probate binding upon all persons, must be read in connection with this parenthetical clause, and be limited in scope by it. Unless it does thus limit the matters which may be conclusively established, it has no meaning at all, and the rules of construction require us to give it a meaning. The contents of a will include the terms used in it, and it cannot be said that the legality and validity of the contents are determined when there was no question raised as to them. By the express language of the section, they are established only when they have been determined, and determined in a judicial proceeding means adjudicated on an issue presented. Manifestly the object of the lawmakers in enacting this statute was to prevent repeated litigation of the same issues. It indicates no purpose to abrogate established rules under which rights are protected. This view is sustained by section 7097, R. S. 1908, which provides that—

"If, upon the probate of a later will, or upon rehearing in the county court, or upon appeal or otherwise, it shall be judicially determined that any writing theretofore admitted to probate is not the last will of decedent, the probate of such writing shall forthwith be revoked. * * *

We find nowhere in the statutes any statement as to what shall be sufficient grounds for a rehearing, nor any specification of the time within which a rehearing may be granted. Those questions must therefore be determined upon grounds recognized by the rules of law. This section may be regarded as a legislative construction of the section preceding it.

The one-year period of limitation does not apply to those who were summoned and appeared. There is, therefore, no provision for a contest by such parties after probate, and, upon the theory of counsel for defendants in error, the probate becomes conclusive, though obtained by fraud. In the absence of language clearly expressing such a purpose, we cannot so construe the law. To deny the right to make a direct attack upon a judg-

ment obtained by fraud would be shocking to every thinking person.

The complaint sets out in considerable detail the various acts of defendant Mitchell, which, it is charged, were intended to and did mislead the testator and induce him to make this will. We are of the opinion that the complaint states a cause of action.

For the reasons above stated, the judgment is reversed, and the cause remanded for further proceedings in harmony with the view herein expressed.

BURKE, J., dissenting.

SCOTT, C. J., and DENISON, J., not participating.

(86 Okl. 177)

OKLAHOMA, K. & M. RY. CO. v. HURST.
(No. 10729.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

Appeal and error §1001(1)—Where there is sufficient competent evidence to support the verdict, it is conclusive.

Where the trial court submitted to the jury under the proper instructions the theory of the case presented by the plaintiff and defendant, and there is sufficient competent evidence to reasonably support the verdict, the finding of the jury is conclusive upon appeal.

Appeal from County Court, Ottawa County; C. S. Wortman, Judge.

Action by J. B. Hurst against the Oklahoma, Kansas & Missouri Railway Company. Verdict and judgment for plaintiff, and the defendant appeals. Affirmed.

Ray McNaughton, of Miami, for plaintiff in error.

F. W. Church, of Miami, for defendant in error.

MCNEILL, J. This action was commenced in the county court of Ottawa county by J. B. Hurst against the Oklahoma, Kansas & Missouri Railway, a corporation, to recover for services rendered in making certain collections for the company of the reasonable value of \$474.53 and for certain expenses incurred while plaintiff was in the employ of the company as its agent according to an itemized account attached to said petition. The defendant filed an answer in the nature of a general denial. The facts of the case are practically as follows:

The plaintiff had been employed as depot agent for the defendant company at Commerce, Okla., and was checked out. He contends that the company was indebted to him for a few small items of expense while employed as agent amounting to approximately \$10; that after the termination of his em-

ployment as agent of the company he was employed by the company to make collections of freight bills owing to the company in and around the vicinity of Commerce, where he had been employed as agent. The company authorized the agent to deliver freight to various consignors at that point, without paying the charges therefor, and would thereafter present bills and collect for the same. The plaintiff testified there was nothing said regarding the amount of compensation that he should receive; that he collected over \$5,000, and said services were of the reasonable value of 10 per cent. of the amount collected. The plaintiff produced some evidence that the usual charges for collecting accounts was about 10 per cent. of the amount collected. The evidence upon the part of the defendant admitted the services were rendered, but contends it was agreed plaintiff was to be paid for said services, the same as the salary he had been receiving prior thereto, which was \$75 per month. He worked about four days in making the collections. The defendant introduced evidence that services of this kind were generally paid for at a regularly monthly salary. The court submitted the case to the jury, and advised the jury that, where one party rendered services for another at his request, and no special price is agreed upon, the law implies that the parties for whom the work is done will pay the reasonable value for the services rendered.

The court in instruction No. 3 advised the jury, if the defendant employed the plaintiff after his employment as agent terminated, and the plaintiff accepted said employment, to collect the unpaid freight bills, and they find the compensation agreed upon was the regularly monthly salary which was previously paid the plaintiff, then the verdict should be for the defendant. The case was submitted to the jury, and a verdict in favor of plaintiff of \$358.40. From said judgment the defendant has appealed.

For reversal it is first contended the court erred in refusing to strike the evidence given by Mr. H. J. Butler on behalf of the plaintiff. Mr. Butler was asked if he was familiar with the compensation that collectors received for collecting accounts from various parties taking into consideration the accounts being good, bad, or indifferent in that section of the country. This question was objected to, and the objection overruled, and the witness answered he was. He then testified that a fair compensation would be from 10 to 25 per cent. On cross-examination he was asked if he had any experience in making railroad collections, and he stated that he had none. He further testified that he did not know what was the usual and customary compensation of an agent who had been checked out, and who was thereafter retained to collect accounts. We think there was no error in refusing to strike out this

evidence. This evidence was competent to support the contention of the plaintiff as to the reasonable value of services for collections. Whether there is any difference in collecting accounts from various persons due the railroad company for freight or accounts they might owe to any other individual, firm, or corporation we are unable to state. This was a question of fact, however, for the jury. The evidence was conflicting regarding the terms of the employment and was for the jury under the evidence to find the terms of the contract, and, if the compensation was not agreed upon, what would be fair and reasonable under the circumstances.

The next question presented in the brief is: The court erred in sustaining objections to certain questions propounded to the plaintiff on cross-examination. We think there was no error in sustaining the objection to this question. If so, it was harmless. The questions propounded appear to have been testified to by plaintiff and other witnesses and are matters over which there is no dispute.

It is next contended the verdict of the jury was excessive. There is sufficient competent evidence in the record to support the verdict of the jury, and, there being no error in the instruction, the finding of the jury is conclusive on this court.

For the reasons stated, the judgment of the court is affirmed.

PITCHFORD, V. C. J., and JOHNSON, NICHOLSON, MILLER, and KENNEMAR, JJ., concur.

(86 Okl. 156)

CLARK et al. v. KEITH. (No. 10248.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Forcible entry and detainer §10—Right to maintain unlawful detainer action is not determined by plaintiff's right of possession, but whether he has been in possession.

The right to maintain an action for the unlawful detention of real property is not determined by the plaintiff's right of possession, but by whether he has been in possession, and such possession has been taken from him by force, or, having been obtained from him peaceably, is unlawfully withheld.

2. Landlord and tenant §68—Tenant in possession has no legal right to attorn to or recognize as his landlord any other person.

A tenant in possession of real estate has no legal power or right to attorn to or recognize as his landlord any person other than the party from whom he has rented the land; and, when such attornment is attempted, same is void and conveys no legal rights whatever.

3. Forcible entry and detainer §29(3)—Evidence of title can be introduced only as an incident to right of possession.

Evidence of title to real estate can be introduced, in an action of forcible entry and detainer, only as an incident tending to show the right to possession.

4. Forcible entry and detainer §16(3)—Conditions under which justices of the peace have jurisdiction stated.

A justice of the peace has jurisdiction in an action against tenants holding over, in sales of real estate on execution, orders, or other judicial process, when the judgment debtor was in possession at the rendition of the judgment, or the decree, by virtue of which such sale was made; also in sales by executors, administrators, guardians, and on partition, and in cases where the defendant is a settler or occupier of lands and tenements without color or title, and to which the complainant has the right of possession.

Appeal from County Court, Seminole County; D. G. Hart, Judge.

Action by C. D. Keith against John Clark and another in a justice court. Judgment was rendered in favor of the plaintiff, from which the defendants appealed to the county court, where judgment was rendered in favor of the plaintiff, and the defendants appeal. Reversed.

J. Read Moore and Willmott & Roberts, all of Wewoka, for plaintiffs in error.

Davis & Patterson, of Wewoka, for defendant in error.

PITCHFORD, V. C. J. The above-named defendant in error, who will hereafter be referred to as plaintiff, filed an action in the justice court of Jesse L. Day, justice of the peace of the town of Wewoka, Okla., against the above-named plaintiffs in error, who will hereafter be referred to as defendants, claiming to be the owner of and entitled to the immediate possession of the northwest quarter of the southwest quarter of section 12, township 8 north, range 7 east, and alleging that the defendants were in possession and holding said land unlawfully, and asking for possession of the same; and, further, that the defendants went into the possession of said land prior to the 1st day of January, 1917, as the tenants of the plaintiff's grantors; that they were such tenants for the year of 1917; that the plaintiff purchased the land from the defendants' landlords, and that the defendants are holding over on said land without right and are unlawfully and forcibly withholding the possession of said land from this plaintiff.

Judgment was rendered by the justice of the peace against the defendants and in favor of plaintiff, from which the defendants appealed to the county court. Upon trial in the county court, defendants filed a motion

for judgment on the pleadings, and statement of counsel, on the grounds that the court was without jurisdiction to try the cause, and no cause of action was stated against the defendants. This motion was overruled. Upon conclusion of the evidence, judgment was rendered in favor of the plaintiff, from which the defendants appeal.

The land in controversy was part of the allotment of Dinah Ishmael, a Seminole freedwoman. Plaintiff introduced a deed from the allottee to R. L. Thurmond and Sam Pack, dated July 3, 1905; deed from Sam Pack to R. L. Thurmond, dated July 17, 1906; deed of R. L. Thurmond to W. S. Baker and P. M. Baker, dated May 8, 1907, conveying two-thirds interest in the land; deed of R. L. Thurmond to J. H. Davidson, dated May 20, 1907, conveying one-third of said land; deed of W. S. Baker and P. M. Baker and J. H. Davidson to C. D. Keith, dated November 8, 1917. All of the foregoing deeds were duly recorded.

The plaintiff testified that he was the owner of the land; that on the 1st of January, 1918, the defendants were in possession of the same; that he did not give them permission to remain on the land; that he did not rent it to them for 1918. J. O. Davis, introduced by the plaintiff, testified that he as agent for Pike Baker rented the land to John Clark for the year 1917, and that Clark agreed to vacate the land the first of January, 1918; that the rents were to be paid to Davis, as agent of Pike Baker. B. F. Davis, in behalf of the plaintiff, testified that he was a licensed attorney of Wewoka; that John Clark and J. O. Davis came to his office about November 1, 1917, and had a conversation about renting the land in dispute; that at that time the witness was examining the title for the plaintiff, at which time Clark stated that he had rented from J. O. Davis, as Pike Baker's agent, but that he was not going to make any claim for the land for 1918, and that he would turn possession over in 1918. The defendant Clark testified that he had been in possession of the land for the past four years as tenant of Dinah Ishmael; that he had rented the same from one Mat Henderson four years ago for one year, after which he rented from August Bruner, as agent of Dinah Ishmael, for three years; that he paid Bruner the rents for that period and to no one else; that he never agreed to pay any one else any of the rents and positively denied ever having rented the land from J. O. Davis, denied that he had any talk with B. F. Davis in his office, and denied that he ever told B. F. Davis he would give possession to Keith. August Bruner testified that he had been in the continuous possession of the land as agent for Dinah Ishmael since 1912; that he first leased to Mat Henderson under a written contract for two years; that Henderson paid him the

rent, and he in turn paid the same to Dinah Ishmael; that he next rented to the defendant John Clark; that the witness and Dinah made the contract with Clark under a written contract; that thereafter Clark continued on the land under a verbal contract with witness for 1917, paid rent to the witness, who paid the same to Dinah Ishmael; that he made a verbal contract with Clark in August, 1917, to rent the land for 1918 for one-third and one-fourth rent; that Clark had previously paid cash; that prior to 1912 Bob Davis had charge of the land for Dinah Ishmael; that Dinah had lived with the witness for 20 years.

[1] The controlling question presented by this appeal is, "Whether or not the justice of the peace had jurisdiction to try the cause." If the justice of the peace was without jurisdiction, then the county court could acquire none on appeal. The action of unlawful detainer is purely possessory, and is to be tried in a summary manner; the chief purpose of the action is to give relief in as short a time as may be to one who is entitled to the possession of real estate and is wrongfully held out of the possession of the same. The question of title cannot ordinarily arise, and cannot be tried in such a proceeding, and, in the absence of the relation of landlord and tenant, one who has never been in possession of the premises, sought to be recovered, cannot maintain the action except as hereafter stated.

Under section 5504, Rev. Laws of 1910, a justice of the peace is given power to inquire, in the manner therein directed, against any one who makes unlawful and forcible entry into lands or tenements, and detains the same, as well as against any one who, having a lawful and peaceable entry, unlawfully holds the same.

[3, 4] While section 5505, Id., gives the justice of the peace jurisdiction against tenants holding over their terms, in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the rendition of the judgment, or the decree by virtue of which such sale was made; also in sales by executors, administrators, guardians, and on partition, and in cases where the defendant is a settler or occupier of lands, and tenements without color of title and to which the complainant has the right of possession. This is upon the theory that, by reason of the sale, the purchaser is subrogated to all the rights belonging to the judgment debtor, the executor, administrator, or guardian, and the parties in the partition proceedings. In the instances last enumerated, it would be necessary for the purchaser to establish his right to possession; this being done by introducing in evidence the deed executed under sales approved by the proper court. This does not militate against the rule that in a proceeding of this nature the title cannot be inquired

into; and, if the title does become involved, it is only as an incident, and can only be inquired into for the purpose of determining who has the right to possession. For example, where one is attempting to hold land without color of right, then the owner has the right to maintain the action, and, in order to show his right to possession, he introduced his title, and for no other purpose.

If it is true that Dinah Ishmael executed and delivered a deed, in 1906, to Thurmond and Pack, she thereby vested in her grantees the entire legal interest in the premises, and, if she afterwards remained in possession, the presumption would be, nothing to the contrary appearing, that she held possession as tenant or trustee of the grantees. She would be regarded as holding the land in subservency to the grantees, and nothing short of an explicit disclaimer of such a relation and a notorious assertion of right in herself would be sufficient to change the character of her possession. See *Flesher v. Callahan* et al., 32 Okl. 283, 122 Pac. 489; *Wolverine Oil Co. v. Parks* et al., 79 Okl. 318, 193 Pac. 624.

[2] In the instant case, however, all the evidence tends to show that Dinah Ishmael was holding possession and claiming the land as her own from 1906, the date of the deed to Thurmond and Pack, to the date upon which the plaintiff filed his action in the instant case. Dinah exercised every act of ownership over the land, she remained in the possession of the same, she rented and collected the rents appropriating the same to her use, and no demand was ever made upon her for these rents by any of the grantees.

The evidence further establishes that, long prior to the execution of the deed to the plaintiff, the defendant Clark had been holding the land as the tenant of Dinah. It is true that the witness J. O. Davis testified that he rented the land for 1916, as agent of Pike Baker, to Clark for the year of 1917. This, however, is denied by Clark. Admitting, however, that Clark did make or attempt to make a contract with Davis, as agent of Baker, this would not be tolerated by the law, for at that time Clark was in possession as the tenant of Dinah Ishmael. Even if Clark himself had purchased the land from Keith, and Dinah Ishmael had brought an action against him for unlawful detainer, he would be precluded from claiming any rights under the deed from Keith, without first surrendering the possession to Dinah. The plaintiff's case is in no manner strengthened by the evidence of B. F. Davis, to the effect that Clark promised to surrender possession on the 1st of January, 1918.

In *Reynolds v. Brooks*, 49 Okl. 188, 152 Pac. 411, the second paragraph of the syllabus is as follows:

"2. The attornment of a tenant to a stranger is void, and does not affect the possession of the landlord, unless it be made with his

consent, or pursuant to a judgment at law or the order or decree of a court."

To the same effect, see *Montgomery v. Hill et al.*, 80 Okl. 230, 195 Pac. 897.

The evidence on the part of the defendants is that Clark had rented the premises for 1918 from August Bruner, who was acting at the time as agent for Dinah Ishmael. Nowhere is this contradicted. It therefore follows that, if plaintiff had been vested with all the rights of Dinah Ishmael, by virtue of the deed executed on November 7, 1917, he would not be in position to maintain action as the same would have been premature, for the reason the defendants were holding the premises under rental contract for 1918.

In *Gross v. Baker*, 47 Okl. 361, 148 Pac. 734, the third paragraph of the syllabus is as follows:

"3. In an action of forcible entry and detainer, where the relation of landlord and tenant does not exist between the parties to the action, and both plaintiff and defendant are claiming possession of the premises in controversy under leases and rental contracts with the owner, the justice court, in the first instance, and the county court upon appeal, is without jurisdiction to determine who in fact is the rightful owner of the leasehold estate in the premises."

In *Link v. Schlegel*, 33 Okl. 458, 126 Pac. 576, the syllabus is as follows:

"Under the statutes of this state, in the absence of the relation of landlord and tenant, a person who has never been in possession of the premises in controversy cannot maintain an action of forcible entry and detainer against one in possession under color of title."

We conclude that the judgment of the trial court should be reversed, and it is so ordered.

JOHNSON, McNEILL, KENNAMER, and NICHOLSON, JJ., concur.

(86 Okl. 181)

LEONARD v. ADAMS. (No. 10661.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

Appeal and error \S 766—Where plaintiff in error has failed to comply with Supreme Court rules relating to his brief, the appeal will be dismissed.

Where the plaintiff in error has failed to comply with rule 25 of this court (38 Okl. x, 137 Pac. xi), the appeal will be dismissed.

Appeal from District Court, Logan County; John P. Hickam, Judge.

Action by A. D. Adams against Ben L. Leonard before a justice of the peace. Judgment was rendered for the plaintiff, the cause was appealed to the district court,

where verdict and judgment were rendered for the plaintiff, and the defendant appeals. Appeal dismissed.

O. R. Fegan and T. C. Whitley, both of Guthrie, for plaintiff in error.

John Adams, of Guthrie, for defendant in error.

NICHOLSON, J. This action originated before a justice of the peace and was brought by the defendant in error as plaintiff to recover from the plaintiff in error as defendant the sum of \$72, for the use and occupation of certain real estate located in Guthrie. Judgment was rendered for the plaintiff. The cause was appealed to the district court, where a trial was had to a jury. After the testimony was in, the court permitted the plaintiff to amend his bill of particulars so as to ask for an increased amount of recovery. A verdict was returned in favor of the plaintiff for the sum of \$145, upon which judgment was rendered and to review which this proceeding in error is prosecuted.

The only purported assignment of error in the brief of plaintiff in error is contained in the following statement:

"Our specifications of error are all contained in our original and supplemental motions for a new trial, and we will now direct our argument to the error of the court in overruling these motions."

Rule 25 of this court (137 Pac. xi) requires:

"The brief of the plaintiff in error in all cases shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. * * * Also, where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portions to which he objects or may save exceptions. * * * The brief shall contain the specifications of error complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order, with strict observance of rule 7."

Counsel for plaintiff in error have made no attempt to comply with the rule in any of the foregoing particulars, and, when this rule is not complied with, the appeal will be dismissed. *Watkins National Bank v. Polk*, 47 Okl. 256, 147 Pac. 1011.

For the reasons stated, the appeal is dismissed.

PITCHFORD, V. C. J., and JOHNSON, McNEILL, MILLER, and KENNAMER, JJ., concur.

(86 Okl. 178)

CROKER v. SHURLEY et al. (No. 10658.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Appeal and error ⇨1009(4)—Judgment in equitable proceeding not set aside unless against clear weight of the evidence.

In an equitable proceeding the judgment of the trial court will not be set aside unless it is against the clear weight of the evidence.

2. Specific performance ⇨121(3)—Judgment held not clearly against weight of the evidence.

Record examined, and held, that the judgment of the trial court is not clearly against the weight of the evidence.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Action by J. L. Croker against N. A. Shurley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Alexander Gullett and W. D. French, both of Tishomingo, and Sigler & Jackson, of Ardmore, for plaintiff in error.

Champion & George, of Ardmore, for defendants in error.

NICHOLSON, J. The plaintiff in error brought this action against the defendants in error, seeking the specific performance of a verbal contract for the sale of land alleged to have been entered into between the plaintiff and A. F. Shurley.

It is alleged in the petition, in substance, that on or about the 1st day of November, 1911, the plaintiff and A. F. Shurley entered into an agreement to purchase 140 acres of land situate in Carter county, then being advertised for sale at a guardian's sale; that on November 24, 1911, said A. F. Shurley purchased said land for the sum of \$700, and that said land was conveyed to him; that thereafter the plaintiff and A. F. Shurley took possession of said land, and on or about the 15th day of December, 1911, they made an agreement partitioning said land; that by the terms of said agreement said A. F. Shurley was to retain and hold the north 80 acres of said land at the agreed price of \$400, and was to convey to the plaintiff the south 60 acres (being the land in controversy), for a consideration of the sum of \$300, and that plaintiff paid said Shurley said sum; that, after said agreed partition of said land, each party took possession of his portion thereof, and Shurley and his wife executed a mortgage to one G. M. Dodge on the 80 acres so set aside to him, and that said plaintiff took possession and exercised ownership over the 60 acres set apart to him, and paid the taxes thereon; that said A. F. Shurley departed this life on the 6th day of February, 1916,

leaving surviving him the defendant N. A. Shurley, his widow, and the other defendants, his children; that the defendant N. A. Shurley is the daughter of the plaintiff. The prayer of the petition is that the court decree the plaintiff to be the sole owner of the 60 acres of land involved and entitled to a conveyance thereof, and requiring the defendant N. A. Shurley to convey said land to him by warranty deed, and to execute a proper guardian's deed as guardian for the minor defendants, and that, if said conveyance be not made, that the court order the sheriff of Carter county to execute to plaintiff a proper deed conveying said land to him.

To this petition an answer consisting of a general denial was filed. The case was tried to the court without the intervention of a jury, and the court found generally for the defendants, and rendered judgment in their favor, to review which this proceeding in error was brought.

The plaintiff in error relies upon but one assignment of error, viz., that the court erred in rendering a judgment for the defendants and in refusing to render a judgment for the plaintiff. This assignment necessarily involves the question of whether or not the judgment of the trial court is against the clear weight of the evidence.

To sustain the allegations of his petition, the plaintiff used as a witness one J. M. Dawson, his son-in-law, who testified that in the fall of 1911 the plaintiff and A. F. Shurley had a conversation, in the presence of the witness, wherein it was understood that the plaintiff and Shurley were to bid \$5 per acre for the 140 acres of land then being advertised for sale at a guardian's sale, and if they bought the land Shurley was to pay for it and let the plaintiff have a portion of it at the same price paid by Shurley, and that Croker was to let Shurley have some cattle in payment for his share of the land; that in the following spring Shurley obtained from Croker three cows and calves at the agreed price of \$35 each, one cow at the agreed price of \$25, and one heifer at the agreed price of \$12.50; that, after Shurley had removed the cattle, one of the cows returned to the home of the witness, and the plaintiff afterwards sold her. The witness further testified that the plaintiff purchased 24 spools of wire with which to fence the land, and that Shurley afterwards told him that he bought the wire at Coleman because he could get it cheaper; that both Croker and Shurley told him that each was to have half the wire to fence the place; that he thought the wire cost \$2 per spool; that the plaintiff paid \$5 for repairing Shurley's wagon. He also identified as Shurley's the signature to the indorsement on two checks drawn by the plaintiff and payable to the order of A. F. Shurley; one of the checks being for the sum of \$50, and the other for the sum of \$25. He

further stated that both Croker and Shurley told him that Shurley obtained 26 bushels of cotton seed from Croker and that Croker let Shurley have 125 bushels of corn of the value of 50 cents per bushel. On cross-examination he stated that he did not know whether Shurley paid Croker for the cotton seed, corn, wire, etc., or not.

Robert Hardy Wood, a witness for the plaintiff, testified that he was a son-in-law of the plaintiff; that he was acquainted with the land in controversy; that A. F. Shurley built a house and resided upon the north 80 acres of said land; that Shurley indicated to him the location of the line between the north 80 acres and the south 60 acres of said land; that the land was all inclosed in one inclosure. He also testified that Shurley obtained the cattle, cotton seed, wire, and corn mentioned by Dawson in his testimony, but, like Dawson, did not know whether or not Shurley paid the plaintiff therefor.

The plaintiff introduced evidence showing that A. F. Shurley and wife had executed a mortgage upon the north 80 acres of said land, and that plaintiff paid the taxes upon the south 60 acres of said land for several years, but he had not paid any taxes for two years prior to the institution of this action. He also introduced in evidence the petition of N. A. Shurley, for the appointment of herself as guardian for the minor defendants filed in the county court of Johnston county, wherein it was recited that J. L. Croker was the owner of six-fourteenths of 140 acres of land in section 15, township 5 south, range 3 east.

The plaintiff was permitted to testify as to certain facts pertaining to transactions with A. F. Shurley regarding the land in controversy. Much of his testimony was inadmissible, was admitted over the objection of the defendants, and, no doubt, his testimony was disregarded by the court.

To refute the evidence introduced by the plaintiff, the defendant Mrs. N. A. Shurley testified that she was the widow of A. F. Shurley, deceased, the mother of the other defendants, and the daughter of the plaintiff; that A. F. Shurley purchased the land in controversy in the year 1911, and paid therefor the sum of \$700; that her husband and his family took possession of said land shortly after said purchase and have remained in possession thereof at all times since; that the plaintiff had never at any time been in possession of said land; that the land was inclosed with a wire fence; and that her husband purchased the wire and posts and erected the fence. She further testified that her father, the plaintiff, insist-

ed upon her being appointed guardian of her children, and that he accompanied her to the office of I. R. Mason, an attorney, and did all the talking with Mr. Mason; that she did not instruct Mr. Mason to recite in the petition for the appointment of herself as guardian the statement that the plaintiff owned an undivided six-fourteenths interest in the 140 acres of land; that she signed the petition without reading it, and did not know that it contained such statement. She further testified that her husband paid the plaintiff \$140 in money for the cattle purchased; that the corn purchased by her husband was paid for in work by her husband and his family; that she gave her husband the money with which to pay for the cattle; and that he paid for them when he and their son obtained them. She testified that there was an agreement between her husband and her father whereby her father was to pay \$300 for the south 60 acres of said land; that the consideration was to be paid in cash, and the reason this consideration was to be paid in cash was that her husband wanted to use the money to improve the other 80 acres. She further testified that the plaintiff did not pay any amount of the purchase price of the land. She further testified that she was present and saw her husband pay her father for the wire used in fencing the land, and that her husband also paid for the posts used.

[1] Other witnesses testified on behalf of each of the parties to the action, but it is unnecessary to comment upon their testimony. After a thorough examination of the record, we are unable to say that the judgment is against the clear weight of the evidence. In an equitable proceeding, the judgment of the trial court will not be set aside unless it is clearly against the weight of the evidence. *Robinson et al. v. Potterff*, 78 Okl. 202, 189 Pac. 744; *Lamb v. Alexander* (Okl. Sup.) 201 Pac. 519.

[2] While it conclusively appears that there was an oral contract between A. F. Shurley and the plaintiff whereby Shurley agreed to sell and convey the land in controversy to the plaintiff, there is a sharp conflict in the evidence as to the payment of the purchase price, and the plaintiff has not sustained the burden cast upon him of clearly establishing such payment.

The judgment of the trial court, not being clearly against the weight of the evidence, is affirmed.

PITCHFORD, V. O. J., and McNEILL, JOHNSON, MILLER, and KENNAMER, JJ., concur.

(88 Okl. 181)

In re NICHOLS' ESTATE.

COOK v. VINSON.

(No. 11420.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

Appeal and error \S 773(5)—Where plaintiff in error has served and filed brief, and defendant in error has neither filed brief nor offered excuse, court may reverse cause.

Where plaintiff in error has served and filed his brief in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the trial court may be sustained, but may, where the authorities cited in the brief filed appear to reasonably sustain the assignments of error, reverse the case in accordance with the prayer of the petition in error.

Appeal from District Court, Pottawatomie County; John L. Coffman, Judge.

Action by S. C. Vinson, former administrator of the estate of Enos Nichols, deceased, against the estate of Enos Nichols, deceased, R. W. Cook, administrator. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

T. G. Cutlip, of Tecumseh, for plaintiff in error.

Maben & Pitman and Abernathy & Howell, all of Shawnee, for defendant in error.

NICHOLSON, J. This action originated in the county court of Pottawatomie county, which court, in passing upon the final account of the defendant in error, made an order charging him with certain amounts for which he had previously taken credit. An appeal was, by the defendant in error, taken to the district court of said county, which court rendered judgment reversing the judgment of the county court, and it is to review this judgment that this proceeding in error was commenced.

Plaintiff in error has served and filed his brief, but no brief has been filed by the defendant in error. It is a well-established rule in this jurisdiction that when the plaintiff in error has served and filed his brief in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for his failure to do so, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, when the authorities cited in the brief filed appear reasonably to sustain the assignments of error, reverse the cause in accordance with the prayer of the petition in error. Chicago, R. I. & P. Ry. Co. v. Weaver (Okl. Sup.) 171 Pac. 34, and cases

there cited; Lawton National Bank v. Ulrich, 81 Okl. 159, 197 Pac. 167.

The brief of the plaintiff in error and the authorities cited therein appear reasonably to sustain the assignments of error. Therefore the judgment of the trial court is reversed, and the cause remanded for a new trial.

PITCHFORD, V. C. J., and JOHNSON, McNEILL, MILLER, and KENNAMER, JJ., concur.

(86 Okl. 185)

HINES, Director General of Railroads, et al. v. BACON, County Treasurer.
(No. 10667.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 854(1) — Where judgment does not disclose upon which of several grounds it is based, it will not be reversed if any one of them is sufficient.

Where a judgment does not disclose which of several grounds it is based upon, but is general in its terms, it will not be reversed if any one of such grounds is a valid basis for the judgment, and there is sufficient evidence to sustain it upon such grounds.

2. Process \S 157—Judgment sustaining motion to quash summons held valid.

Where the plaintiff's petition and the summons show and designate the plaintiff as Walker D. Hines, Director General of Railroads of the United States, and the Atchison, Topeka & Santa Fe Railway Company, a corporation, and the copy of the summons served upon the defendant designates the party by whom he was sued as "Walter D. Haines, Director Gen. of R. R. of U. S. & A. T. & S. F. Ry. Co.," and the defendant appeared specially and presented a motion to quash the summons upon five different grounds, among which was (2) that the copy of summons served upon the defendant is not a true copy of the purported summons issued in said cause, and (4) for the reason that the said purported summons served upon the defendant does not sufficiently advise the defendant of the names of the persons or companies or corporations by whom he has been sued, who are plaintiffs in said action, and the trial court entered a general judgment sustaining said motion, held, that the judgment of the trial court was not erroneous, and that the same should be affirmed.

Appeal from District Court, Ellis County; T. P. Clay, Judge.

Action by Walker D. Hines, Director General of Railroads of the United States, and the Atchison, Topeka & Santa Fe Railway Company against E. L. Bacon, County Treasurer of Ellis County. Judgment quashing summons, and the plaintiffs appeal. Affirmed.

Cottingham, Hayes, Green & McInnis, of Oklahoma City, for plaintiffs in error.

Harry C. Brownlee, Co. Atty., of Arnett, for defendant in error.

JOHNSON, J. On January 20, 1919, plaintiffs commenced this action in the district court of Ellis county, Okl., for recovery of \$466.28 taxes paid under protest by plaintiffs to the county treasurer of Ellis county, Okl., December 30, 1919. The purposes of this appeal do not necessitate setting forth this petition at length.

The action is brought under section 7, subd. B, art. 1, c. 107, Sess. Laws 1915, which provides that it shall be the duty of one claiming a tax to be illegal, having no remedy by appeal, to pay the full amount of the tax at the time required by law, and to give notice to the collecting officer setting forth the grounds of complaint and advising that suit will be brought for the recovery of the payment so made under protest. Quoting literally, this section of the statute further provides:

"It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit."

On January 20, 1919, summons issued returnable January 30, 1919, and setting answer date March 1, 1919. This summons was served January 20, 1919.

It will be observed that the petition was filed, summons issued, and service had within 30 days after December 30, 1919, the date on which the protested payment of taxes was made.

A copy of the summons with the return of service, as set forth, omitting the caption, follows:

"The State of Oklahoma, to the Sheriff of Ellis County—Greeting:

"You are hereby commanded to notify E. L. Bacon, Co. Treasurer, Ellis County, Okl., that he has been sued by Walker D. Hines, Director Gen. of R. R. U. S. & A. T. & S. F. Ry. Co., in the district court sitting in and for said county of Ellis, and that unless he answer by the 1st day of March, A. D. 1919, the petition of the said Walker D. Hines, Director Gen. of R. R. of U. S. & A. T. & S. F. Ry. Co., against said defendant filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

"You will make due return of this summons on the 30th day of January, A. D. 1919.

"Witness my hand and seal of said court affixed at my office in Arnett, this 20th day of January, A. D. 1919. R. H. Elder, Court Clerk, by Chloe Dean, Deputy. [Seal.]

"State of Oklahoma, County of Ellis—

"Received this writ January 20, 1919, and as commanded therein I summoned the following persons of the defendants within named at the

times following, to wit: E. L. Bacon, county treasurer, January 20, 1919, by delivering to each of said defendants personally, in said county, a true and certified copy of the within summons, with all indorsements thereon. P. F. Bradshaw, Sheriff, James Haslem, Deputy.

On February 28, 1919, after the expiration of the 30-day period, the defendant filed his special appearance and motion to quash summons and set aside service, which, omitting signature, is as follows:

"In the District Court of Ellis County, State of Oklahoma. No. 1804. Walker D. Hines, Director General of Railroads of the United States, and the Atchison, Topeka & Santa Fé Railway Company, a Corporation, Plaintiffs, v. E. L. Bacon, County Treasurer of Ellis County, State of Oklahoma, Defendant. Special Appearance and Motion to Quash Summons and Set Aside Service.

"Comes now the defendant, appearing specially and for the purpose of this motion only, and moves the court to quash, set aside, and hold for naught the summons and purported service thereof in the above-entitled cause, for the reason that the same was not issued, served, and returned according to law, and is insufficient to confer jurisdiction on this court for the following reasons, to wit:

"First. For the reason that the certified copy of said purported summons, shown by the sheriff's return to have been served upon E. L. Bacon, county treasurer, on January 20, 1919, which is attached hereto and made a copy of this motion marked Exhibit A fails to show that said summons was issued under the seal of said court.

"Second. For the reason that the said copy of said summons hereto attached as aforesaid is not a true copy of the purported summons issued in said cause.

"Third. For the reason that the return of the sheriff to said purported summons fails to show that service thereof was made upon E. L. Bacon, county treasurer of Ellis county, state of Oklahoma, the defendant above named.

"Fourth. For the reason that said purported summons does not sufficiently advise the defendant of the names of the persons or companies or corporations, by whom he has been sued and who are plaintiffs in said action.

"Fifth. For the reason that the copy of said alleged summons aforesaid does not show under the hand of the clerk of said court the amount for which judgment will be taken if defendant fails to answer."

This motion bore verification by the defendant county treasurer, and to it was attached as an exhibit an exact copy of the original summons, except (a) the name of Walker D. Hines appeared as Walter D. Haines, (b) the copy did not bear the seal as did the original, and (c) in making the copy the sheriff failed to copy the signature of the clerk under the indorsement of the amount sued for.

April 7, 1919, the district court entered the following judgment sustaining this motion:

"Now on this 7th day of April, 1919, being one of the regular judicial dates of the regular

April term, 1919, of said court, the above cause came on for hearing on the special appearance and motion of the defendant to quash the summons and set aside the purported service thereof in said cause, the plaintiffs appearing by their attorney, O. E. Leady, and the defendant appearing by Harry C. Brownlee, county attorney of said Ellis county; and the court, having heard the reading of said motion, and the argument of counsel for both parties, finds that the said motion is well taken, and that the same should be, and said motion is hereby, sustained by the court, and the said summons in said cause, together with the purported service thereof, is hereby quashed, set aside, and held for naught, to which ruling of the court the plaintiffs except, and exceptions are allowed by the court.

"Thereupon the plaintiff elects to stand upon the service and summons and gives notice of appeal to the Supreme Court. Said notice of appeal was made orally in open court, and at the request of the plaintiff the court allowed the plaintiffs 30 days in which to prepare a transcript for appeal to the Supreme Court in said cause."

The plaintiff in error's petition contains the following specifications of error:

"(1) That said district court erred in its said order and judgment sustaining the said motion to quash the said summons, and in setting aside said summons, to which plaintiffs, here plaintiffs in error, duly excepted at the time.

"(2) That said court erred in not overruling the said motion to quash summons, to which said plaintiffs in error at the time excepted."

—concerning which counsel said in their brief:

"From the above it will be observed that the action of the court in quashing the summons and return of service, if sustained, because of the expiration of the 30 days, would release the sequestration of this fund, so that, if sustained, the county treasurer would be at liberty to distribute it, leaving no money available for the payment of any judgment that we might recover. To all practical intents and purposes, therefore, the action of the court below, if sustained by this court, terminates this suit; and this appeal presents for review the error of the trial court in sustaining the motion to quash summons and set aside service. * * *

"For reversal the plaintiffs in error rely upon the specification of error contained in the petition in error that the district court erred in sustaining the motion of the defendant to quash summons and set aside the service thereof."

This presents but one question for our determination, which is purely an unmixed question of law. As we have seen, the defendant's motion to quash the summons contained the grounds: (1) That the purported copy of the summons and the sheriff's return failed to show that the summons was issued under the seal of the court; (2) that said copy is not a true copy of the purported summons issued in the cause; (3) that the return of the sheriff failed to show service upon E. L. Ba-

con, county treasurer of Ellis county, state of Oklahoma; (4) the purported summons does not sufficiently advise the defendant of the names of the persons or companies or corporations by whom he has been sued, and who are plaintiffs in said action; (5) that the alleged summons does not show under the hand of the clerk of said court the amount for which judgment will be taken if defendant fails to answer.

The trial court rendered a general judgment sustaining the defendant's motion to quash the summons.

[1] This court, in the case of Dunkin v. Galloway, 75 Okl. 125, 181 Pac. 939, stated as follows:

"Where a judgment does not disclose which of several grounds it is based upon, but is general in its terms, it will not be reversed if any one of such grounds is a valid basis for the judgment, and there is sufficient evidence to sustain it upon such ground."

To the same effect was Hines et al. v. Olsen et al., 78 Okl. 259, 190 Pac. 266.

[2] Section 4705, R. L. 1910, provides:

"The summons shall be issued by the clerk, upon a written præcipe filed by the plaintiff; shall be issued under the seal of the court from which the same issued, shall be signed by the clerk, and shall be dated the date it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount, to be furnished in the præcipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs."

The mode of service of summons is specified in section 4711, R. L. 1910, as follows:

"The service shall be made by delivering a copy of the summons to the defendant personally or by leaving one at his usual place of residence with some member of his family over fifteen years of age, at any time before the return day."

In the case of State ex rel. Collins v. Parks, Judge, 34 Okl. 335, 126 Pac. 242, it is stated in the body of the opinion as follows:

"It is the duty of attorneys and clerks to be familiar with the method of proceeding to get defendants into court. It should not be considered a hardship to require that a statute prescribing the method by which a defendant is brought in to answer should be strictly followed. Courts should not be expected to construe plain statutes so as to relieve plaintiffs of the duty of following them as written. A plaintiff desiring to summons a defendant to answer in a court of record has full opportunity to ascertain what is necessary in order to make the

summons comply with the law. A defendant cannot be brought into court except as the law directs."

Again, in *Sealey v. Smith et al.*, 81 Okl. 97, 197 Pac. 490, this rule is stated in syllabus 1, as follows:

"Statutes prescribing the manner of service of summons are mandatory and must be strictly complied with in order to vest the court with jurisdiction."

An inspection of the record discloses that the plaintiffs' petition gave the style of the case in the caption as follows:

"Walker D. Hines, Director General of Railroads of the United States and the Atchison, Topeka & Santa Fé Railway Company, a Corporation, Plaintiffs, v. E. L. Bacon, County Treasurer of Ellis County, State of Oklahoma, Defendants."

The copy of summons left with the defendant was as follows:

"The State of Oklahoma, to the Sheriff of Ellis County—Greeting:

"You are hereby commanded to notify E. L. Bacon, Co., Treasurer, Ellis Co., Okl., that he has been sued by Walter D. Haines, Director Gen. of R. R. of U. S. & A. T. & S. F. Ry. Co., in the district court sitting in and for said county of Ellis, and that unless he answer by the 1st day of March, A. D. 1919, the petition of the said Walter D. Haines, Director Gen. of R. R. of U. S. & A. T. & S. F. Ry. Co., against said defendant, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

"You will make return of this summons on the 30th day of January, A. D. 1919.

"Witness my hand and seal of said court affixed at my office in Arnett this 20th day of January, A. D. 1919. R. H. Elder, Court Clerk, by Chloe Dean, Deputy."

We think that the summons was fatally defective for the reasons stated in the second and fourth paragraphs of the defendant's motion to quash: (2) That the copy of summons served upon the defendant is not a true copy of the purported summons in said cause; (4) for the reason that the said purported summons does not sufficiently advise the defendant of the names of the persons or companies or corporations by whom he has been sued, and who are plaintiffs in said action.

The plaintiffs' petition and the original summons showed that the plaintiffs in the action were "Walker D. Hines, Director General of Railroads of the United States, and the Atchison, Topeka & Santa Fé Railway Company, a Corporation," while the copy of the summons served upon the defendant showed that he was sued by "Walter D. Haines, Director Gen. of R. R. of U. S. & A. T. & S. F. Ry. Co."

Having reached the conclusion announced, it follows that the judgment of the trial

court sustaining the defendant's motion to quash the summons was not erroneous, and, this being the sole question for our determination, it is ordered that the judgment of the trial court be affirmed.

MCNEILL, NICHOLSON, MILLER, and KENNAMER, JJ., concur.

BLANCHARD et ux. v. STATE. (No. A-3842.)

(Criminal Court of Appeals of Oklahoma.
May 27, 1922.)

(Syllabus by the Court.)

1. Depositions ⇐6—Neither defendant nor state are required to consent to taking of depositions except in the mode prescribed by statute.

Depositions in criminal cases were unknown to the common law. The authority trial courts of this state have in permitting depositions of nonresident witnesses to be taken in criminal cases is derived from the statute, and neither the defendant nor the state is required to consent to the taking of such depositions in any other mode than that prescribed by the statute.

2. Stipulations ⇐4—County attorney may consent to use of nonresident witnesses' depositions without a commission having been issued.

The county attorney, on behalf of the state, may consent to the use as evidence of depositions of nonresident witnesses taken without a commission having been issued.

3. Depositions ⇐83(4)—Where county attorney stipulates defendant may take depositions without commission, a motion to suppress them as a whole, first made when offered in evidence, comes too late.

Where the county attorney stipulates that defendant may take in his behalf depositions of nonresident witnesses without the issuance of a commission, and that such depositions may be read at the trial, a motion to suppress the depositions as a whole, made for the first time when the depositions are offered in evidence, comes too late and should be overruled. For reasons for so holding, see body of opinion.

Appeal from District Court, Ottawa County; S. C. Fullerton, Judge.

Earl Blanchard and Mrs. Earl Blanchard were convicted of murder and sentenced to life imprisonment, and they appeal. Reversed and remanded.

Blanton & Shannahan, of Kansas City, Mo., Dennis H. Wilson, J. J. Smith, A. W. Turner, and Arthur G. Croninger, all of Miami, and Prulett, Sniggs, Patterson & Morris, of Oklahoma City, for plaintiffs in error.

The Attorney General and E. L. Fulton,
Asst. Atty. Gen., for the State.

MATSON, J. On the 14th day of January, 1920, the county attorney of Ottawa county filed in the district court of said county an information jointly charging Earl Blanchard and Mrs. Earl Blanchard with the murder, by shooting, of Charles Stricker, on the 22d day of October, 1919.

The killing occurred in the city of Commerce, in Ottawa county, at nighttime; the deceased being a police officer of said county. On the night of the tragedy an automobile belonging to a citizen of Miami, Okl., located four miles south of the city of Commerce, was stolen from a place on the public streets of said city. The stolen car was driven north to the city of Commerce, and the killing of the deceased occurred while the stolen car was being driven through the city of Commerce and while the deceased was trying to compel the thief to stop the car in a public street in the city of Commerce; the fatal shot being fired by an occupant of the car. The defendant Earl Blanchard was identified by some of the witnesses as the person who fired the fatal shot. Some witnesses also testified that the defendant Mrs. Earl Blanchard was riding in the car with the defendant at the time the fatal shot was fired, but there is no evidence in the record that she fired any shots at the deceased or took any part in the killing, her only connection with the crime being that she was with her husband in the city of Miami that day prior to the larceny of the automobile and was riding with him in the stolen car after it was stolen, and was also seen with him in the city of Joplin, Mo., the next morning after the commission of the homicide; and she was also identified by a chauffeur of a service car who testified he drove the defendants from Joplin, Mo., to the town of Carthage, Mo., on the next day after the homicide. The defendants were residents of the city of Nevada, Mo., and the defense relied upon was an alibi.

[1] Among the assignments of error urged as grounds for a reversal of this case is the alleged error of the trial court in rejecting admissible, competent, relevant, and material testimony offered by the defendants at the trial, all over the objection and exception of each of the defendants. This ground for reversal is based upon the action of the trial court in excluding certain depositions of witnesses taken on behalf of the defendants in the state of Missouri at the cities of Kansas City and Nevada. These depositions were taken pursuant to stipulations entered into on the 21st day of February, 1920, between the county attorney of Ottawa county, acting through his duly appointed and qualified deputy, and counsel for the defendants. Said stipulations read as follows:

207 P.—7

"Defendant's Exhibit 1. In the District Court of Ottawa County, Oklahoma. State of Oklahoma, Plaintiff, v. Earl Blanchard and Vida Blanchard, Defendants. No. —. Stipulation to Take Depositions.

"It is hereby agreed by and between the plaintiff and the defendants that depositions of sundry witnesses may be taken on the part of the defendants at the law office of Blanton and Shannahan, 306 Keith & Perry Bldg., southwest corner of Ninth and Walnut streets, in the city of Kansas City, county of Jackson, state of Missouri, on Friday the 27th day of February, 1920, between the hours of 8:00 o'clock in the forenoon and 6:00 o'clock in the afternoon of that day and will be continued from day to day at the same place and between the same hours until completed.

"That said depositions may be taken in shorthand by a stenographer and transcribed in typewriting and the signatures of witnesses to said depositions are waived.

"That formal notice of the taking of said depositions as to time and place is hereby waived and it is agreed also that all objections to the materiality, competency, and relevancy of any of the questions or answers may be read at the trial of this cause at the time said depositions are read with the same force and effect as is made at the taking of the depositions and the filing of written objections is waived.

"Dated this the 21st day of February, 1920.

"Defendant's Exhibit 2. In the District Court of Ottawa County, Oklahoma. State of Oklahoma, Plaintiff, v. Earl Blanchard and Vida Blanchard, Defendants. No. —. Stipulation to Take Depositions.

"It is hereby agreed by and between the plaintiff and the defendants that depositions of sundry witnesses may be taken on the part of the defendants at the law office of W. M. Bowker, Bowker Building, northeast corner of the Public Square in the city of Nevada, county of Vernon, state of Missouri, on Wednesday, the 25th of February, 1920, between the hours of 8:00 o'clock in the forenoon and 6:00 o'clock in the afternoon of that day, and that if the taking of said depositions is not completed on that day will be continued from day to day at the same place and between the same hours until completed.

"That said depositions may be taken in shorthand by a stenographer and transcribed in typewriting and the signatures of witnesses to said depositions are waived.

"That formal notice of the taking of said depositions as to time and place is hereby waived, and it is agreed also that all objections to the materiality, competency and relevancy of any of the questions or answers may be read at the trial of this cause at the time said depositions are read with the same force and effect as is made at the taking of the depositions and the filing of written objections is waived.

"Dated this the 21st day of February, 1920. D. H. Cotten, by W. R. Chestnut, Attorneys for State. Dept. Co. Atty. Horace Blanton and Bennett & Wilson, Attorneys for defendants."

The depositions, after having been taken in accordance with the provisions of the fore-

going stipulations, were duly certified, sealed, and transmitted to the court clerk of Ottawa county and were on file in said court prior to the beginning of the trial, and no motion to suppress, or other objection, was urged to these depositions prior to the beginning of the trial. The defendants, believing that counsel for the state would give full faith and credit to the stipulations entered into, and relying upon such stipulations, announced that they were ready for trial. Let it here be understood that counsel for the state, pursuant to the notice contained in the stipulations and pursuant to the agreements therein, appeared at the times and places mentioned in the stipulations and cross-examined the witnesses whose depositions were taken.

The first objection raised to the introduction and admission in evidence of said depositions was after the state had closed its case in chief and the said depositions were offered to be read in evidence in behalf of the defendants. The objections urged against the depositions were not objections to the materiality, competency, or relevancy of any of the questions or answers of any of the witnesses, but were objections to the introduction of any of the depositions as a whole and were in the nature of a motion to entirely suppress all the depositions taken. The trial court sustained the motion and objections to the introduction of the depositions, announcing that the decision of this court in the case of *Westbrook v. State*, 14 Okl. Cr. R. 423, 172 Pac. 464, controlled. In effect, the trial court held that because the depositions were not taken strictly in conformance with the letter of the statute providing for the taking of depositions by a commission, of witnesses residing out of the state, on behalf of the defendants, the depositions were clearly inadmissible and the trial court was powerless to receive them in evidence.

In *Westbrook v. State*, supra, this court held:

"The right to take and use depositions of non-resident witnesses in behalf of the defendant in a criminal case is statutory. Penal Code, art. 17. The statute regulates the practice in such cases, and its provisions must be substantially complied with."

In the body of the opinion it is said:

"Counsel for the defendant insist 'that the court erred in refusing to grant to the defendant a commission to take depositions.'

"The statutory provisions for the taking of depositions by the defendant in a criminal case are, in part, as follows:

"Section 6036, Rev. Laws 1910: 'When an issue of fact is joined upon an indictment or information, the defendant may have any material witness residing out of the state examined in his behalf as prescribed in this article and not otherwise.

"Sec. 6037. When a material witness for the defendant resides out of the state the defendant

may apply for an order that the witness be examined on a commission to be issued under the seal of the court, and the signature of the clerk, directed to some party designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, and to take and certify the deposition of the witness and return it according to the instructions given with the commission.

"Sec. 6038. Application must be made upon affidavit stating: First. The nature of the offense charged. Second. The state of the proceedings in the action and that an issue of the fact has been joined therein. Third. The name of the witness and that his testimony is material to the defense of the action. Fourth. That the witness resides out of the state.

"Sec. 6039. The application may be made to the court or judge himself, and must be upon five days' notice to the county attorney.

"Sec. 6040. If the court or the judge to whom the application is made, is satisfied of the truth of the facts stated and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction that the trial be stayed for a specified time reasonably sufficient for the execution of the commission and return thereof, or the case may be continued.'

"Counsel for the state contend that under section 6040, above quoted, the issuance of a commission to take the deposition of a non-resident witness rests in the discretion of the trial court or judge, and that no abuse of discretion appears in this case.

"From the record it appears that the defendants, on the day they entered their pleas, served notice on the county attorney that they would make application to take the deposition of a nonresident witness, which application was supported by their affidavits, averring the facts required to be shown under the statute. The county attorney offered to waive notice and the issuance of a commission, and offered to appear at any time to take the deposition of said witness. Counsel for the defendants, very properly we think, refused to accept this proposition. There is no inherent power in a court of record, to issue commissions to take depositions to be read in behalf of a defendant in a criminal case. The right to take and use the deposition of a nonresident witness in behalf of a defendant in a criminal case is statutory, and the procedure prescribed for taking and returning the same must be substantially complied with in order to make such deposition competent and admissible. We think the record shows a manifest abuse of judicial discretion in overruling the application of the defendants for a commission to take the deposition. In cases of this kind, where the defendant is on trial for his life, he should have the advantage of every right which the law secures to him upon his trial, and in a capital case, when notice is given and a proper affidavit for the taking of a deposition is made by the defendant and filed as soon as issue is joined by entering plea, it would be an abuse of discretion to deny an application properly made."

In deciding the question involved in this case, which is materially different from that

considered in the Westbrook Case, it is not necessary for this court to depart from the general principles of law concerning the inherent power of the trial court to permit the taking of depositions in a criminal case in any other manner than by commission, as provided in the Code of Criminal Procedure. Depositions in criminal cases were unknown to common law, and all the authority the trial courts of this state have in permitting depositions of nonresident witnesses to be taken in criminal cases must be derived from the statute, and neither the defendant nor the state can be compelled by the court to consent to the taking of depositions in a criminal case in any other mode than that prescribed by the statute.

Depositions taken in accordance with the provisions of the Criminal Code of Procedure are admissible in behalf of the defendant. Such statute clearly authorizes the use of depositions of nonresident witnesses in behalf of the defendant in a criminal case. However, a question is involved in this appeal which was not considered nor passed upon by the court in the Westbrook Case. The question here involved is whether or not the county attorney may consent to the use as evidence of depositions of nonresident witnesses taken without commission in behalf of a defendant as was here done, and, if so, should such consent, where no timely objection is urged in the trial court, be enforced. The doctrine is well established, and the principle is applicable to criminal as well as civil proceedings, that one should not complain of a thing done with his consent; however, this doctrine, like any other legal doctrine, is sometimes compelled to give way, because of the circumstances of the particular instance, to another of more compelling force which forbids its application. The decisions of this court are full of the application of the doctrine above announced. Some instances of it may be enumerated as follows: (1) Waiver of jury trial. (2) Waiver of preliminary examination. (3) Consent to the admission of secondary instead of primary evidence. (4) Failure to interpose timely objection to the admissibility of evidence or to the argument of counsel, or to the instructions of the court. (5) Waiver of copy of indictment or information. (6) Waiver of list of witnesses. (7) Waiver of time to plead or for judgment.

Bishop says this law is analogous to the doctrine of estoppel. Bishop's New Criminal Procedure (2d Ed.) vol. 1, § 117.

Applying the doctrines of waiver or consent, which are practically analogous, because waiver is based on consent either express or implied, to the question involved in the instant case, the conclusion is reached that, although the trial courts of this state have no inherent power to authorize the tak-

ing of depositions of nonresident witnesses of this state in criminal cases otherwise than in accordance with the statutory provisions, the statute having authorized the taking of depositions of nonresident witnesses in behalf of the defendant, such statute should not be construed to prohibit the use in behalf of a defendant of depositions taken by the concurrent consent of the accused and the prosecution, where no timely objection is made to suppress them.

Section 5882, Revised Laws 1910, of the Code of Criminal Procedure, in part, provides:

"Except as otherwise provided in this and the following chapter, the rules of evidence in civil cases are applicable also in criminal cases."

There is nothing in the Criminal Code of Procedure providing the manner in which or time at which exceptions to depositions as a whole shall be made. In the absence of such a provision, and because depositions in criminal actions were unknown to the common law, the following section, included within the Code of Civil Procedure, should control: Section 5092, Id., on exceptions to depositions as a whole, reads as follows:

"The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions as a whole, before the commencement of the trial."

[2, 3] The stipulations entered into between counsel for the state and for the defendant as to the taking and use of depositions of nonresident witnesses in behalf of the defendant in this case, after waiving notice of the time and place of taking these depositions, contain an agreement that—

"All objections to the materiality, competency and relevancy of any of the questions and answers may be read at the trial of this cause at the time said depositions are read."

Such language constituted a consent on the part of the legally constituted representatives of the state in the trial of said cause, if not expressly, clearly by implication, that such depositions should be read in evidence at the trial. In the face of such an agreement, it was manifestly unfair to the defendant in this case for the state's counsel to remain silent before the commencement of the trial and permit the counsel for the defendant, relying upon said depositions and their use at the trial, to announce ready for trial, if it was their intention thereafter to take any exceptions to the depositions as a whole. Such action on the part of the state's counsel was clearly contrary to the stipulations, and, in the light of the foregoing provisions of our Code of Procedure, amounted in our opinion to an unfair advantage, and we believe, in this instance, deprived the defendant of that fair and impartial trial which

it is the purpose of our Constitution and statutes to afford an accused, and which substantial right this court has always been zealous to protect. In this state the county attorney is the legal representative of the state in all prosecutions on behalf of the state in the trial courts of record. He has authority to bind the state by agreements as to criminal procedure, not directly in conflict with the plain constitutional and statutory provisions, as much so as the counsel representing the accused can bind him to such an agreement. *State v. Murphy*, 48 S. C. 1, 25 S. E. 43.

In *Wightman v. People*, 67 Barb. (N. Y.) 44, it was held that an accused might consent to the admission of a deposition taken *de bene esse* before the trial in his presence and with his consent, though the statutory formalities had not been complied with.

In *People v. Grundell*, 75 Cal. 301, 17 Pac. 214, it is held:

"A defendant, on trial for larceny, having appeared by counsel, and consented that the testimony of a deposing witness be taken down and read in evidence, cannot, upon the trial, object to the reading of such deposition on the ground that it does not conform to all of the provisions of the Penal Code relating to depositions."

In the body of the opinion it is said:

"The prosecution also read in advance the deposition of one Rost, which was taken before Judge Belden in open court, and written down by the reporter of the court. Certain objections were taken to the mode of authentication of this deposition, and also that there was no proof that the witness could not be produced at the trial. It appears, however, that the defendant appeared by his counsel in open court, and consented that the deposition of Ernest Rost, a witness detained in custody to testify, may be taken; that the said testimony of the said witness be taken down by the shorthand reporter of this court, and the same may be by him hereafter written out, and said written notes of the direct and cross examination read in evidence upon the trial of said cause, with the same force and effect as if said witness were himself present and testifying." This was an express consent that this identical deposition should be read in evidence at the trial. There was no condition that it should be shown that the witness could not be produced. The deposition was taken as provided in the stipulation, and is to be governed by it, and not by the provisions as to depositions in the Penal Code. In this view the certificate was unnecessary."

In *Bishop's New Criminal Procedure* (2d Ed.) vol. 2, § 1206, p. 1029, it is stated that depositions for the defendant, either under statutes or by consent of the prosecuting officer, may be taken.

If the defendant in a criminal prosecution may waive his constitutional right to meet the witness against him face to face, under

certain circumstances (see *Bishop's New Criminal Procedure* [2d Ed.] vol. 2, § 1205, p. 1028), and consent that the deposition of an absent witness may be read against him (full opportunity for cross-examination having been afforded him), why may not the county attorney, as the legally constituted representative of the state, in a like prosecution and with like opportunities, be bound (however irregular his action may have been when viewed in the light of the statute on the subject) by his consent that depositions taken for the defendant in an irregular manner may be read at the trial. And further, where such consent is given, is not the doctrine of waiver applicable where such officer fails to object to depositions so taken at the appropriate opportunity?

In the case of *Shutte v. Thompson*, 15 Wall. 151, 21 L. Ed. 123, the Supreme Court of the United States, applying the principle of waiver, said the following:

"At the trial in the court below, the plaintiff offered to read in evidence the deposition of William Underwood, which had been taken in the cause, with the certificate annexed thereto, respecting the time, place and manner of taking it, and the court permitted the deposition to be read, though the defendant objected and excepted to such permission. The decision of the court admitting the deposition is the first error assigned.

"The grounds of objection are stated specifically in the record. They are three in number. The first is that the deposition was not taken and certified by an officer authorized by the acts of Congress to take and certify a deposition, so that it may be read in evidence. The second is that it was taken without any affidavit of the cause or reason for taking it, and without any commission authorizing it. The third objection is that it was neither certified nor proved that the witness had been sworn to testify to the whole truth. No other reason for opposition to the reception of the deposition in evidence was stated in the court below, and no others are urged in this court.

"It is to be observed that the objections are all formal rather than substantial. Still they are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect. The act of Congress of September 24, 1789 (1 Stat. at L. 88, sec. 30), authorizes the deposition of an ancient, or any infirm person (among others), to be taken *de bene esse*, when the testimony of such person is needed in any civil cause depending in any district in any court of the United States. The deposition may be taken before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause. The act further provides for notice to the adverse party, and enacts that every person deposing as aforesaid shall be carefully examined

and cautioned and sworn or affirmed to testify the whole truth. It is also further enacted that the depositions taken shall be retained by the magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons of their being taken, and of the notice, if any, given to the adverse party, be by the magistrate sealed up and directed to the court, and remain under his seal until opened in court. It must be admitted that the deposition of Underwood was not taken in conformity with these regulations. It does not appear that the witness was sworn to testify the whole truth. Nor does it appear that there was any certificate of the reasons why the deposition was taken. In addition to this, it was taken before a township justice, and not by any magistrate described in the act of Congress. But it is obvious that all the provisions made in the statute respecting notice to the adverse party, the oath of the witness, the reasons for taking the deposition, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the full extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice, will take care that on the trial of every cause neither party shall reap any advantage from his own fraud."

In the later case of *Howard et al. v. Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, it is said:

"The points made against the deposition of Odell by counsel for plaintiffs in error are, that it was not taken under any provision of the Revised Statutes of the United States, and that section 914, Revised Statutes, relating to the adoption by the federal courts of the forms and modes of proceeding in civil causes in the state courts, has no application to the present inquiry. It will be observed that these points do not relate to the competency of the witness whose deposition was taken, or to the admissibility of the evidence given in it, but are based solely on objections as to the form of the commission and the manner of taking the deposition. The record shows that the cause was at issue May 20, 1886. The commission to take the deposition of the witness Odell was signed January 4, 1887. Notice of the issuing of the commission was served on the defendants, and

they filed cross-interrogatories in the premises, at the same time making the following waiver: 'We waive copy of interrogatories and consent that commission may issue upon the original, direct and cross interrogatories. (Signed) Lindsley & McCormick, Atty's for Defendants.' As already stated, the deposition was filed in the case on the 22d of January, 1887, and opened, at the request of the attorney for the plaintiff, on the 5th of February, following. The motion to suppress the deposition was not made until the 8th of February, when the case came on for trial. In our opinion, the motion in this instance was too late. The counsel for defendants, by waiving copy of the interrogatories, when notice of them was served upon them, and consenting to the issue of the commission, and practically uniting with plaintiff's counsel in executing it, by adding their own cross-interrogatories, and withholding the objections until after the trial had begun, must be considered as having waived such objections."

See, also, *Rich v. Lambert*, 12 How. 347, 13 L. Ed. 1017; *Sheibley v. Ashton*, 130 Iowa, 195, 106 N. W. 618; *Delisle v. McGillivray*, 24 Mo. App. 680; *Homburger v. Alexander*, 11 Utah, 363, 40 Pac. 280; *Com. v. Stone*, Thacher, Cr. Cas. (Mass.) 604.

The doctrine of waiver is applicable here. The trial court erred to the prejudice of these defendants in suppressing the depositions as a whole upon objections made to them for the first time when the defendants offered them in evidence.

In justice to the county attorney, it should be stated in this opinion that he made no objection at the trial to the introduction of the depositions offered on behalf of the defendant, and taken according to the terms of the stipulations entered into between him and counsel for the defendants. The objections urged to the admission of the depositions in evidence came from counsel privately employed to assist in the prosecution.

It is further contended that the evidence is insufficient as to each of the defendants to sustain the conviction.

With this contention the court cannot agree. The evidence against the defendant Earl Blanchard is sufficient, but if, upon a retrial of this case, the state is unable to produce additional evidence against the defendant Mrs. Earl Blanchard, the prosecution as to her ought in justice to be dismissed. We discover no evidence against her sufficient to authorize her conviction as an accomplice in the killing of Stricker.

For reasons stated, the conviction as to each defendant is set aside, and the cause remanded to the district court of Ottawa county for another trial, and the warden of the state penitentiary is directed to surrender the defendants Earl Blanchard and Mrs. Earl Blanchard to the sheriff of Ottawa county upon proper demand.

DOYLE, P. J., and BESSEY, J., concur.

VANN v. STATE. (No. A-3738.)

(Criminal Court of Appeals of Oklahoma,
May 29, 1922.)

(Syllabus by the Court.)

1. Forgery \S 44(1/2)—Evidence not showing that accused committed or aided the forgery, but that he conspired to obtain its proceeds, insufficient.

Where a criminal statute defines the crime of "forgery" as the doing of some particular act or acts, the accused will be held amenable for the doing of only such acts as come properly within the definition; and where the evidence fails to show that the accused committed the forgery, or aided or abetted in its commission, but shows that the accused, after the forgery was complete, conspired with the forger and others to obtain the proceeds of the forgery, the accused will not be held amenable for the original offense.

2. Forgery \S 21—Party not committing or aiding in commission of forgery, but conspiring to obtain proceeds thereof, is accessory after fact.

Under such circumstances, under our statute, he is an accessory (after the fact) only, and cannot be prosecuted as a principal, jointly or separately, for the original forgery.

Appeal from District Court, Muskogee County; Benjamin B. Wheeler, Judge.

Billy Vann was convicted of forgery in the first degree and sentenced to seven years' imprisonment in the state penitentiary, and he appeals. Reversed.

Gavin & Porter, of Muskogee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. Billy Vann, in this opinion referred to as the defendant, was, jointly with W. A. Rentie, Tom Peters, Freddie Rentie, Roy Rentie, and Rebecca Mays, charged with the crime of forgery in the first degree, by information filed on June 17, 1918. This prosecution grew out of a conspiracy entered into between W. A. Rentie, Freddie and Roy Rentie, Rebecca Mays, and Tom Peters to have Rebecca Mays, a young negro girl, impersonate one Katie Thompson, a Creek freedman allottee of land. It was agreed that Rebecca Mays should sign, execute, and acknowledge a deed to 80 acres of the Katie Thompson allotment, and that these conspirators should collect the purchase money, to be divided among themselves for their own use and benefit. Pursuant to this conspiracy, Rebecca Mays represented to J. A. Evans, agent for J. C. Smith, that she was Katie Thompson and pretended to sell this particular 80 acres of land to Smith, impersonating Katie Thompson and signing her name to the deed, ac-

knowledging its execution as Katie Thompson, and receiving therefor a part of the agreed purchase price from Evans. The balance of the purchase price, about \$1,100, was to be paid so soon as the abstract of title was examined and approved.

After the forgery of this deed as stated, on the 18th day of May, and after the deed had been delivered and recorded on the 20th day of May, Evans, the agent of the grantee named in the deed, not being satisfied that the grantor was indeed Katie Thompson, inquired of Billy Vann, this defendant, whether he knew Katie Thompson. The defendant stated that he knew Ned Thompson well and knew that he had a daughter. The evidence is conflicting as to whether the defendant knew that the daughter's name was Katie. In order to avoid paying the balance of the purchase price to the wrong person, on the 21st day of May Evans requested the defendant Vann to go with him to the place where Rebecca Mays was staying in Muskogee, for the purpose of identifying her as Katie Thompson. Evans, Fred Rentie, W. A. Rentie, Tom Peters, and the defendant drove to the place where Rebecca Mays was, and the defendant identified her, or partially identified her, as being Katie Thompson. There is evidence tending to show that for this identification Vann was to be compensated by payment to him of a part of the unpaid balance of the purchase price.

Later, upon further investigation, Evans ascertained that Rebecca Mays had impersonated Katie Thompson, and he thereupon caused the arrest of all the parties implicated in the conspiracy. Fred Rentie, Roy Rentie, and Rebecca Mays pleaded guilty to the information. As to what disposition was made of the charge against the other defendants does not appear of record here.

[1] The charging part of the information upon which the conviction of this defendant was based recites that the defendants, naming them, did on the 17th day of May, 1918, knowingly, willfully, unlawfully, fraudulently, falsely, and feloniously make and forge a certain deed and instrument in writing, the same purporting to be the act and deed of one Katie Thompson and purporting to convey the rights and properties of the said Katie Thompson in the land described therein, with the unlawful and felonious intent to defraud J. C. Smith.

It is urged by the defendant that there is no testimony in this record indicating that he was in any way connected with the original conspiracy to forge this instrument; and that he had nothing whatever to do with the transaction until after the instrument was forged, delivered, and recorded; and that the testimony is therefore wholly insufficient to support the verdict as to this defendant, finding him guilty of forgery.

A careful examination of all the evidence supports the claim that this defendant had nothing whatever to do with this transaction until after the deed had been forged, delivered, and recorded. This brings us to the question of whether the defendant can be held upon a charge of forgery where he participated only in the fraudulent scheme to procure money by reason of a forged deed, after the deed had been uttered, delivered, and recorded by means of the scheme perpetrated by the original conspirators.

Section 2104, R. L. 1910, is as follows:

"All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present are principals."

Section 2105 defines "accessories" as follows:

"All persons who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, are accessories."

Section 2107 provides for the punishment of accessories:

"Except in cases where a different punishment is prescribed by law, an accessory to a felony is punishable by imprisonment in the state penitentiary not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

It will be observed that this defendant was not prosecuted as an accessory, but was prosecuted as a principal, under section 2621, R. L. 1910, which is, in part, as follows:

"Any person who, with intent to defraud, forges, counterfeits or falsely alters:

"First. Any will or codicil of real or personal property, or any deed or other instrument being or purporting to be the act of another, by which any right or interest in real property is, or purports to be, transferred, conveyed or in any way changed or affected.

"Is guilty of forgery in the first degree."

The gist of the offense under this section of the statute is the uttering of the false or forged instrument, coupled with the intent to defraud. Actual fraud need not in fact be alleged or proved. The crime is complete so soon as the false or forged signature is made, with the fraudulent intent, even though that intent may fall of realization. *Arnold v. State*, 15 Okl. Cr. R. 519, 178 Pac. 897; 26 Corpus Juris, 906, 907; 12 R. C. L. 152.

In the case of *State v. Lingafelter*, 77 Ohio, 523, 83 N. E. 897, it was held that, according to the Ohio statutes (like our own), whoever before the consummation of an offense aids, abets, or procures another to com-

mit the offense, may be prosecuted and punished as if he were the principal offender; but that, where one is indicted and placed on trial for the crime of forgery, and the evidence fails to show that the accused committed the forgery or aided and abetted in its commission, but tends to prove that said offense had been committed by another and that the accused person performed acts in the interest of the forger for the purpose of covering up his forgery and of preventing his detection and punishment, such person cannot be convicted of the forgery. We see no distinction in the application of the principle under consideration where a forgery is committed by a number of persons acting together and where the forgery was committed by one acting alone. If Rebecca Mays, acting alone, had committed and consummated this forgery, clearly a subsequent conspiracy formed at a later day with Billy Vann to divide the benefits of the forgery would not have made him a party to the forgery.

Now, if the defendant and original conspirators had been charged with the crime of false pretense or with criminal conspiracy, any person joining in, aiding and abetting in the unlawful enterprise before its consummation would be guilty as a principal; but this rule of law cannot be invoked where the crime charged is one that has been fully consummated and the criminal object of the conspiracy to commit the crime charged is at an end before the defendant is in any way implicated in the enterprise, or has any knowledge of it; any person who thereafter seeks to profit by reason of the unlawful enterprise is guilty, if at all, of some other offense. *State v. Lingafelter*, supra.

If there are two or more independent felonious conspiracies entered into by some of the parties, the participants in either will be held for the results of only the conspiracy in which he may have participated, and will not be held accountable for another conspiracy with which he was not connected, although some of the parties took part in both conspiracies.

Under our statute above quoted, section 2104, R. L. 1910, making accessories before the fact principals, there are two things that must concur in order to justify the conviction of one as an accessory before the fact: First, he must have advised or urged the parties, or in some way aided them to commit the offense, although not present when the offense was committed; second, the crime must have actually been committed by the principal.

[2] All persons who, after the commission of the felony, conceal or aid the offender, are accessories. From this it will be seen that an accessory after the fact, the only kind known under our law, is not an accomplice nor a coconspirator. One indicted

for the crime of robbery as a principal cannot be convicted of the offense charged in the indictment if the evidence shows that he was only an accessory after the fact. *People v. Gassaway*, 28 Cal. 405; *Bradley v. State*, 2 Ga. App. 622, 58 S. E. 1064; *People v. Chadwick*, 7 Utah, 134, 25 Pac. 737.

There is an important and material difference between an accessory before the fact, in our state a principal, and an accessory after the fact. If the accused is found guilty as an accessory to the crime before its commission, he may be punished as a principal; but, if a person be found guilty as an accessory after the fact, the statute provides another procedure and penalty. *State v. Phillips*, 18 S. D. 1, 98 N. W. 171, 5 Ann. Cas. 761, and notes; *State v. Umbie*, 115 Mo. 452, 22 S. W. 378; *Wharton's Crim. Evidence*, § 440; 1 R. C. L. 148.

Where a criminal statute by express terms defines a crime as the doing of some particular act, the accused will be held amenable for the doing of only such acts as come properly within the definition. An accessory, under our statutes, is not so connected with the crime, and is only connected with the offender and his interests after the offender has committed the original offense. Accessories therefore cannot be guilty of the commission of the main offense. *State v. Strong*, 52 Tex. Cr. R. 133, 105 S. W. 785.

In this case there is nothing in the record to show that this defendant had anything to do with or had any knowledge of the execution of the forged deed or of the scheme to forge such instrument prior to its execution, acknowledgment, and delivery. He became implicated in the affairs of these conspirators after the deed was delivered and recorded, by forming and entering into another conspiracy with those implicated in the forgery, whereby they were to procure the balance of the purchase price of the land. By his conduct in confirming the statements of those concerned in the forgery, to the effect that Rebecca Mays was in fact Katie Thompson, he secured a further payment on the purchase price of the land, and the conspirators expected thereby to procure the entire balance of such purchase price.

The defendant was not charged as an accessory after the fact or with criminal conspiracy to defraud, as principal. He was charged with forgery in the first degree. The evidence and the instructions of the court related to that offense alone. The court instructed the jury, in part, as follows:

"Any person who, with intent to defraud, forges, counterfeits, or falsely alters any deed or other instrument purporting to be the act of another, by which any right or interest in real property is, or purports to be, transferred, conveyed, or in any way changed or affected, is guilty of forgery in the first degree."

To the same effect are the allegations in the information. It follows, therefore, that before this defendant can be held for forgery he must in some way be shown to have been culpably implicated in the forgery or the conspiracy to perpetrate the forgery before it was consummated. An independent crime or conspiracy to profit by the forgery after its consummation will not relate back to the original conspiracy, so as to make him a principal as an aider or abettor.

We conclude, therefore, that the defendant, Billy Vann, was not guilty of the crime of forgery by aiding and abetting those implicated in this forgery, for the simple reason that he did not join in or aid in that transaction. The evidence does disclose a culpable and felonious intent to defraud, for which he should have been prosecuted in an appropriate separate action. For the reasons stated, the other errors urged by the defendant need not be noticed.

The cause is reversed and remanded for further action not inconsistent with this opinion.

DOYLE, P. J., and MATSON, J., concur.

HOLLINGSHEAD v. STATE. (No. A-3831.)

(Criminal Court of Appeals of Oklahoma.
May 3, 1922. Rehearing Denied June 7,
1922.)

(Syllabus by the Court.)

1. Criminal law §423(1)—Declarations of conspirators touching conspiracy and before its consummation or its abandonment are competent against coconspirator.

After a conspiracy is shown to exist all acts of the conspirators in furtherance of the conspiracy, and all declarations of the conspirators, or any of them, touching upon the subject of the conspiracy before the object of the conspiracy is consummated or its purposes abandoned, are competent against the one on trial.

2. Criminal law §372(5)—Where conspiracy exists evidence of thefts preceding the particular theft held admissible.

Where there is a conspiracy to perpetrate a series of systematic thefts, and the thefts are consummated pursuant to the conspiracy, and the accused is prosecuted for one particular theft of the series, evidence of the thefts preceding the particular theft, as well as of those following, so long as the conspiracy continues, are competent to explain motive, intent, a common scheme or plan, elucidating the circumstances of the particular crime charged.

3. Criminal law §424(6)—Testimony of independent theft not part of conspiracy is inadmissible.

Testimony concerning an independent theft of an automobile committed by a coconspirator

for the purpose of fleeing from justice or for his own use, not a part of the conspiracy, is inadmissible.

4. Criminal law §511(2)—Accomplice's testimony must be corroborated in a way to connect defendant with the offense.

The testimony of an accomplice, to sustain a conviction, need not be corroborated in every particular in detail. The rule is that the testimony of an accomplice must be corroborated by such other evidence of material parts of his testimony as will tend to connect the defendant with the commission of the offense.

5. Criminal law §1169(7)—Evidence of independent theft by coconspirator held not prejudicial.

The evidence concerning an alleged independent theft by a coconspirator examined, and held not prejudicial.

Appeal from District Court, Garfield County; James B. Cullison, Judge.

J. V. Hollingshead was convicted of the larceny of an automobile and sentenced to a term of 15 years in the state penitentiary, and he appeals. Affirmed.

H. J. Sturgis, of Enid, for plaintiff in error.

Geo. F. Short, Atty. Gen., and R. E. Wood, Asst. Atty. Gen., for the State.

BESSEY, J. J. V. Hollingshead, plaintiff in error, in this opinion referred to as the defendant, was on January 15, 1920, in the district court of Garfield county convicted of the larceny of a Buick automobile on July 8, 1919, and by the judgment of the court rendered on the verdict, February 15, 1920, his punishment was fixed at confinement in the state penitentiary at McAlester for a term of 15 years. After the overruling of a motion for a new trial the defendant appeals.

The outstanding facts gleaned from this record tend to show that C. C. Blasdel, W. W. Garrett, Quincy Kygar, the defendant, Hollingshead, and state's witness, O. R. Sams, during the summer of 1919 were implicated in the theft of a large number of automobiles, their bases of operation being at Enid, Okla., and Kansas City, Mo. Oscar Sams was a married man of about 25 years of age, a farmer who for several years lived on a farm near the eastern line of Garfield county. The defendant Hollingshead, formerly lived on a farm near Hayward, in the eastern portion of the same county. Prior to the summer of 1919 these two had known each other for some four or five years. In February, 1919, defendant, Hollingshead, was employed by Blasdel as an automobile mechanic. Blasdel at this time had an interest in an oil lease some distance from Enid, where he had an office. He was also engaged in selling oil stock and in buying

and trading secondhand automobiles. Hollingshead's duties were to repair and care for these cars, make trips to this oil lease and elsewhere, and do such other miscellaneous work as Blasdel might require.

Oscar Sams, as chief witness for the state, testified that in the month of May, 1919, he and defendant Hollingshead met on the streets of Enid and there had some conversation about a new Ford car parked near by in the street, and that in the course of this conversation Hollingshead told him that if he would bring in Ford cars of that character and put them in Blasdel's barn he or Blasdel would pay Sams \$125 for each car so delivered; that Sams finally agreed to this proposition, and, pursuant to the arrangement, went to the town of Garber and stole a practically new Ford car belonging to a Mr. Leslie. He brought this car to Enid, where Hollingshead was waiting for him, and they together put the car in Blasdel's garage. A short time thereafter Blasdel sold this car to a Mr. Hoff, a farmer near Garber. In the meantime the number on the engine block had been filed off and changed. Later the car was recovered from Hoff and restored to the owner.

Thereafter numerous cars were stolen by Sams at various times and places and delivered to Blasdel at this barn or garage, or at the barn of V. W. Garrett, if Blasdel's barn did not have room for them. In nearly every instance the numbers on the engine block were filed off and other numbers substituted. This process was termed "vaccination" by the conspirators. Later on it was agreed by Sams, Hollingshead, and Blasdel that Sams should procure better and higher priced cars, and the base of delivery and distribution was changed from Enid to Kansas City.

The particular car here in question, being a Buick car belonging to a Mr. Gannon, of Enid, was stolen by Sams from the streets of Enid and immediately driven by him to Kansas City, where he arrived about noon on July 9th and placed the car in the Cook & Nelson Garage, pursuant to a previous understanding with Blasdel. At this time both Hollingshead and Blasdel were in Kansas City, and on the afternoon of July 9th defendant, Hollingshead, Blasdel, Sams, and one "Blackie" Jones took this car from the garage out into the country and changed the engine number and the car number with tools and dies which they had taken with them for that purpose. This car was sold by Blasdel to S. Hermans, a tailor in Kansas City, on July 10th, and was later recovered from him by Gannon, the owner.

It would extend this record unnecessarily to relate in detail the circumstances of the theft of each of the 12 or 15 cars which were stolen, handled, and recovered during the

months of June and July, 1919. Over the objections of the defendant, Sams was permitted to testify to the theft of another car on July 14th, several days subsequent to the theft of the Buick car here in question. This car was also put in the Blasdell Garage, and on the 15th he put yet another stolen car in this garage. These cars were both sold and recovered later. After the recovery of some of the stolen cars sold by Blasdell, Blasdell was arrested in Kansas City and brought back to Enid on July 22d, charged with automobile theft.

The testimony of Sams, a confessed accomplice in this conspiracy to steal automobiles, was corroborated in many details by the admissions of defendant, Hollingshead, Blasdell, and by the testimony of disinterested witnesses, some of which were as follows:

Mrs. H. S. Cook, wife of one of the proprietors of the Cook & Nelson Garage in Kansas City, testified that Blasdell and Hollingshead were together a number of times at the garage about the 9th and 10th of July, 1919. She identified Sams as the man who brought in one or two cars which were afterwards shown to be stolen property, one of these cars being the Buick here in question. She identified a check or ticket made out by her and placed on this particular Buick car, showing the date of its reception and the hour at which it was taken out and the hour when returned, with the notation on the card, "Blasdell Buick;" that Blasdell had told her that he was looking for some cars in, which he claimed he was getting in trades.

Harry Doyle, a police sergeant at Kansas City, testified that Blasdell when arrested had a grip with dies in it, such as were used in stamping numbers on automobile engine blocks. In this he was corroborated by Policeman Allen, of the Kansas City police force, who testified further that these dies fitted exactly the changed numbers on the engine and on the frame of the Buick car in question.

A part of the register of the Kupper Hotel in Kansas City, beginning with the date of July 1, 1919, and extending to July 15th, was introduced in evidence, showing the names of Blasdell, Kygar, O. R. Sams and "Slim Hollingsworth" as being registered there on the dates on which Sams testified to meeting these men in Kansas City.

With reference to transactions at Enid, G. M. Bellaires, a deputy sheriff for Garfield county, testified that he found a stolen car in Blasdell's garage, that when he found it the numbers on the car had not been changed, and that during the time he was returning to town to get another driver for his car the stolen car disappeared from the garage. This was one of the cars Sams testified to having taken, and the car was afterwards found on the streets of Enid, identified, and recovered by the owner.

Defendant, Hollingshead, admitted that he was working for Blasdell from February until July 17, 1919; that he was employed to do any work needed on Blasdell's cars; that at this time Blasdell was engaged in handling secondhand cars; that he went to Kansas City on the evening of July 7th to drive back a Dodge roadster for Blasdell; that Kygar went with him to drive down a Cadillac roadster from some point in Nebraska. Defendant admitted sleeping at the Kupper Hotel the night of July 8th, as shown by the register. Defendant admitted getting a car out of Blasdell's barn in Enid, in Blasdell's absence, and selling it on the authority of a long-distance telephone call from some unknown party. He admitted that this car had afterwards been identified as stolen property, and that he and Blasdell had been sued jointly for the recovery of the purchase price of this and other stolen cars. He also admitted that he was familiar with the use of dies to change numbers on engine blocks, and that he had made a number of such changes on cars not mentioned in Sams' testimony.

C. C. Blasdell, as a witness for the defendant, admitted receiving in Kansas City both the Buick car here in question and a Cadillac car which Sams testified to having stolen in Enid. He stated, however, that he purchased these cars, or traded oil stock for them, from two individuals, Mullens and Ward, neither of whom were produced in court. He admitted telling Mrs. Cook at the garage in Kansas City that he was expecting some cars in. He also admitted that a number of cars which he sold to various persons were subsequently recovered by the owners as stolen cars, and that he had been sued in a number of instances for the purchase price of such cars.

A further recital of corroborating testimony seems unnecessary. Sams' testimony, on the whole, was amply corroborated, showing that a conspiracy existed among Sams, Hollingshead, Blasdell, and others to systematically steal and dispose of stolen cars.

There was testimony admitted concerning the theft of another Buick car by Sams after the arrest of Blasdell, about August 1st. This car may have been stolen by Sams for his own use and benefit, and not in furtherance of his previous conspiracy with Hollingshead and Blasdell. At this time Sams knew that Blasdell was in trouble about stolen cars, and Sams possibly stole this last car in order to make his escape to Colorado, where he went with the car—maybe for a much-needed rest and for recreation after his strenuous operations of the month previous. On the other hand, there was some reason to believe that he took this car with the intention of returning so soon as it was safe to do so and resume his operations with the defendant and Blasdell.

[1-3] It is earnestly contended by counsel

for defendant that all of the evidence concerning the theft of the cars taken subsequent to the date of the alleged theft of the Buick car charged in the information, and particularly concerning the theft of this last car in which Sams made his trip to Colorado, was concerning independent thefts, not connected with the conspiracy, and that the reception of this testimony was highly prejudicial to the rights of the defendant.

There is nothing shown in evidence definitely indicating just when the operations of this conspiracy ended or were to end. This was not a conspiracy to steal merely this particular Buick car here in question; it was a conspiracy to steal as many cars as could be safely stolen, and there was no time fixed as to when the joint enterprise should end. Sams testified that after Blasdel got into trouble he told Sams to go ahead and get other cars as he had been doing, but to do so under circumstances indicating that Blasdel was the victim of a frame-up. We think the evidence, in connection with all the surrounding circumstances, was sufficient to indicate that this conspiracy had not ended, and that the evidence of the theft of this last car may have been admissible on this theory.

We do not intend to depart from the previously announced rule of this and other courts that acts done by a coconspirator, after the object of the conspiracy has been accomplished, are inadmissible in evidence against other coconspirators, unless the acts are so closely connected with the accomplishment of the object as to be explanatory of the common purpose. *Koontz v. State*, 10 Okl. Cr. 553, 139 Pac. 842, Ann. Cas. 1916A, 689; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, notes 487; 12 C. J. "Conspiracy," §§ 228-230.

Without deciding whether this evidence was admissible or not, we think that under the circumstances here its reception was not prejudicial to the defendant. Among other reasons, we are justified in this conclusion by the fact that in a companion case, being case No. A-3790, *Hollingshead v. State*, 207 Pac. 108, just decided, but not yet officially reported, this same defendant was tried for the theft of the Cadillac car mentioned in this record, being one of the series of thefts appearing in this record, the state avoided any reference to the theft of the Buick car

taken by Sams to Colorado; yet counsel for defendant, the same attorney representing the defendant in this case, on cross-examination of Sams examined him in detail as to the theft of this Buick car last stolen, evidently for the purpose of attacking his credibility as a witness by showing that he was a thief on his own account.

[4, 5] It has been often held by this court that the testimony of an accomplice need not be corroborated in every particular. The corroboration is sufficient if it covers the material portions of his testimony. If such corroboration shows that the accomplice has testified truthfully in many particulars, the jury will be justified in inferring that he has testified truthfully concerning other matters about which there is no corroboration. Section 5884, R. L. 1910; *Ryal v. State*, 16 Okl. Cr. 266, 182 Pac. 253; *U. S. v. Lancaster* (C. C.) 44 Fed. 896, 10 L. R. A. 333.

Complaint is made of certain language used in instruction No. 9, viz.:

"But evidence of other crimes is competent to prove the specific crime charged when it tends to establish motive, intent, * * * a common scheme or plan of two or more crimes so related to each other that proof of one tends to establish the other."

The language just quoted, considered along with the two instructions which immediately follow, relating to conspiracy and the testimony of accomplices, fairly states the law applicable to this case.

One cannot read this record without being impressed that the defendant, Sams, and Blasdel were members of an organized syndicate engaged in the systematic theft of automobiles. Twelve or fifteen stolen cars, including the car here in controversy, were handled by these men in the course of one month. So far as this record discloses, with the possible exception of one car, this seems to have constituted the total business for that period.

As we see it, the testimony of Sams was amply corroborated in many material particulars by disinterested witnesses, by record evidence, and by the admissions of the defendant and of his witnesses.

The judgment of the trial court is therefore affirmed.

DOYLE, P. J., and MATSON, J., concur.

HOLLINGSHEAD v. STATE. (No. A-3790.)

(Criminal Court of Appeals of Oklahoma.
May 6, 1922. Rehearing Denied
June 7, 1922.)

(Syllabus by the Court.)

1. Larceny \S 55—Evidence held to indicate systematic organized conspiracy to steal automobiles.

The evidence examined, and held indicative of a systematic, organized conspiracy between defendant and others to steal automobiles, among others, the car here in controversy.

2. Criminal law \S 371(2, 12), 372(5)—Evidence of theft of other cars held admissible.

Evidence of the theft of other cars about this time, pursuant to this conspiracy, was properly admitted.

3. Criminal law \S 423(6), 511(1)—Testimony of accomplice held sufficiently corroborated.

The testimony of an accomplice, a witness for the state, was sufficiently corroborated.

Appeal from District Court, Garfield County; J. C. Robberts, Judge.

J. V. Hollingshead was convicted of the larceny of an automobile, and he appeals. Affirmed.

H. J. Sturgis, of Enid, for plaintiff in error.

Geo. F. Short, Atty. Gen., and R. E. Wood, Asst. Atty. Gen., for the State.

BESSEY, J. J. V. Hollingshead, plaintiff in error, was on the 3d day of December, 1919, in the district court of Garfield county, convicted of the larceny of a Cadillac automobile on July 6, 1919, and his punishment was fixed at confinement in the state penitentiary at McAlester for a term of 12 years. After the overruling of a motion for a new trial plaintiff in error appeals.

[1-3] The record in this case is voluminous, containing 811 pages. This is a companion case to case No. A-3831, 207 Pac. 104, just decided by this court, not yet officially reported, involving the same parties and the same or similar facts and chain of circumstances, growing out of the alleged theft of a large number of automobiles by the plaintiff in error and his accomplices. Without reciting the facts in detail, it is sufficient to say that the evidence contained in the record strongly indicates that the Cadillac automobile in question was stolen by the plaintiff in error, acting with a band of coconspirators, organized for the purpose of stealing this and other cars and operating under a definite plan and system. Within a month or a little over, from the latter part of May until early July, 1919, this band handled 12 or 15 stolen cars, among them the car here in controversy.

According to the testimony on the part of

the state, this car was taken from the garage of the owner, Eugene McConkey, at Enid, about midnight of July 6, 1919, by the plaintiff in error and Oscar Sama. When they first attempted to remove the car, they found the ignition locked, so that it could not be moved under its own power. The car was moved some distance away, where the ignition switch was taken apart and rewired, so as to enable them to run the car by means of its own mechanism. The tank was then filled with gasoline and the car was driven by Sama to Kansas City, and there delivered to another accomplice, Blasdell. Within a day or two the car was sold in Kansas City by Blasdell, and later recovered by the owner.

To give all the details of this conspiracy, including the theft of the several different cars, the methods of operation of this band of conspirators, and the corroborating circumstances, would prolong this opinion to an unnecessary length. The testimony in this case is very like the testimony in the companion case referred to above, to which, for the sake of brevity, reference is here made. In this case the testimony corroborating the state's witness Sama, a confessed accomplice, is stronger and more complete than in the companion case. In this case, unlike the other, the testimony concerning the stolen car used by Sama to make a trip to Colorado was brought out on cross-examination of the witness Sama by counsel for the plaintiff in error. This part of the testimony probably operated to the advantage of plaintiff in error and was doubtless brought out by counsel for that purpose. At any rate, it was done at his solicitation, on account of which he cannot now complain.

For the reasons stated above and the reasons stated in the companion opinion, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(63 Mont. 190)

THOMPSON v. BARTON GULCH MINING CO. (No. 4732.)

(Supreme Court of Montana. May 1, 1922.)

1. Mines and minerals \S 14(1)—Statutes as to posting notice of location of claim, etc., required to be substantially complied with.

Rev. Codes 1921, \S 7365, providing for posting of notice of location of a mining claim, sinking of discovery shaft, marking of boundaries, and requiring a statement of the number of feet claimed along the course of the vein from point of discovery, and section 7366, providing for the recording of location certificate in the county clerk's office within 60 days after posting of notice, which certificate must contain in the case of a lode claim "the direction and distance claimed along the course of the vein each way from the discovery shaft, cut or tunnel, with the width claimed on each side of

the center of the vein," must be substantially complied with.

2. Mines and minerals §18—Requirements as to definiteness and certainty of boundaries of location of lode mining claim stated.

Rev. Codes 1921, §§ 7365, 7366, requires that the boundaries of a location of a lode mining claim shall be so definite and certain that, taking the discovery shaft as the initial point, they may be readily traced, and the declaratory statement shall furnish such information that a person of reasonable intelligence may find the claim and run its lines.

3. Mines and minerals §21(4)—Recitals of recorded declaratory statement control as to distances claimed from point of discovery, in absence of actual knowledge of corners.

The recitals in the declaratory statement as recorded in compliance with the law controls as to the distance a locator claims on either side from the point of discovery of a quartz location along the course of the vein, in the absence of actual knowledge of the position of the corners.

4. Mines and minerals §27(1)—Excess territory included in lode mining claim held subject to be included in a claim subsequently filed.

In an action involving boundaries of lode mining claims a finding that an excess in defendant's claim was not included to deceive or defraud, but by inadvertence and mistake in measurement, and that there was no encroachment or infringement on the rights of others, the excess being open public domain, was a departure from the requirement of statute and law forbidding one from shifting his claim in either direction along the length of the lode from the point of discovery and the excess territory was subject to be included in plaintiff's claim subsequently filed.

Appeal from District Court, Madison County; Wm. A. Clark, Judge.

Action by W. O. Thompson against the Barton Gulch Mining Company. Judgment for the defendant, and the plaintiff appeals. Reversed and remanded, with directions to enter judgment in favor of plaintiff.

Pray & Callaway, of Great Falls, and H. P. Beckett, of Virginia City, for appellant.

M. M. Duncan, of Virginia City, for respondent.

GALEN, J. This is an adverse action involving a conflict in the mining locations of the plaintiff and the defendant, comprising fifty-three one-hundredths of an acre. The plaintiff rests his claim to the area in conflict upon a location by him made September 1, 1915, of "the Metallic quartz lode mining claim," and the defendant bases its right thereto upon a location made June 2, 1903, by its predecessors in interest, of "the Marietta quartz lode mining claim." The action was instituted to determine the conflict in consequence of the defendant having applied for patent to "the Marietta claim." The case

was tried before the court without a jury, and resulted in findings of fact and conclusions of law in favor of the defendant, upon which judgment was entered. The appeal is from the judgment.

Many errors are assigned by the plaintiff, all of which may be resolved into the single question whether the court erred in its findings of fact and conclusions of law.

There is no conflict in the evidence. It appears that the Marietta claim was located June 2, 1903, by the predecessors in interest of the defendant company, William Hill, John A. Jordan, and Bert Ferguson, and that in staking the claim on the ground after discovery made the locators made an excessive location of 175 feet in length and about 75 in width. Rev. Stat. U. S. § 2320 (U. S. Comp. St. § 4615). In the declaratory statement recorded in the office of the county clerk and recorder of Madison county, the locators claimed "500 feet in a northeasterly direction and 1,000 feet in a southwesterly direction, along the course of the lead from the point of discovery, where a notice of this location is posted, and 300 feet on each side from the middle or center of said lode or vein at the surface, comprising in all 1,500 feet in length along the course of said vein or lode, and 500 (600) feet in width." On December 28, 1903, Bert Ferguson conveyed his interest in the Marietta claim to Dewey Davies, and on March 6, 1909, William Hill made like conveyance to Davies. Thus Dewey Davies became the owner of an undivided two-thirds interest in the Marietta claim. John A. Jordan left the state, and Dewey Davies entered into the sole and exclusive possession of the property. Davies was living upon or near the claim in August, 1915, doing assessment work, and the plaintiff, W. O. Thompson, was camped a short distance away. The plaintiff prospected the ground to the south of the "Marietta" claim, and with the assistance of Dewey Davies sunk a discovery shaft, posted notice of discovery, and marked on the ground the exterior boundaries of the claim by him named and designated as "the Metallic quartz lode mining claim." In the recorded certificate of location of this claim it is recited:

"The adjoining claims are as follows: On the north the Marietta lode claim. * * * The course of the vein or lode is northerly and southerly, along which the undersigned (plaintiff Thompson) claims 1,280 feet in a southerly direction and 220 feet in a northerly direction from the discovery shaft, together with surface area 300 feet on the east side and 300 feet on the west side of the center of said vein, comprising a tract of 1,500 by 600 feet in size."

At the time of the location of the "Metallic" claim, the plaintiff talked with Mr. Davies, stating that he (plaintiff) did not wish to encroach upon the Marietta claim, and Da-

vies, who was familiar with the corners of the "Marietta" claim, said the ground was open public domain, and exhibited to the plaintiff the original declaratory statement of the "Marietta" claim, which had been recorded in the office of the county recorder. As to the location of the "Metalic" claim, made by the plaintiff, Dewey Davies, as a witness for the plaintiff, testified in part as follows:

"Q. Are you acquainted with the Marietta lode mining claim? A. Yes, sir. Q. And also the Metalic? A. Yes, sir. Q. Do you recall whether you were upon the Marietta ground in the year 1915? A. Yes, sir. Q. Did you see Mr. Thompson during the month of August that year? A. Yes, sir. Q. At that time were you living upon the ground of the Marietta claim? A. I was doing my assessment work. Q. Were you at that time in the sole and exclusive possession of the ground? A. Yes, sir. Q. How long have you been the owner of it, if you were? A. From November, 1903. Q. Up to that time? A. Yes, sir. Q. How about Mr. Thompson coming there? Was he over on the ground with you? A. He was camped a short distance from where I was working. Q. Did you at that time have the original declaratory statement of the Marietta which had been filed of record in the office of the county clerk? A. Yes, sir. Q. It was returned to you and in your possession? A. Yes, sir. Q. Tell the court whether you showed it to Mr. Thompson? A. Yes, sir. Q. You recall Mr. Thompson prospecting the ground southerly of the Marietta? A. I don't understand you. Q. Do you recall his prospecting the ground southerly of the Marietta? A. Yes, sir. Q. Tell the court whether you were familiar with his discovery shaft or not. A. I helped him do some work on it. Q. What sort of a discovery did he make there? A. A shaft. Q. What, if anything, did he find in the discovery shaft? A. Gold. Q. You mean ore-bearing gold? A. Yes, sir. * * * Q. At the time he made his discovery, did you recall his having posted a notice of location on a tree near by the discovery shaft or not? A. Yes, sir. Q. Did he do that or did he not? A. Yes, sir. Q. He did? What, if anything, was done toward marking the boundaries of the Metalic? A. He put up his corners. Q. How far south or southerly from the Marietta discovery shaft was the north end line according to your claim in the recorded notice? A. 1,000 feet. Q. Did you and Bill do anything to determine where that northerly end line was? A. We measured it with a 20-foot pole. Q. Who did that? A. I and Mr. Thompson together. Q. Will you tell the court your method of doing that? A. We used a 20-foot pole and measured it down and leveled it up as near as we could 1,000 feet. Q. Was the country south of the 1,000-foot point claimed by any one else prior to Mr. Thompson's location? A. No, sir. Q. It was open, unappropriated, public domain, was it? A. Yes, sir. Q. What, if anything, did you do to mark that end line between the two claims? A. I just drove a stake down. Q. Were you with Mr. Thompson at any time when he put up or located any corners? A. I helped him put up part of his corners. Q. Which ones? A. His north end line corners. Q. How did you determine that? What meth-

od did you employ to do that? A. We had the apex of the vein, and we just squared it off as near as we could with a box compass. Q. You ran at right angles from the strike of the vein? A. Yes, sir."

And on cross-examination the witness testified in part as follows:

"Q. You knew where your corners were of the Marietta? A. Yes, sir. Q. You knew where both corners were? Did you show those to Mr. Thompson at that time? A. No, sir. Q. You just simply told him that you claimed 1,000 feet south? A. That is it. Q. You knew at that time where the southwest corner of the Marietta was, didn't you? A. Yes, sir. Q. And where the southeast corner was? A. Yes, sir. Q. And are they the same corners that you pointed out to Mr. Pennington? A. Yes, sir. Q. When he surveyed it—when Mr. Thompson made his location and you helped him dig his hole there—did you go to your corners at all? A. No. Q. You did not take Mr. Thompson up there? A. No. Q. You helped him put up the other corners that were put up by Mr. Thompson on all the corners? A. Yes, sir. Q. You helped him on all of them? A. On all of them."

And on direct examination as a witness for the defendant, Davies testified:

"Q. You acquired the Marietta claim, did you, from certain parties? A. Yes, sir. Q. When did you first know the discovery of the Marietta? A. 1903. Q. Who was working it at that time? A. Hill and Jordan. Q. Where was that discovery with reference to the Snowdrift claim? A. The discovery was in a southerly direction from the side line of the Snowdrift. Q. About how many feet would you say? A. It was supposed to be 500 feet. Q. It was located that way? A. Yes, sir; it was located that way. Q. You did not help dig the discovery, did you? A. No, sir. Q. Was there anybody there at the discovery? * * * A. Yes, sir. Q. At the time you saw it? A. Yes, sir. Q. Whose names were signed to the certificate of location, do you know? A. Bert Ferguson, W. A. Hill, and Jordan. Q. That notice said how much ground was claimed, did it? A. Yes, sir. Q. How much did it claim? A. 500 feet northerly and 1,000 feet southerly. Q. Did you know where the corners were at the north end? A. Yes, sir. Q. What was the northwest corner of that claim? A. One was a tree, and one was a post. Q. Which was a tree? A. The northwest. Q. What kind of a tree was it? A. Pine. Q. Was it marked? A. Yes, sir. Q. How was it marked? A. The northwest—I could not say what the numbers were. Q. And the other corners—how was the southeast corner of the claim marked? A. It was a pine tree. Q. A green tree? A. Yes, sir. Q. What size was that? A. About eight inches, I believe. Q. Was it marked? A. Yes, sir. Q. What was it marked? A. I could not see the marks on that. Q. It was blazed, was it? A. It had been blazed; yes, sir. Q. Did any one point that corner out to you? A. One of the old men did. Q. Mr. Jordan and Mr. Hill were the old men? A. Yes, sir. Q. The southwest corner, how was that marked? A. That was a pine tree. Q. What kind of a tree? A. A pine tree. Q. Was

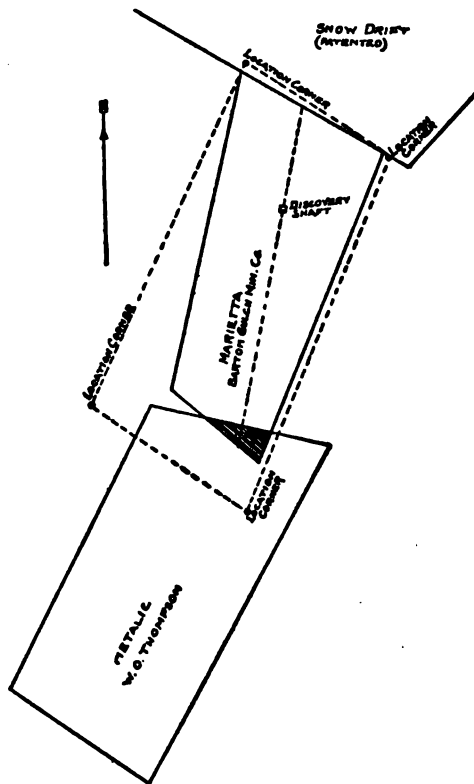
it a live or a dead tree? A. It was a live one, I think. Q. And still alive, is it? A. No; it is dead. Q. Was both of those trees blazed? A. Yes, sir. Q. And marked? This last corner, did you notice the marks on it? A. You could not see the markings. Q. Did you ever remark it? A. No, sir. Q. You knew it was the corner, though? A. Yes, sir."

From the testimony of Davies and Thompson, it appears that at the time of the location of the "Metallic" claim, Thompson did not know the location of the corners of the "Marietta" claim, and that he placed entire reliance upon the declaratory statement of the "Marietta" claim exhibited to him by Dewey Davies and Davies' statements made at the time. The plaintiff, Thompson, testified that he did not know the location of the corners of the Marietta claim, and did not learn of their position on the ground until Mr. Pennington went there to survey the "Marietta" claim for patent. He testified:

"Q. You did not know where the end line of the Marietta was at that time? A. No, sir. I did not. Q. Did you ever know? A. I never did until Mr. Pennington came up and found them. Q. You never tried to find them, did you? A. There is several trees there in that vicinity that was squared up, old trees, and it was pretty hard to find out which one was the Marietta and which one was some other corner. Q. You did not go over to the southwest corner—a big dead tree—with 'Marietta' still marked on it? A. I did not know at that time that that was a corner at all. Q. But you found out later that it was, did you? A. Mr. Davies told me after he made the survey that that was his original corner."

By deed dated July 29, 1918, Dewey Davies conveyed the Marietta claim to the defendant, Barton Gulch Mining Company. The defendant company attempted by advertisement to obtain the title of John A. Jordan to this claim by declaration of a forfeiture of his interest therein for failure to perform or contribute to the performance of required annual representation work. In July, 1918, the defendant, being desirous of securing a patent to the Marietta claim, caused a survey thereof to be made by W. W. Pennington, a United States deputy mineral surveyor, who was assisted in the work upon the ground by Dewey Davies. In consequence of such survey, the defendant made and filed an amended certificate of location of the Marietta claim, December 14, 1918. By such amendment the boundaries of the claim as originally staked on the ground were changed, although remaining within the area as originally marked. By the amended location notice, 392 feet are claimed in a northeasterly direction, 1,108 feet in a southwesterly direction from the discovery shaft. It will be noted that the distance claimed to the north was thus shortened 108 feet, and this amount added to the distance south of the discovery shaft. The relative location

and boundaries of the claims in alleged conflict, the area in dispute, and the original boundaries of the "Marietta" claim, and those after amendment of the location, are well illustrated by the following diagram:



The dotted lines show the original boundaries of the Marietta claim, and the heavy lines show the amendment thereof after survey. The ribbed portion shows the area in conflict in this action. Mr. Pennington, as a witness for the defendant, testified:

"Q. Did you find the corners there in 1918, when you made the survey—the location corners? A. Yes, sir. Q. What corners did you and Mr. Davies find on the ground, Mr. Pennington? A. All of them. Q. All four of the corners? Can you tell us now what kind of a corner you found on the northwest corner; was it a tree? A. It was a pine tree. Q. Was it blazed? A. Yes. Q. Did you notice any marks on it at that time? A. The markings were obliterated; you could not tell what they were. Q. At the northeast corner of the claim what was there? A. A post. Q. Set in the ground? A. Yes, sir. Q. Did you notice whether there was any markings on that? A. There were markings, but you could not read them. Q. The southeast corner, did you find that? A. Yes, sir. Q. What was that? A. That was a pine tree. Q. How big was it? A. About 10 inches, as I remember. Q. Was it blazed? A. Yes, sir. Q. Did you notice any markings on that? A. We could not make them out. Q. The southwest corner, did you find that? A. Yes, sir; that was a dead tree

that had been broken off; it was about 10 or 12 inches high. Q. Was that blazed? A. The bark was off, and it looked as if it might have been off for a good many years; I could not tell you whether it was blazed or not. Q. Was there any markings on it? A. No; I don't think there were; we could not decipher them. Q. You did not see any markings on that at that time? A. I don't remember the markings."

And further, on redirect examination, the witness testified:

"Q. You say it is 675 feet from the southeast corner location of the Marietta to the southwest corner location of the Marietta? How far is it at right angles from one corner to the other, at right angles with the vein? A. About 650 feet. Q. How far is it from the northeast end line of the Marietta to the discovery shaft of the Marietta? A. 392 feet. Q. From the discovery of the Marietta to the southwest end line of the Marietta, will you give that? A. It is 1,108 feet from the discovery of the Marietta to the south end line. Q. As surveyed for patent? A. On the vein line. Q. As surveyed for patent? A. Yes, sir. Q. But as located, how far would it be? A. It would be 1,283 feet."

And on recross-examination, he testified:

"Q. Mr. Pennington, didn't you fix a 1,000-foot point from the shaft of the Marietta to the discovery shaft of the Metallic for Mr. Thompson? A. I believe I did. Q. And didn't he drive an iron pin there? A. I don't think he did at that time. I think I drove a stake there. Q. You had the discovery notice there, didn't you, the declaratory statement? A. Yes, sir. Q. Tell the court why you did not run your end line through that 1,000-foot point, instead of the 1,108-foot point? A. Because I was trying to give my client all that he was entitled to. Q. In other words, you did that in order to give him the whole 1,500 feet on the line of the vein? A. Yes, sir. Q. At that time you were advised by Mr. Thompson that he claimed that land south of the 1,000 feet, and he wanted you to run the line through that? A. Yes, sir. I knew Mr. Thompson was claiming it beyond the 1,000-foot point. Q. When you found the claim on the ground as pointed out to you by Mr. Davies, the end lines were not parallel, were they? A. Very close. Q. The fact is, they were not parallel, were they? A. They were closer than 99 per cent. of the claims you find. Q. Please answer the question. They were not parallel, were they? A. No; I never found one that was. Q. What you did, you were doing as a United States deputy mineral surveyor? A. Yes, sir. Q. What you did was to make these end lines parallel as you could within the ground that you had, in order to comply with the instructions of the government, and thus give the claimant the extralateral rights? That is correct? A. Yes, sir. Q. I will ask you to tell the court if it is not a fact that it is not only permissible, but mandatory under the rules and form of the government, to always pull in end lines to make them parallel, if conditions permit? A. Yes, sir. You can always pull in. Q. If you don't encroach upon the rights of other people? A. Yes, sir. * * * Q. If you had run the claim

392 feet northerly from the discovery shaft, which you did, you would thus have been 108 feet short of the 500 feet claimed in the declaratory statement of your client, would not you? A. Yes, sir. Q. What you did was to simply put 108 feet on the 1,000 feet to make it 1,108; was it not? A. Yes, sir."

The Marietta claim having been surveyed, application for patent was made to the United States Land Office in January, 1919. The plaintiff then filed his adverse claim, and commenced action to have the conflict determined within the time prescribed by law.

The trial court found that—

"The said locators of the Marietta lode mining claim, both in their notice posted on the claim and in their recorded notice, claimed 1,500 linear feet along said vein or lode, 1,000 feet in a southerly direction and 500 feet in a northerly direction from the center of the discovery shaft; that the northern boundary of the said Marietta claim was the south end line of the said Snowdrift lode mining claim, survey No. 4525, patented, and that corner No. 1 of said Marietta lode mining claim was on said boundary line of said Snowdrift lode mining claim, from said corner No. 1, whence said claim ran southerly to the southeast corner No. 2, westerly to the southwest corner No. 3, northerly to the northwest corner No. 4, and thence easterly to the place of beginning. That said claim as marked upon the ground includes approximately 1,650 feet along the said vein, 392 feet of which said vein runs northerly from the center of discovery shaft to the side line of the said survey No. 4525, the Snowdrift lode mining claim, and 1,240 feet southerly from said discovery shaft, making the said Marietta lode mining claim along the vein or lode excessive in length of 132 feet from the amount allowed by law; but said excess was not included in said location for the purpose of deceiving or defrauding any person, but was caused by inadvertence and mistake in measurement, and there was no infringement or encroachment upon the rights of others, the land covered by said excess being at the time of said location and for a long period of years thereafter on public domain of the United States. * * * The said plaintiff, prior to the marking of the boundaries of said Metallic lode mining claim, and following the statement, only in the certificate of location of said Marietta lode mining claim, that the said locators claimed 500 feet in a northerly direction and 1,000 feet in a southerly direction from the center of discovery shaft, and without making any attempt to locate or become familiar with the corner stakes of the said Marietta lode mining claim, or to measure the length of said Marietta lode mining claim from the north end line thereof, in company with Dewey Davies, who at that time was the successor in interest by purchase of the interest of the locators Hill and Ferguson, and who had not been present at the original location of the said Marietta lode mining claim, measured a distance of 1,000 feet southerly from the center of the discovery shaft of the Marietta lode mining claim for the purpose of determining the northern boundary of the said Metallic lode mining claim, and for the purpose of determining where he should estab-

his north end line of his said Metallic lode mining claim, so that the same should coincide with and conform to south end line of the said Marietta lode mining claim, as located on the ground. * * * That upon the survey of said Marietta lode mining claim for patent, it was discovered that the claim was excessive in length, and for the purpose of making the claim conform to the law the south end line of said claim was drawn in to that extent that the said application for patent applied for 1,500 linear feet on the vein or lode of said Marietta lode mining claim, and that after the southern end line of said Marietta lode mining claim was so established, the said plaintiff claimed that said Marietta lode mining claim, as so established by said surveyor and application for patent, conflicted with his said Metallic lode mining claim in an area of fifty-three one-hundredths of an acre, * * * which said premises so in conflict form a part of the Marietta lode as originally marked and staked on the ground, and lies within the lines of said Marietta lode as surveyed, and for which patent is applied."

And as conclusions of law the court found:

"That the original location of the Marietta lode mining claim was valid, in full force and effect at the time the plaintiff located his so-called Metallic lode mining claim. That the plaintiff, when he located his Metallic lode mining claim, knew, or by the exercise of reasonable diligence, could have known, the exact extent of the premises located, staked, and marked upon the ground and claimed by the defendant herein, and its predecessors in interest, as the Marietta lode mining claim. * * * That when the plaintiff located his so-called Metallic lode mining claim, in establishing his end lines failed to make his north end line conform to the south end line of the said Marietta lode mining claim, as staked upon the ground, or otherwise; that the plaintiff in making the location of his alleged Metallic lode mining claim overlapped and infringed upon the surface ground and premises, which were not open to location and belonged to the locators and owners of the Marietta lode mining claim. That the defendant is the owner of and entitled to the possession of all of the lands and premises described in the complaint of plaintiff and the answer of the defendant as the area in conflict between the Marietta lode mining claim as surveyed and the Metallic lode mining claim as located, together with all the dips, angles, and spurs, privileges thereunto belonging, and the extralateral rights allowed by law."

Under the facts as stated, question at once arises decisive of the case as to whether the defendant, whose predecessors in interest staked the Marietta claim upon the ground 1,675 feet in length and 1,283 feet in a southerly direction from the discovery shaft, claiming in the recorded certificate of location but 1,000 feet in a southerly and 500 feet in a northerly direction from the discovery shaft, may now claim and hold 1,108 feet in a southerly direction and 392 feet in a northerly from the discovery shaft.

[1] Section 7365, R. C. M. 1921, provides for the posting of notice of location of a mining claim, sinking of a discovery shaft,

marking of the boundaries on the ground, and requires a statement of the number of feet claimed along the course of the vein from the point of discovery. And section 7366 provides for the recording of the certificate of location in the office of the county clerk of the county wherein the claim is situated, within 60 days after posting the notice of location, which certificate must contain, among other statements:

"In the case of a lode claim, the direction and distance claimed along the course of the vein, each way from the discovery shaft, cut, or tunnel, with the width claimed on each side of the center of the vein."

"It is settled law that such statutory requirements must be substantially complied with. *Gonu v. Russell*, 3 Mont. 358; *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; *Leggatt v. Stewart*, 5 Mont. 107, 2 Pac. 320; *Purdum v. Laddin*, 28 Mont. 387, 59 Pac. 153; *Walker v. Pennington*, 27 Mont. 369, 71 Pac. 156; *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, 104 Am. St. Rep. 683, affirmed in *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; *Hahn v. James*, 29 Mont. 1, 73 Pac. 965; *Wilson v. Freeman*, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *Dolan v. Passmore*, 34 Mont. 277, 85 Pac. 1034; *Helena Gold & Iron Co. v. Baggaley*, 34 Mont. 464, 87 Pac. 455; *Butte Northern Copper Co. v. Radmilovich*, 39 Mont. 157, 101 Pac. 1078.

[2] The statute requires that the boundaries of a location shall be so definite and certain that, taking the discovery as the initial point, they may be readily traced; and the declaratory statement shall furnish such information that a person of reasonable intelligence may find the claim and run its lines. *Hauswirth v. Butcher*, supra; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869; *Leveridge v. Hennessey*, 48 Mont. 58, 135 Pac. 906.

In the case last cited, this court, speaking through Mr. Justice Sanner, said:

"While neither mathematical precision as to measurements nor technical accuracy of expression is expected, the degree of accuracy that is required is indicated by the fact that the locator after his discovery had 30 days in which to definitely ascertain the course of the vein and mark his boundaries and 30 days more in which to file his declaratory statement describing his claim so that it could be identified. *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037. That degree of accuracy is not met if the description given is so erroneous as to be delusive and misleading, as when the declaratory statement and the markings upon the ground do not even approximately agree as to the general shape of the claim or as to any point, direction, or distance. *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725."

The purpose of our statutory requirements relative to the location of mining claims is

well stated in *Hauswirth v. Butcher*, supra, wherein the court said:

"Before there can be a valid location there must be a discovery. Taking the discovery as the initial point, the boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law. Otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice, and would be equivalent to no boundaries at all. A discovery entitles the person making the same to a mining claim, embracing the discovery, not to exceed 1,500 feet in length by 600 in width. Within these limits, if the boundaries are properly marked on the ground, and the location properly made and recorded, the grant of the government attaches, and third persons must take notice. But they would not be required to look for stakes or boundaries outside of, or beyond, the utmost limits of the location as authorized by the statute.

"As to the length of a mining claim, there must be a substantial compliance with the law, as there must in all other respects pertaining to the location. The claim in question, as shown by the stakes and boundaries thereof, is 2,000 feet in length, whereas the greatest length, as authorized by law, is 1,500 feet. If such a location could be sustained to the extent of 1,500 feet, where the rights of third persons had not intervened, which we do not decide, certainly, if such rights had attached, such a location would not protect 500 feet in length of claim more than the law authorizes by virtue of one discovery. A 1,500-foot claim cannot be shifted from one end to the other of a 2,000-foot claim, as circumstances might require, to cover the discovery of a third person within such 2,000-foot location. 'The object of the law in requiring the location to be marked upon the ground is to fix the claim, to prevent floating or swinging, so that those who, in good faith, are looking for unoccupied ground in the vicinity of previous locations, may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. The provisions of the law designed for the attainment of this object are most important and beneficent, and they ought not to be frittered away by construction.' *Gleason v. Martin White M. Co.*, 13 Nev. 462.

"The locator should make his location so certain that the miners who follow him may know the extent of his claim, and be able to locate the unoccupied ground without fear that, when they have found a paying mine, the theretofore indefinite lines of some prior location may be made to embrace it.' *Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 449."

In the case of *Leggatt v. Stewart*, supra, the case of *Hauswirth v. Butcher*, supra, is reaffirmed, and an instruction given to the jury approved as follows:

"The location must be so distinctly marked on the ground that the boundaries can be readily traced, and the court instructs you that

a location 263 feet in length in excess of the ground allowed by law to be located is void for uncertainty, and defendants cannot claim to have sufficiently marked their boundaries, if their stakes include 1,763 feet in length."

In the case of *Flynn Group Mining Co. v. Murphy*, 18 Idaho, 266, 109 Pac. 851, 138 Am. St. Rep. 201, the Supreme Court of Idaho, speaking through Mr. Chief Justice Sullivan, in disposing of a case involving similar facts, laid down the correct principle applicable, in the following language:

"The location notice of the Snowdrift claim provides that the lode claim extends from the point of discovery 700 feet in a northwesterly direction and 800 feet in a southeasterly direction. If the parties who located it in fact placed their stakes at the northeasterly and southeasterly corners of said claims so as to take in more ground than called for in the notice, such excess was not and could not be legally included in that location. It is not left to the pleasure of the locator to adjust his boundaries when and where he likes within an excessive location when it will interfere with a subsequent locator.

"Counsel for appellant contends that a locator may cover or include within his location an excessive area of ground and hold it against the world until he gets ready to conform it to the area allowed by the mining laws or until he has the same surveyed for a patent. We recognize the rule that where a claim is excessive in area the location is not void unless the excess is so great as to impress the locator with a fraudulent intent. The intent of the law is to require the locator to make his location so definite and certain that from the location notice and the stakes and monuments on the ground the limits and boundaries of the claim may be readily ascertained, and so definite and certain as to prevent the changing or floating of the claim. This court held in *Burke v. McDonald*, 2 Idaho (Hasb.) 679, 33 Pac. 49, that where the boundary of a claim is made excessive in size with fraudulent intent, it is void; or if so large as to preclude innocent error, fraud will be presumed. *Stemwinder Min. Co. v. Emma & L. C. Con. Co.*, 2 Idaho (Hasb.) 456, 21 Pac. 1040."

And in reaffirming this doctrine the Supreme Court of Idaho, in *Swanson v. Koeninger*, 25 Idaho, 361, 137 Pac. 891, said:

"After a careful consideration of the decision in *Flynn Group Min. Co. v. Murphy*, we cannot escape the conclusion that it is based on the fact that a locator cannot claim a greater length in either direction along the ledge or lode than is called for in his notice of location. In that case, as in the case at bar, the location notice was posted at the discovery and not upon either of the end stakes, and the court said: 'Under that notice, he was only entitled to 800 feet in a southeasterly direction from the discovery point.' The location notice calls for 500 feet in a northwesterly direction from the discovery. The claim as surveyed for patent swings the northerly part from an angle of about 45 degrees to a straight northerly direction from the discovery point, so that the location notice is misleading with respect to

the adjoining claims on the north, the extent of ground claimed northerly from the discovery and with respect to the course of the vein, as well as the direction from discovery. All these points together show that the location notice, instead of performing the function designed by law (that is to say, informing the public of the precise ground claimed thereunder), misleads in every particular when it is made the basis of a claim to the ground included in the patent survey. * * *

"The object of the law in requiring the location' of a mining claim 'to be marked upon the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue." *Gleason v. Mining Co.*, 13 Nev. 442; *Book v. Justice Min. Co. (C. C.)* 58 Fed. 106; *Daggett v. Yreka Min. & Mill. Co.*, 149 Cal. 357, 86 Pac. 968.

"The wisdom of the rule laid down in these cases cannot be questioned, as it is contrary to the policy and spirit of the mining laws to permit a mining claim of excessive size to be staked and then afford the opportunity for the stakes to be shifted at the locator's pleasure to include ground proved to be rich in mineral through the development of other ore bodies."

Mr. Lindley in his work on Mines (3d Ed.) § 362, says:

"Here a lode location is excessive and the area to which a locator is entitled can be determined by measurements following the calls for distances from the discovery contained in the notice of location, it has been held that a subsequent locator may measure the ground cast off and locate the excess. The notice of location, as a rule, specifies the linear distance from the discovery, point, and when it does not, the locator can only claim 750 feet along the vein on each side of the discovery notice. Obviously this is a method which the courts would follow in casting off excess."

See, also, *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; *Bremlett v. Flick*, supra.

[3, 4] The trial court attempted to justify its findings by asserting that the "Marietta" claim, as marked upon the ground, includes approximately 1,650 feet along the vein, 392 feet of which runs northerly from the center of the discovery shaft and 1,240 feet southerly from the discovery shaft, making the "Marietta" "along the vein or lode excessive in length of 132 feet over the amount allowed by law; but such excess was not included in said location for the purpose of deceiving or defrauding anybody, but was caused by inadvertence and mistake in measurement, and there was no infringement or encroachment upon the rights of others, the land covered by said excess being at the time of said location and for a long period of years thereafter, open, and public domain of the United States."

In making such findings, the court depart-

ed from the requirement of the statute and settled law, forbidding one from shifting his claim in either direction along the length of the lode from the point of discovery, so as to interfere with the rights of others. It is obvious that when the plaintiff and Dewey Davies measured 1,000 feet southerly from the discovery shaft on the Marietta to determine the end line of the Marietta, they simply did what Thompson himself could have done under the well-settled principles of law. The fact that Dewey Davies, who then claimed to be the sole owner of the "Marietta," assisted Thompson in making the measurements to determine the end line of the "Metallic" claim, simply emphasizes the fair play which characterized the entire transaction.

In view of the facts and circumstances attending the location of the "Metallic" claim by the plaintiff Thompson, the findings and legal conclusions made by the district court were manifestly unfair, unjust and erroneous. The plaintiff was assisted in locating the Metallic claim by Dewey Davies, who was at the time in actual possession, and the claimant of the "Marietta" claim, adjoining the "Metallic" on the north. Together they measured the distance southerly from the shaft of the "Marietta" claim, and fixed the north end line of the "Metallic" claim, with reference to that which Dewey Davies established as the south end line of the Marietta claim, and, although Davies knew the location of the corner posts of the Marietta claim, he made no reference to them, and did not point the same out to Thompson at the time the latter made the location of the "Metallic" claim. He produced the declaratory statement of the "Marietta" claim as recorded, and reference was made thereto exclusively for the purpose of establishing the south end line of the Marietta claim and the north end line of the Metallic. In fact, the length of the Marietta claim as staked on the ground was 175 feet excessive, and it is manifestly unfair and unjust to permit the defendant by amendment to shorten the distance to the north of the discovery shaft 108 feet and add the same to the south end, more especially in view of the excessive length of the claim as originally staked. The recitals in the declaratory statement as recorded in compliance with the law is, in our opinion, controlling as to the distance a locator claims on either side from the point of discovery of a quartz location along the course of the vein, in the absence of actual knowledge of the position of the location of the corners.

We are of opinion that the area in conflict was open for location under the laws of the United States and the statutes of Montana, at the time that Thompson made his location thereof, and that the district court was in error in making its findings of fact and entering judgment in favor of the defendant. The judgment is reversed, and the cause re-

manded, with directions to enter judgment in favor of the plaintiff.

Reversed and remanded.

COOPER and HOLLOWAY, JJ., and AYERS, District Judge, sitting in place of REYNOLDS, J., disqualified, concur.

(63 Mont. 223)

CONTINENTAL OIL CO. v. MONTANA CONCRETE CO. (No. 5043.)

(Supreme Court of Montana. May 1, 1922.)

1. Statutes \Leftrightarrow 226—Legislature adopting statute of other state presumed to have adopted construction placed thereon.

The Legislature in enacting a statute patterned after that of another state will be presumed to have adopted the construction placed thereon by the highest court of such state as well as the text.

2. Corporations \Leftrightarrow 334—Personal liability of directors for disclaiming illegal dividends in the nature of a penalty.

Rev. Code 1907, § 3837, as amended by Laws 1919, c. 37 (Rev. Codes 1921, § 5939), prohibiting payment of dividends except from the surplus profits and the reduction or increasing of the capital stock, except in specified manner, and making the directors personally liable for violation thereof, imposes a statutory liability in the nature of a penalty for failure to obey the mandate of the law, in view of Rev. Codes 1921, § 6003.

3. Statutes \Leftrightarrow 164—Statute amending existing statute "to read as follows" repeals all portions of former act not repeated in new one.

Where the Legislature declares an existing statute to be amended "to read as follows," etc., the new act is a substitute for the old one, and only so much of the original act as is repeated in the new one is continued in force, and all other portions are repealed.

4. Statutes \Leftrightarrow 276(1)—Repeal of statute takes away all remedies existing thereunder.

In view of Rev. Codes 1921, § 95, the repeal of a statute without any reservation takes away all the remedies existing under the repealed act and defeats all actions pending under it at the time of its repeal, particularly where statute creating cause of action providing a remedy not known to the common law is repealed.

5. Constitutional law \Leftrightarrow 105, 145 — Corporations \Leftrightarrow 326—Statute depriving corporation's creditor of right to enforce debt against directors held not unconstitutional as impairing obligation of contract or interfering with vested rights.

Laws 1919, c. 37 (Rev. Codes 1921, § 5939), amending Rev. Codes 1907, § 3837, so as to deprive creditor of corporation, whose debt was contracted prior to enactment of amendment, of the right to enforce debt against directors who created the debt beyond the subscribed capital stock, held not unconstitutional, to impair the

obligations of contracts, nor to interfere with vested rights, since the directors' liability was not founded in contract and there was no vested interest in an unenforced penalty.

6. Constitutional law \Leftrightarrow 191—Statute depriving corporation's creditor of right to enforce debt against directors held not "retrospective law."

Laws 1919, c. 37 (Rev. Codes 1921, § 5939), amending Rev. Codes 1907, § 3837, so as to deprive creditor of corporation, whose debt was contracted prior to the enactment of amendment, of the right to enforce debt against directors who created the debt beyond the subscribed capital stock, held not violative of Const. art. 15, § 13, prohibiting the enactment of a "retrospective law," since a law is retrospective which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, as there is no vested right in an unenforced penalty (citing 4 Words and Phrases [Second Series] p. 373—Retrospective Law.)

7. Corporations \Leftrightarrow 346—Statute depriving creditors of right of action against directors held applicable to directors whose liability attached prior to enactment; "retroactive"; "retrospective."

Laws 1919, c. 37 (Rev. Codes 1921, § 5939), amending Rev. Codes 1907, § 3837, so as to deprive corporation's creditors of right to enforce debt against directors who created debt beyond subscribed capital stock, held applicable to directors whose liability had attached prior to the amendment, notwithstanding Rev. Codes 1921, § 3, providing that no law is retroactive unless expressly so declared, such amendment not being "retroactive" merely because it disregarded a right of action theretofore existing, the term "retroactive" being synonymous with "retrospective."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Retroactive.]

8. Statutes \Leftrightarrow 271—As to effect of Rev. Codes, held emergency measures to prevent abatement of pending proceedings consequent on their adoption and not applicable to statutes generally.

Rev. Codes 1907, § 8, providing that no action or proceeding commenced before this Code takes effect and no right accrued is affected by its provisions, etc., and section 17, providing for the repeal or abrogation of certain laws, and specifying that "this repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided," etc., held not to constitute a saving clause applicable to statutes generally, but merely constituting emergency measures intended to prevent the abatement of pending proceedings and the loss of existing rights consequent upon the adoption of the Codes.

Appeal from District Court, Silver Bow County; Wm. E. Carroll, Judge.

Action by the Continental Oil Company, a corporation, against the Montana Concrete

Company, a corporation. From order denying plaintiff's application for the appointment of a receiver for the defendant, the plaintiff appeals. Affirmed.

Nolan & Donovan and Harlow Pease, all of Butte, for appellant.

Charles R. Leonard, E. M. Lamb, and F. C. Fluent, all of Butte, for respondent.

HOLLOWAY, J. In an action pending in the district court of Silver Bow county, wherein the Continental Oil Company is plaintiff and the Montana Concrete Company, a corporation, is defendant, an affidavit was filed on behalf of the plaintiff which recites that on March 9, 1918, plaintiff recovered a judgment against the defendant for \$367.81 and costs; that no part thereof has been paid; that execution has been issued and returned unsatisfied; that between January 1, 1916, and December 31, 1918, the directors of the defendant corporation, J. D. Slemmons, James H. King, and D. A. Morrison, incurred debts on behalf of the corporation, including the debt due to plaintiff, exceeding the subscribed capital stock of the corporation by more than \$25,000. Upon this affidavit an application was made to the court for the appointment of a receiver for the defendant, to the end that its right of action against the directors may be prosecuted, the amount of their liability recovered, and plaintiff's judgment satisfied. After a hearing upon an order to show cause, the application was denied, and plaintiff appealed from the order.

During the period when the indebtedness constituting the excess was incurred, section 3837, Revised Codes 1907, was in force. It provided:

"The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they *create debts beyond their subscribed capital stock*, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large in the minutes of the directors at the time, or were not present when the same did happen) are, in their individual and private capacity, jointly and severally liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or *debt contracted*," etc.

[1] On February 21, 1919, section 3837 was amended by eliminating the words in italics (chapter 87, Laws of 1919; section 5839, Revised Codes 1921), and the question is now presented: Did this amendment operate to destroy the right of action which the defendant corporation had against its directors? A statute very similar to section

3837 was enacted in California in 1850 (St. 1850, p. 348, § 13) and with slight changes was carried into the Civil Code of 1872 as section 309. In 1863 the Act of 1850 was construed by the Supreme Court of California, and it was then said:

"This statute provides for making one person individually liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable. Like other statutes which create a forfeiture or impose a penalty, it is to be strictly construed; and every intendment and presumption is in favor of the defendant in such cases." *Irvine v. McKeon*, 23 Cal. 472.

In 1889 section 309 of the Civil Code became the subject of consideration by the same court, and the language quoted above from *Irvine v. McKeon* was approved and adopted. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. When the commissioners appointed to codify the laws of Montana completed the original draft of each of the four proposed codes, they submitted a report in which, among other things, it is said:

"This [Civil] Code is almost entirely taken from the Civil Code prepared by the Hon. David Dudley Field for the Legislature of the State of New York, and the Civil Code adopted by the state of California."

Section 309 of the California Civil Code was appropriated by our commissioners without change and in that form was adopted by the Legislature and became section 438 of our Civil Code of 1895 and was continued without amendment and incorporated in the Revised Codes of 1907 as section 3837 above. It will be seen that we borrowed section 3837 from California after its character had been determined by the highest court of that state, and, under the familiar rule applicable in such cases, we must indulge the presumption that our legislative assembly adopted the construction as well as the text, and intended that the liability imposed upon the offending directors should be treated as a penalty for their violation of the law. *Moreland v. Monarch Min. Co.*, 55 Mont. 419, 178 Pac. 175; *State ex rel. Rankin v. State Board of Examiners*, 59 Mont. 557, 197 Pac. 988.

[2] In principle, there is not any distinction between the liability imposed by section 3837 and that imposed by the companion section (section 451, Civil Code 1895; section 3850, Rev. Codes 1907; section 6003, Rev. Codes 1921) for the failure of the directors to file the required annual report, and beginning with *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18, this court has held consistently that the latter provision is penal in character; that it establishes a new rule of private right unknown to the common law; and that the liability is neither created by contract nor given as compensation for a direct and immediate wrong done by the directors to the cred-

itors. The most recent case affirming the rule is *Butler v. Peters*, 62 Mont. —, 205 Pac. 247. The same reason which prompted the decision in each of the last class of cases compels the conclusion that the liability imposed by section 3837 is purely statutory and is in the nature of a penalty for failure to obey the mandate of the law, and this is in harmony with the decided weight of authority. *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; *Park Bank v. Remsen*, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008; *Savage v. Shaw*, 195 Mass. 571, 81 N. E. 303, 122 Am. St. Rep. 272, 12 Ann. Cas. 806; *Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146; *Leighton v. Campbell*, 17 R. I. 51, 20 Atl. 14, 9 L. R. A. 187; *Steck v. Prentice*, 43 Colo. 17, 95 Pac. 552; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; 4 *Fletcher*, *Cyclopedia Corporations*, § 2597; 14a C. J. 197.

[3] Chapter 37, Laws of 1919, provides:

"That section 3837 of the Revised Codes of the State of Montana of 1907 be, and the same is hereby, amended to read as follows, to wit:" Then follows the section as amended and the conclusion: "All acts and parts of acts in conflict herewith are hereby repealed."

It is the rule in this state, and elsewhere generally, that whenever the Legislature declares that an existing statute is to be amended "to read as follows," etc., it thereby evinces an intention to make the new act a substitute for the old one and that so much only of the original act as is repeated in the new one is continued in force, and all portions omitted from the new act are repealed. *City of Helena v. Rogan*, 27 Mont. 135, 69 Pac. 709; *State ex rel. Jacobson v. Board*, 47 Mont. 531, 134 Pac. 291; *State ex rel. Paige v. District Court*, 54 Mont. 332, 169 Pac. 1180. The effect of the amendment made to section 3837 was to repeal the statute which imposed a liability upon the directors of a corporation for incurring debts beyond the corporation's subscribed capital stock. What effect, if any, had this repeal upon the director's liability existing at the time the new act became effective?

[4] The right of action against the directors recognized by section 3837 was one created by the statute itself, one which did not exist at common law, and the amending statute does not contain any saving clause. It is the general rule that the repeal of a statute without any reservation takes away all the remedies existing under the repealed act and defeats all actions pending under it at the time of its repeal. The rule is peculiarly applicable to the repeal of a statute which creates a cause of action providing a remedy not known to the common law. 38 Cyc. 1228. The principle is in harmony with that declared by our own Codes. Section 95, Revised Codes 1921 (section 294, Pol. Code

1895; section 121, Rev. Codes 1907) declares:

"Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal."

In 38 Cyc. 1227, it is said:

"The repeal of a statute under which penalties recoverable in a civil action have been incurred, will operate to take away all rights to the recovery of such penalties either by the public or by individuals, unless such rights are preserved by a saving clause," etc.

[5] Counsel for plaintiff contend that, if the effect of chapter 37 is to destroy the right of action existing against the directors, it is invalid as impairing the obligation of contract and interfering with vested rights. The answer to this contention is plain. The directors' liability is not founded in contract, and there is not any such thing known to the law as a vested interest in an unenforced penalty. *Gregory v. Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *Bay City, etc., Ry. Co. v. Austin*, 21 Mich. 391; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821.

[6] Again, counsel contend that, if the effect of chapter 37 is to wipe out the existing liability of directors, it violates section 13, art. 15 of our Constitution, which provides:

"The legislative assembly shall pass no law for the benefit of a * * * corporation, or any individual or association of individuals, retrospective in its operation."

We are unable to admit the validity of this contention. "A law is retrospective in its legal sense which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past." 7 Words and Phrases, First Series, p. 6199; 4 Words and Phrases, Second Series, p. 373. As we have observed, there is not any such thing known to the law as a vested right in an unenforced penalty, and, since the only effect of chapter 37 is to relieve the directors of their individual liability for the penalty imposed by section 3837, it does not impinge upon the constitutional limitation above.

[7] Section 3, Revised Codes 1921 (section 3, Pol. Code 1895; section 3, Rev. Codes 1907) declares:

"No law contained in any of the Codes or other statutes of Montana is retroactive unless expressly so declared."

From this, counsel argue that chapter 37 cannot be held to relieve directors whose liability had attached prior to February 21, 1919; but the argument has its foundation in the erroneous assumption that chapter 37 is retroactive merely because it destroys a

right of action theretofore existing. The terms "retroactive" and "retrospective," as applied to laws, are used interchangeably and are synonymous (Century Dictionary; Standard Dictionary; Bairden v. Holden, 15 Ohio St. 207), and, as observed heretofore, chapter 37 does not fall within any well-recognized definition of the terms "retrospective law."

In 4 Fletcher, Cyclopaedia Corporations, § 2607, the character of a statute, such as section 3837, and the effect of its repeal, are discussed at length. It is said:

"It is generally held that such statutes are penal in such a sense that they may be repealed at any time, even after an action has been commenced by a creditor, without violating constitutional prohibitions against laws impairing the obligation of contracts or interfering with vested rights; and that a creditor has no vested right under such a statute against an officer until he has recovered a judgment against him. In such a case, the Legislature may repeal a statute imposing upon directors or other officers a penal liability for corporate debts, not only as against existing creditors, but also as against creditors who have commenced an action, and after the repeal no judgment can be rendered." 2 Thompson on Corporations, § 1331; Credit Men's Adjustment Co. v. Vickery, 62 Colo. 214, 161 Pac. 297.

In support of their contention for a contrary rule, counsel for plaintiff cite 12 O. J. 977; but the subject-matter there dealt with is the liability of stockholders, and counsel fail to distinguish between the character of a stockholder's liability and the liability imposed upon a director as such—a distinction recognized by all authorities. Wiles v. Suydam, 64 N. Y. 173; Flash v. Connecticut, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966.

[8] But counsel for plaintiff insists that we have in this state a general saving statute, and reference is made to sections 8 and 17 of the Revised Codes of 1907. Section 8 provides:

"No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions," etc.

Section 17 provides for the repeal or abrogation of certain laws, and then proceeds:

"This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided," etc.

Like provisions are found in the Codes of 1905 and of 1921. These sections do not in any sense constitute a saving clause applicable to statutes generally. They are, as their very terms suggest, emergency measures intended to prevent the abatement of pending proceedings and the loss of existing rights consequent upon the adoption of the particular Codes, and extend no further.

No action had been prosecuted to judgment against the directors of the Montana Concrete Company prior to the enactment of chapter 37, and, since by the terms of that act their liability was extinguished, no purpose could be served by the appointment of a receiver.

The order is affirmed.

Affirmed.

COOPER and GALEN, JJ., and AYERS, District Judge, sitting in place of REYNOLDS, J., disqualified, concur.

(63 Mont. 241)

LINSE v. ZASTROW. (No. 4802.)

(Supreme Court of Montana. May 1, 1922.
Rehearing Denied June 5, 1922.)

1. Specific performance ⇨114(2)—Complaint held demurrable for failure to show consideration for the contract.

Complaint for specific performance of contract to convey land, specifying the consideration as "the sum of one dollar and other valuable considerations, * * * the receipt of which is hereby acknowledged," not specifying nature of other valuable considerations, held demurrable for failure to show the consideration for the contract.

2. Specific performance ⇨114(2)—Complaint must show consideration for the contract.

Though inadequacy of consideration for a contract to convey land is a matter of defense in suit for specific performance, the complaint in such action must show the consideration for the contract.

3. Vendor and purchaser ⇨21—Contract held not void for indefiniteness.

Contract for conveyance of land, by which purchaser agreed to pay vendor "the sum of one dollar and other valuable considerations (\$——), under date hereof, the receipt of which is hereby acknowledged," held not void for indefiniteness, as against contention that the consideration could not be determined therefrom; the clause "the receipt of which is hereby acknowledged" having reference to "other valuable considerations" as well as to the "one dollar."

4. Contracts ⇨153—Valid construction adopted if possible.

If of two constructions one will render a contract valid and the other void, the valid construction will be adopted if it can be done without violence to the ascertained intention of the parties.

Commissioners' Opinion.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

Action by Louise Linse, as administratrix of the estate of Auguste Zastrow, against August Zastrow. From judgment for plaintiff and from order denying defendant's motion for a new trial, the defendant appeals.

Judgment and order reversed, and cause remanded, with directions.

Belden & De Kalb and Merle C. Groene, all of Lewistown, for appellant.

E. K. Matson and John A. Coleman, both of Lewistown, for respondent.

POMEROY, C. C. This is an action by the administratrix of the estate of the vendee for the specific performance of a contract for the conveyance of land. The contract as set forth in the complaint is as follows:

"This agreement, made and entered into this 13th day of January, 1911, by and between August Zastrow, of Moore, Fergus county, Montana, party of the first part, and Auguste Zastrow, of Moore, Fergus county, Montana, party of the second part, witnesseth:

"That the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and the said party of the second part agrees to buy all that certain lot and parcel of land, including ——— situated in Fergus county, Montana, and described as follows, to wit: The east half of the northeast quarter of section eleven south of the public highway; the northeast quarter of the southeast quarter of section eleven; the east half of the northeast quarter and the east half of the southeast quarter of section fourteen in township fourteen north of range fifteen east of the Montana Meridian in Montana, containing approximately 275 acres for the sum of one dollar and other valuable considerations and the said party of the second part, in consideration of the premises agrees to pay the said party of the first part the sum of one dollar and other valuable considerations (\$——) dollars, on the date hereof, the receipt of which is hereby acknowledged, and ——— (\$——) dollars on or before ———, 19——, and ——— (\$——) dollars on or before ———, 19——, and ——— (\$——) dollars on or before ———, 19——, and ——— (\$——) dollars on or before ———, 19——, all deferred payments to bear interest at the rate of 6 per cent. per annum, and the party of the first part agrees to furnish the party of the second part an abstract of title, showing that he has a fee simple title to the said lands and that it is free from incumbrance, within ——— (——) days after the date hereof, and further agrees that upon receiving the said payments at the times and in the manner above mentioned, that he will execute and deliver to the said party of the second part or to his assigns, a good and sufficient warranty deed of the above described property, and agrees that he will pay all state and county taxes upon the said property for the year 19——.

"It is mutually agreed, by and between the parties hereto, that in the event of a failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligations in law and equity to convey the said property and the said party of the second part shall forfeit all right hereto, and the said party of the first part shall keep and retain the moneys paid thereon for his own personal use, and the same

shall be considered as payment of an option and rents upon the said lands from the date hereof until the time of the failure of the party of the second part to comply herewith.

"It is agreed, by and between the parties hereto, that this agreement and all of the covenants hereof shall extend to and bind the heirs, executors, administrators and assigns of both of the parties hereto.

"In witness whereof, the respective parties hereto have hereunto set their hands and seals the day and year in this agreement first above written.

[Signed] August Zastrow.

"[Signed] Auguste Zastrow.

"Witness:

"[Signed] L. V. Jackson.

"[Signed] Jno. A. Nelson."

The plaintiff in her complaint alleges that, at the time of the execution of the contract, all of the conditions precedent, or otherwise, were duly fulfilled and performed, and the full consideration for the conveyance of the lands was received and acknowledged by the defendant, and nothing further was to be done except to execute a good and sufficient deed for the land. The complaint does not contain any allegation as to what was the consideration for the contract, other than by making the contract a part of the complaint. The sufficiency of the complaint was challenged by general demurrer and by objection to the introduction of any testimony at the trial.

The appeal is from a judgment for the plaintiff and from an order denying defendant's motion for a new trial.

[1, 2] The demurrer should have been sustained. While, in a suit for specific performance, inadequacy of consideration is a matter of defense, it is necessary that the complaint show the consideration for the contract. *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333; *Finlen v. Heinze*, 28 Mont. 548, 78 Pac. 123; *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58.

[3, 4] Counsel for the defendant attack the contract for indefiniteness, contending that it cannot be determined therefrom what the consideration is, or when it is to be paid. It is contended that the clause, "the receipt of which is hereby acknowledged," refers only to that part of the consideration recited as "one dollar" and not to the words following, "and other valuable considerations." This contention cannot be maintained. It is apparent from the language used that the vendor, by the terms of his contract, acknowledged the receipt of the entire consideration, whatever that consideration was. Omitting the characters and word "(\$——) dollars," being one of various blanks in the contract used by the parties, which were not filled, doubtless as not applicable to the agreement they desired to make, and the clause reads:

"The sum of one dollar and other valuable considerations on the date hereof, the receipt of which is hereby acknowledged."

Transpose the clause to read, "the sum of one dollar on the date hereof, receipt of which is hereby acknowledged, and other valuable considerations," the meaning contended for by defendant would be conveyed. "If of two constructions one will render a contract * * * valid and the other void, the former will be adopted, if it can be done without violence to the ascertained intention of the parties." *Finley v. School District No. 1*, 51 Mont. 411, 153 Pac. 1010. See, also, section 7534, R. C. M. 1921.

It will not be necessary to notice the other errors presented by the defendant, as the matters are not likely to arise on another trial of the cause.

The question as to whether an action such as this can be maintained by an administrator was not presented and is not decided.

It is recommended that the judgment and order be reversed, and the cause remanded, with directions to sustain the demurrer to the complaint.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause is remanded to the district court, with directions to sustain the demurrer to the complaint.

AYERS, District Judge, sitting in place of Mr. Justice **REYNOLDS**, being disqualified, takes no part in the foregoing decision.

(32 Mont. 293)

IN RE EXTENSION OF BOUNDARIES OF CROW CREEK IRR. DIST.

Petition of **KIMPTON et al.**

(No. 4760.)

(Supreme Court of Montana. May 8, 1922.)

1. Waters and water courses §226 — Only lands specially benefited may be included in irrigation district against will of owner.

Under Rev. Codes 1921, § 7169, only such lands as will be specially benefited may be included within a proposed irrigation district against the will of the owner.

2. Constitutional law §290(3)—Waters and water courses §216—Inclusion of nonconsenting owner's land in irrigation district may be effected only by due process of law.

The inclusion of a particular tract of land in an irrigation district subjecting it to its pro rata burden of expense in the construction and operation of the system deprives a nonconsenting owner of his property to the extent of the burden imposed, and such deprivation can be effected only by due process of law, which contemplates that such owner must be afforded adequate opportunity to be heard.

3. Statutes §206 — Must be considered in their entirety.

A statute is passed as a whole and not in parts or sections, the division into sections being merely a matter of convenient reference, and in ascertaining the intention of the Legislature statutes must be considered in their entirety.

4. Statutes §238—Scope and extent of privileges stated in declaratory sections control and interpret all subsequent sections.

It is the general rule in construction of statutes that, when the scope and extent of the privileges are once stated in the declaratory sections, the character of the grant as thus disclosed controls and interprets all subsequent sections, and it is unnecessary to restate the character thus disclosed; but those subsequent sections, unless there be words of limitation, will be understood as coextensive with and applicable to the full scope and extent of the powers theretofore granted.

5. Waters and water courses §226—Statute held to provide hearing for nonconsenting owners before lands included in extension of irrigation district.

Under Rev. Codes 1921, § 7189, providing that in the extension of boundaries of existing irrigation district a petition designating time for hearing must be filed and due notice given and public hearing had, in view of general statute providing for the creation of the district, held, that ample opportunity is afforded nonconsenting landowner to be heard before his lands are included in the district and for a review of the proceedings on appeal.

6. Waters and water courses §226—Special findings that lands of nonconsenting owners included in extension of irrigation district unnecessary.

Rev. Codes 1921, §§ 7166-7264, does not require a special finding that lands of nonconsenting owner included in the creation or extension of an irrigation district will be specially benefited, but the order creating the district or extending its boundaries amounts to a finding of every fact necessary to the validity of the order.

7. Waters and water courses §226—In proceedings to extend district, evidence, though not preserved, may be settled in bill of exceptions.

Under Rev. Codes 1921, § 7255, making rules of pleading and practice provided by the Code of Civil Procedure applicable to proceedings for extension of irrigation districts, the fact that in such a proceeding the evidence was not taken down and preserved did not deprive the objectors of the right to have the evidence as far as obtainable settled in a bill of exceptions.

8. Appeal and error §907(3) — Where no bill of exceptions filed, procedure presumed regular.

Where, in proceedings to extend boundaries of an irrigation district, no bill of exceptions was filed, it will be presumed on appeal that the trial court regularly heard and deter-

mined the question of whether the included lands of nonconsenting owners were benefited.

9. Appeal and error §598 — Transmittal original petition disapproved.

There is no authority for the practice of transmitting the original petition in a cause to be reviewed, and such practice is expressly disapproved.

Appeal from District Court, Broadwater County; E. H. Goodman, Judge.

In the matter of the application of Adnah M. Kimpton and others for the extension of the boundaries of Crow Creek Irrigation District and for the inclusion of their own and other lands within the district. From an order for petitioners, objectors appeal. **Affirmed.**

E. K. Cheadle, of Lewistown, for appellants.

Walsh, Nolan & Scallon, of Helena, for respondents.

HOLLOWAY, J. The Crow Creek Irrigation district, in Broadwater county, was established in February, 1919. In July, 1920, a petition in due form, bearing the necessary number of signatures, was presented to the district court, praying that the boundaries of the district be extended to include certain lands which were particularly described. On the same day an order was made designating a time and place for hearing, and notice was given as required by statute. At the hearing, C. E. Adams, L. D. Blodgett, E. F. Cobb, and the Adams Realty Company, owners, respectively, of tracts of land described in the petition, objected in writing to the inclusion of their lands or any of them. Upon the conclusion of the hearing the objections were overruled and an order was entered granting the prayer of the petition and extending the boundaries of the district. From that order the objectors appealed.

[1] Our district irrigation statute became effective March 18, 1909 (chapter 146, Laws 1909). With some slight amendments and additions it has been carried forward and is now comprised in sections 7166-7264, Revised Codes 1921. The statute deals generally with the organization of irrigation districts, the powers and duties of the governing boards, the extension of the boundaries of existing districts, the construction of necessary irrigation works, the acquisition of rights of way and other properties, the issuance of bonds, the levy and collection of special assessments, the dissolution of districts, and some miscellaneous matters of procedure. In its general legislative plan, our statute is modeled after the Wright Law of California (O'Neill v. Yellowstone Irrigation District, 44 Mont. 492, 121 Pac. 283), the constitutionality of which has been established

by numerous decisions of the California court and by the decision of the Supreme Court of the United States in Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. By our statute the Legislature has not designated any particular district as subject to the provisions of the act and has not assumed to determine the character or quality of any specific lands which may be included in a given district. It goes no further than to prescribe the conditions which must exist in order to permit the inclusion of any lands. It declares that all included lands must be susceptible of irrigation from the same general source and by the same general system of works (section 7166), but the existence of these facts alone is not sufficient to authorize the inclusion of particular lands against the will of the owner. Section 7169 declares:

"Nor shall any lands which will not, in the judgment of the court, be benefited by irrigation by means of said system of works, nor shall lands already under irrigation, nor lands having water rights appurtenant thereto, nor lands that can be irrigated from sources more feasible than the district system, be included within such proposed district, unless the owner of such lands shall consent in writing to the inclusion of such lands in the proposed district."

In other words, the fundamental principle which underlies the statute is that only such lands as will be specially benefited may be included against the will of the owner or owners.

[2] In this proceeding the validity of the act in its entirety is not assailed, but it is contended that the enforcement of the provisions for the extension of the boundaries of an existing district operates to deprive the nonconsenting landowner of his property without due process of law, and this objection has its foundation in the assumption that the statute does not provide for any hearing upon or determination of, the question: Will the lands included in the extended area reap any benefit from the improvement? It will be conceded at once that the inclusion of a particular tract of land and subjecting it to its pro rata part of the burden of the expense necessarily incident to the construction of the works and the operation of the system will deprive the nonconsenting owner of his property to the extent of the burden thus imposed; that such deprivation can be effected only by due process of law; and that due process of law contemplates that the owner must first be afforded adequate opportunity to be heard.

[3] Counsel for appellants directs his attack to the provisions of section 7189, and it may be true that, if that section be segregated from the other portions of the statute and considered alone, some basis might be

found for the contention advanced, but the statute consists of numerous sections, all relating to the same general subject—the creation, organization, government, and extension of irrigation districts—and it is an elementary rule of statutory construction that, in ascertaining the intention of the Legislature, the statute must be considered in its entirety. The reason for the rule is manifest. A statute is passed as a whole and not in parts or sections, and the division into sections is merely a matter of convenient reference. 25 R. C. L. 1009. It is true that section 7169 appears early in the statute and relates primarily to the organization of a district, but it declares the general policy of the law.

[4] Again:

"It is a general rule in the construction of statutes that when in the early and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections, and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges; but these subsequent sections will be understood (unless there be words of restriction and limitation therein) as coextensive with and applicable to the scope, and the full scope, and extent, of the powers theretofore granted." *Talbott v. Silver Bow County*, 139 U. S. 438, 11 Sup. Ct. 594, 35 L. Ed. 210.

[5] Section 7189, which has to do directly with the extension of the boundaries of an existing district, provides that a petition for such extension must be filed with the district court, a time designated for hearing, due notice given, and a public hearing had. The statute then proceeds:

"At such public hearing, the district court shall hear those who may desire changes made in the proposed extension, and all those whose lands are included or sought to be included in the district, and all other persons whose rights may be affected by the proposed extension. * * * The court shall make an order either granting or denying said petition. * * * The order * * * shall be final and conclusive * * * unless appealed from to the Supreme Court within ten days from the entry of the order."

There are not any words of restriction or limitation employed. Provision is made for the hearing in the most general terms, and any objections which would be valid as against the inclusion of particular lands in the district upon its creation are equally valid as against their inclusion upon an extension of the boundaries of the district. This is the reasonable interpretation of the language and avoids the conclusion that the legislative assembly provided for a hearing but did not intend that any relief might be obtained thereby. *Embree v. Kansas City Road District*, 240 U. S. 242, 36 Sup. Ct.

317, 60 L. Ed. 624. The statute provides its own rule of interpretation. Section 7262 declares:

"The object of this act being to secure the irrigation of lands of the state, and thereby to promote the prosperity and welfare of the people, its provisions shall be liberally construed so as to effect the objects and purposes herein set forth."

With the construction thus given to the statute, it is apparent that ample opportunity is afforded the nonconsenting landowner to be heard before his lands are included in the district and for a review of the proceedings on appeal. It follows that the statute is not open to the objection now urged against it. *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *King v. Portland*, 184 U. S. 61, 22 Sup. Ct. 290, 46 L. Ed. 431; *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565, 26 L. R. A. (N. S.) 973, 135 Am. St. Rep. 642, 20 Ann. Cas. 264.

[6] The fact that the trial court did not make a special finding to the effect that the lands of these objectors will be specially benefited by being included in the district is not of any consequence. The statute does not require such a finding either in the order creating a district or in the order extending the boundaries of an existing district, but the order creating the district in the one instance, or extending its boundaries in the other, amounts to a finding of every fact necessary to the validity of the order. *Fallbrook Irrigation District v. Bradley*, above.

[7, 8] Section 7255 declares:

"The rules of pleading and practice provided by the Code of Civil Procedure which are not inconsistent with the provisions of this act, are applicable to all actions or proceedings herein provided for."

It appears that the evidence heard by the trial court was not taken and preserved by the court stenographer as it should have been, but this irregularity did not deprive the objectors of the right to have the evidence, so far as it was obtainable, settled in a bill of exceptions. However, such bill of exceptions was not settled in the court below, and therefore the evidence is not before us for consideration. Assuming, as we must, that the trial court heard and determined the question of benefits or no benefits, it does not appear that any reversible errors were committed.

[8] As observed heretofore, the proceedings for the extension of the boundaries of an existing district are initiated by filing a petition with the district court. Such a petition performs the same office in this proceeding as does a complaint in a civil action, and a review of the order granting the petition must necessarily involve consideration of the petition itself. The transcript on

appeal does not contain a copy of the petition but the original petition has been transmitted to this court for our consideration. There is no authority for this practice, and we expressly disapprove it. However, we have examined the record and determined the principal question presented.

The order is affirmed.

Affirmed.

COOPER and GALEN, JJ., and AYERS, District Judge, sitting in place of REYNOLDS, J., disqualified, concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(63 Mont. 322)

STATE v. RICHARDSON. (No. 4991.)

(Supreme Court of Montana. May 8, 1922.)

1. Rape \S 52(1)—Evidence held sufficient to sustain verdict of guilty.

In a prosecution for rape on a 14 year old girl, evidence held sufficient to sustain a verdict of guilty.

2. Rape \S 54(1)—Uncorroborated evidence of prosecutrix sufficient to sustain conviction.

In a prosecution for rape, uncorroborated evidence of the prosecutrix is sufficient to sustain a conviction.

3. Criminal law \S 747—Solution of conflict of evidence is exclusive province of jury.

Where there is a conflict in evidence, its solution is in the exclusive province of the jury.

4. Witnesses \S 380(8)—Exclusion of evidence tending to impeach prosecutrix's testimony on cross-examination held not error.

Under Rev. Codes 1921, \S 10665, providing that in cross-examining a witness concerning matters not testified to in direct examination the same rules apply as in direct examination, in a prosecution for rape, where defendant's counsel asked prosecutrix whether she had had sexual intercourse with other persons, which was not asked in direct examination, and which she denied, he was bound by her answers, and could not introduce testimony of her admissions to impeach her, since defendant did not bring himself within section 10666, providing that a party may contradict his own witness by other evidence or showing inconsistent statements.

5. Criminal law \S 1038(3)—Defendant may not on appeal first complain of failure to instruct concerning restricting effect of state's evidence.

Under Rev. Codes 1921, \S 11069, in a prosecution for rape in which a physician, who had examined prosecutrix, testified to facts which tended to show that she had had sexual intercourse, defendant may not complain on appeal that an instruction that the physician's testimony was merely to show that from the con-

dition of the child the offense took place was not given, since he did not ask it.

6. Rape \S 13—Consent not a defense in statutory rape.

In a prosecution for rape of a 14 year old girl, her consent is not a defense.

7. Rape \S 40(1)—Evidence of general reputation of prosecutrix for unchastity may be received where she is above age of consent.

In a prosecution for rape, where prosecutrix is above the age of consent, evidence of her reputation for unchastity, but not evidence of specific acts of unchastity, may be received to show the nonprobability of resistance by her, since her resistance is an essential element and one of the issues.

8. Rape \S 40(5)—Evidence of unchastity with others than defendant inadmissible where prosecutrix is under age of consent.

In a prosecution for rape, evidence of the immoral or unchaste conduct of prosecutrix with others than defendant, either by proving general reputation for unchastity or by proof of specific acts of immoral conduct, is inadmissible, where the prosecutrix is under the age of consent.

Galen, J., dissenting.

Commissioners' Opinion.

Appeal from District Court, Flathead County; C. W. Pomeroy, Judge.

Joseph W. Richardson was convicted of rape, and he appeals. Affirmed.

Brennen & Kendall, of Kalispell, for appellant.

W. D. Rankin, Atty. Gen., and A. H. Angstrom, Asst. Atty. Gen., for the State.

COMER, C. The information in this case charges the defendant and appellant with rape of one Mary Richardson, a girl of the age of 14 years at the time of the commission of the offense, June 25, 1920. The case came on for trial in the district court on the 7th day of December, 1920; the jury returned a verdict of guilty; and from the judgment of conviction and the refusal of the district court to grant a new trial, the defendant appeals.

The assignment of error is: That the court erred in overruling defendant's motion for a new trial for the following reasons: First, that the verdict is contrary to the law and the evidence; and, second, that the court erred in decisions of questions of law arising during the progress of the trial. We will consider these assignments in the order stated.

[1] The appellant contends that the testimony is insufficient to support the verdict rendered by the jury, and that the judgment should be reversed for that reason.

It appears that, from the evidence in the case, defendant and his wife adopted the prosecutrix, Mary Richardson, in February,

1916, while they were living in Saskatchewan, Canada. Thereafter they moved to the state of Minnesota, and about January 1, 1920, Mrs. Richardson left for California, where she remained for about seven months. Thereafter defendant and Mary left Minnesota for Texas, where they remained a short time, arriving in Kallispell, Mont., in the month of May, 1920.

The prosecutrix testified to many acts of intercourse between herself and the defendant, commencing in the year 1916, the last act being performed on the 25th day of June, 1920, the date alleged in the information; that many times he took her to hotels, where they occupied the same room and the same bed. Defendant admits that they occupied the same room at various times, but denies that they occupied the same bed. A further detail of the evidence in this case would not serve any useful purpose. It is sufficient to say that after a careful examination of all of the evidence in the case we are of the opinion that it warrants the verdict returned by the jury.

[2] The uncorroborated evidence of the prosecutrix is sufficient to sustain the conviction. *State v. Peres*, 27 Mont. 358, 71 Pac. 162; *State v. Vinn*, 50 Mont. 27, 144 Pac. 773.

[3] The solution of the conflict in the evidence is in the exclusive province of the jury. *State v. Galmos*, 53 Mont. 118, 162 Pac. 596.

The story told by the prosecutrix is not unreasonable or improbable. There is corroboration of the prosecutrix in the record. While they were living at Kallispell, one evening the defendant asked the prosecutrix to sleep with him, and he was overheard by several young girls who were there at the time; defendant not knowing they were present.

[4] During the course of the examination of the prosecutrix, she was asked by the counsel for the defendant whether she had not had intercourse with persons other than the defendant, to which she answered, "No." She was then asked whether she had not told Mrs. Richardson about having intercourse with a boy by the name of Bordson and a boy by the name of Cunningham, to which she answered, "No." An objection was then made to this cross-examination, the court stating:

"If the defense has no evidence of these acts other than the statements of the complaining witness, that line of questioning will be excluded, and that line of evidence ruled incompetent."

The defendant stated he had no other evidence except the statements of the prosecuting witness. The offer was then made to ask the prosecutrix whether she did not tell Mr. and Mrs. Richardson, during the month of March, 1916, that she had inter-

course with a man by the name of Jones. Objection was made to the question and sustained.

Thereafter a doctor testified for the state that she had examined the prosecutrix subsequent to the alleged offense set forth in the information, and prior to the trial; that she had found the hymen of the prosecutrix absent and her parts larger than would be expected in a girl of her years. The defendant, after the doctor had testified, made an offer to ask the prosecutrix on cross-examination if she did not tell to Mr. and Mrs. Richardson, during the year 1916, that she had intercourse with one Cunningham, and if she did not tell Mrs. Richardson the same story concerning one Jones and one Bordson. Objection was made by the state to the questions, and the objection sustained. The defendant thereafter offered to show by Mrs. Richardson, the wife of the defendant, that the prosecutrix had told her during the year 1916 that she had had intercourse with Cunningham and Bordson. Objection was made and sustained to these questions.

It is the contention of the defendant that error was committed by the district court because of the refusal to allow the defendant to ask these questions, and that, inasmuch as the doctor testified to the physical condition of the prosecutrix, he should be allowed to show that she had had intercourse with other persons, and, if possible, break the force of the necessary inference cast against the defendant by the testimony of the physician, citing the case of *State v. Apley*, decided by the Supreme Court of North Dakota, 25 N. D. 298, 141 N. W. 740, 48 L. R. A. (N. S.) 269; and that, since defendant could ask prosecutrix as to prior acts of sexual intercourse with others, and the prosecutrix having testified on cross-examination that she did not have intercourse with persons other than defendant, he (defendant) should have been allowed to impeach the girl by asking Mrs. Richardson if she was not told by prosecutrix of sexual acts with others. In other words, the defendant contends that it is proper for defendant to ask prosecutrix as to other acts to rebut the presumption created against defendant by the testimony of the physician, and therefore impeachment of her denial should be allowed.

The real question thus raised by defendant is whether he should have been allowed to impeach prosecutrix by the testimony of Mrs. Richardson. The testimony of the physician was given for a limited purpose. The state informed the court:

"That the testimony which the state expects to introduce on the physical condition of the girl will not be directed to the fact that the destruction of the membrane or the condition of the organ was produced by this defendant. We are willing that the jury shall be so instructed, but merely to show that, on the physical con-

dition of the child, it is possible that these acts took place. And we are willing that the jury shall be instructed that the testimony of the doctor on this point shall be competent only for the purpose of showing the possibility for the act to have taken place, and not with any idea of, by that testimony, connecting the defendant in any way with the offense."

[5] Defendant alleges the court failed to instruct the jury concerning the purpose of the physician's testimony, but if such instruction was desired by the defendant, he should have offered such an instruction, and he cannot now complain that such an instruction was not given. Section 11969, R. C. M. 1921; *State v. McCarthy*, 36 Mont. 226, 92 Pac. 521; *State v. Francis*, 58 Mont. 659, 194 Pac. 304. In the latter case, the court said:

"No instruction was offered by the defendant as to the purposes for which the testimony was received, and one was hardly necessary. By not offering an instruction on the subject, the defense may be presumed to have been satisfied that none was necessary, and it would seem that the assignment of error came as an afterthought."

The evidence of the physician having been given for a specific purpose, as shown by the statement of counsel for the state, the jury must have understood what its purpose was, and considered it only for the purposes for which it was offered. *State v. Francis*, supra.

When the prosecutrix was examined by counsel for the state, no questions were asked about acts of sexual intercourse with persons other than defendant, and therefore, when defendant examined her about such acts and asked her as to her conduct with other persons, he made her his own witness, and was bound by her answers with reference to those matters not touched upon on the direct examination. Section 10665, R. C. M. 1921; *State v. Smith*, 57 Mont. 349, 183 Pac. 644; *Mautner v. Brody* (Sup.) 120 N. Y. Supp. 734; *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883.

The error alleged by defendant is the failure of the court to allow the testimony of the girl brought out on cross-examination to be impeached by the testimony of Mrs. Richardson. The defendant was attempting to impeach the prosecutrix as to matters not touched upon or brought out on the direct examination. This cannot be done. *Modern Law of Evidence*, § 3756. In *Mautner v. Brody*, supra, the court held that where a witness for defendant, on cross-examination, is asked by plaintiff about a matter not touched upon in the direct examination, he becomes plaintiff's witness as to the evidence he gives in response to the question, and he cannot be contradicted by the introduction by plaintiff of previous inconsistent statements. The same rule is upheld in *Faulkner v. Rondoni*, supra.

In *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761, the court said:

"The rule is well settled that a witness cannot be contradicted as to collateral matters brought out upon cross-examination. *Greenleaf on Evidence*, § 462 et seq."

Having made prosecutrix his own witness as to these matters, defendant was bound by her answers, and could not impeach her by the testimony of Mrs. Richardson. 40 Cyc. 2693.

It is true that under section 10666, R. C. M. 1921, a party may contradict his own witness by other evidence or by showing inconsistent statements, but before this can be done, a showing must be made. Defendant made no showing of any kind, so if he proceeded upon the theory that his impeaching evidence should have been received because prosecutrix became his witness, he has not brought himself within the provisions of section 10666, providing for the impeachment of a witness by the party producing him.

Sections 2049 and 2052 of the Code of Civil Procedure of California are the same as sections 10666 and 10669, respectively, of the Revised Codes of Montana of 1921. In construing these sections, the Supreme Court of California has held that, before a party calling a witness could impeach him, it must be shown that the party by whom the witness has been produced has been misled and taken by surprise; that he had reason to believe the witness would give testimony favorable to him; and that a party under the guise of this rule cannot present to the jury mere hearsay declarations. *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 206, 93 Pac. 1049; *People v. Crespi*, 115 Cal. 50, 46 Pac. 863.

This court, in construing section 8022, Rev. Codes 1907, now section 10666, R. C. M. 1921, said:

"We think that under the express terms of this statute the state has a right to cross-examine one of its own witnesses where it satisfactorily appears that the evidence has taken the county attorney by surprise, and is contrary to the examination of such witness preparatory to the trial, or to what the prosecuting attorney has reason to believe the witness would testify to." *State v. Bloor*, 20 Mont. 574, 52 Pac. 611.

See, also, *State v. Willette*, 46 Mont. 326, 127 Pac. 1013.

[6] We are of the opinion the district court was correct in refusing the offer, as defendant did not make any showing so as to bring himself within the statute. If the purpose of the offer was to affect the credibility of the prosecutrix by showing prior acts of intercourse with persons other than defendant, then the district court was clearly right in refusing the offer, because consent is not a defense, in this case.

[7] In cases where the prosecutrix is above the age of consent, evidence of the general reputation of the prosecutrix for unchastity may be received for the purpose of showing the nonprobability of resistance by the prosecutrix, for in such cases the resistance of the prosecutrix is an essential element and one of the issues of the trial. For it is more probable that a woman who has had unlawful acts of intercourse voluntarily in the past would be much more likely to consent than would a woman whose personal conduct could not be truthfully assailed (*People v. Johnson*, 106 Cal. 289, 39 Pac. 622), but in this case the question of consent is not involved (*State v. McPadden* [Minn.] 184 N. W. 568; *State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647) because the prosecutrix is under the age of consent, as fixed by the statute (section 11000, R. C. M. 1921).

[8] The weight of authority is to the effect that evidence of immoral or unchaste conduct with others than the defendant in a case of this character is inadmissible, either by proving general reputation for unchastity or by proof of specific acts of immoral conduct, where the prosecutrix was under the age of consent. *Walker v. State*, 8 Okl. Cr. R. 125, 126 Pac. 829; *People v. Johnson*, supra; *State v. Smith*, 18 S. D. 341, 100 N. W. 740. And in those cases where the prosecutrix was over the age of consent at the time of the commission of the crime, the reputation for unchastity cannot be shown by evidence of specific acts. *State v. McPadden*, supra; *People v. McLean*, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263; *State v. Ogden*, 39 Or. 196, 65 Pac. 449; *State v. Smith*, supra; 33 Cyc. 1749.

Even though the credibility of the prosecutrix could be attacked by a showing of immorality or unchastity, it could not be done by cross-examination of prosecutrix on matters not brought out on direct examination, and a subsequent impeachment of her testimony, as this is not proof of any fact. The prosecutrix testified she had no intercourse with persons other than defendant. The offer of testimony of Mrs. Richardson that prosecutrix had told her she had performed such acts with others, if received, would not be proof of such acts. So it is clear that no injustice was, in any event, done to defendant by the exclusion of the testimony of Mrs. Richardson. Defendant stated to the court he had no evidence of the alleged acts of sexual intercourse of prosecutrix with others, except the alleged admissions of prosecutrix.

Error is predicated upon certain remarks the court made to the defendant while he was testifying upon the witness stand, which prejudiced him with the jury. No error was committed by the court in admonishing the

witness; and the record does not disclose that any objection was made by the defendant at the time or request that the jury be cautioned.

We are of the opinion that there is no reversible error in the record, and that the evidence sustains the verdict of the jury and the judgment of the court.

It is recommended that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

AYERS, District Judge (sitting in place of REYNOLDS, J., disqualified). I concur in the affirmance of the judgment and order, but not in all that is said in the opinion.

GALEN, J. (dissenting). I dissent. It is my opinion that error was committed in denying the defendant the right of cross-examination of the prosecutrix as to whether she did not make statements to Mrs. Richardson that she had had intercourse with other persons mentioned. Having answered that she had never had such relations with any other persons than defendant, it was proper to question her concerning her statements made, acknowledging her intimacy with men other than the defendant, and more especially so in view of the doctor's testimony as to the absence of the hymen and the unusual development of the organ for a girl of her age. Such questions were proper as testing her credibility, and in such a case, if the accused is to be denied reasonable latitude in cross-examination respecting the credibility of the prosecutrix, he is placed in defenseless position, no matter how free from guilt he may be. On any ground or for any motive he may be convicted and the conviction allowed to stand on the uncorroborated evidence of the prosecutrix, whose lack of veracity or dependability on proper cross-examination might have been so clearly shown as to produce a different result in the minds of the jury. Moreover, the testimony was clearly competent in aid of determination of proper punishment, in the event the defendant was found guilty.

As was well stated by Mr. Chief Justice Murray, in the early California case of *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506:

"There is no class of prosecution attended with so much danger, or which affords so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless."

Where the prosecutrix is the sole witness, and the defendant is in consequence compelled to rely almost entirely upon her want of credibility, the greatest latitude

should be permitted on cross-examination. Although want of chastity is no defense to such an accusation, yet when the prosecutrix has denied having had relations with other men, her admissions and confessions theretofore made should not be excluded, as her credibility may thereby be determined. Proof of specific acts with others than the defendant may be shown to rebut corroborating circumstances, when, as in this case, a physician has testified to the absence of the hymen and enlargement of the parts. 33 Cyc. 1481.

If she made contradictory statements, this was certainly a test of her credibility. Again, if she were shown to have had intercourse with others mentioned, this might explain to some degree at least the reason for the enlargement described by the physician. The offer to limit the purpose of the doctor's testimony was, in my opinion, not curative, for the damage had been done by its introduction in advance of the statement made by the county attorney as to its purpose.

The questions propounded and offer of proof made by defendant on cross-examination of the prosecutrix were certainly proper for purposes of impeachment. I think the rule laid down in the North Dakota case (*State v. Apley*, 25 N. D. 298, 141 N. W. 740, 48 L. R. A. [N. S.] 269), referred to in the majority opinion, correct; and that which should be followed and applied in the instant case. Our statute (section 10665, R. C. M. 1921) provides:

"The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination."

And in construing and applying the purpose and effect of this statute, this court has heretofore given expression to the doctrine which I contend applicable to the instant case. In the case of *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884, it is said:

"The statute * * * permits a wide range for cross-examination, and the courts should incline to extend, rather than restrict, the right."

"Doubt respecting the limits to which cross-examination may go ought usually, if not always, to be resolved against the objection." *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

"The right of cross-examination extends not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy, and this right should not be restricted unduly." *State v. Howard*, 30 Mont. 518, 77 Pac. 50.

See, also, *State v. Biggs*, 45 Mont. 400, 123 Pac. 410; *Herzig v. Sandberg*, 54 Mont. 538, 172 Pac. 132.

The defendant did not, as stated in the majority opinion, make the prosecutrix his own witness by asking her regarding intercourse by her had with other persons, and, when she denied such relations, it was perfectly competent to make inquiry on cross-examination as to whether or not she had not made confessions or admissions to Mrs. Richardson of specific instances of relations with other men, naming them. Such questions were, in my opinion, within the field of legitimate cross-examination. The witness having made contrary statements concerning the subject under inquiry, it was proper to cross-examine as regards thereto for the purpose of testing her credibility, and—

"if the question was within the legitimate range of cross-examination, it was none the less so that it was also proper in support of defendants' case." *Herzig v. Sandberg*, supra.

Such facts may be proved on the trial as serve to show the credibility of a witness (section 10631, R. C. M. 1921), and while a witness is presumed to speak the truth, such presumption may be repelled by the manner in which the testimony is given by the character of the testimony, or by contradictory evidence. Section 10508, R. C. M. 1921. The prosecutrix testified that the first time the defendant had had intercourse with her was when she was but 10 years of age; that the act was then committed with her standing up; that she did not bleed at all; and that it did not hurt her much. By such testimony, the common knowledge of mankind would naturally bring into question her veracity. Where a conviction for rape is obtained upon the uncorroborated testimony of the prosecutrix, and her testimony in itself is inherently improbable, susceptible of contradiction, or reflection is made upon its credibility by other facts or circumstances, manifestly it is error to exclude it. *People v. Hamilton*, 46 Cal. 540; *People v. Ardaga*, 51 Cal. 372.

As was well said in *People v. Benson*, supra:

"A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials."

While the jury are the exclusive judges of the credibility of a witness, yet it is dangerous to permit a conviction to stand in any case where the defendant has been denied substantial rights of cross-examination.

It is my opinion that the district court erred in so restricting cross-examination of the prosecutrix, and therefore the judgment and order should be reversed, and the cause remanded for a new trial.

(35 Idaho, 340)

KELLY v. EASTON et al. (No. 3624.)(Supreme Court of Idaho. April 12, 1922.
Rehearing Denied June 1, 1922.)**1. Animals §95(1)—Common-law right of distress damage feasant recognized.**

The right of distress damage feasant existed under the common law, and under the provisions of C. S. § 9460, is applicable to this state in so far as it is not repugnant to or inconsistent with our Constitution and laws.

2. Landlord and tenant §141—Where landlord's cattle destroyed tenant's crop, tenant may distrain cattle damage feasant or resort to law action.

Where a landlord interrupts the enjoyment by the tenant of the leased premises by permitting his cattle to enter and destroy the tenant's crop, he is liable for all the damages occasioned by such trespass, for which the tenant may distrain the cattle damage feasant or resort to an action at law.

3. Animals §95(1)—Trespassing animals may be restrained for damage.

A person finding the animals of another trespassing on his grounds damage feasant may, by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals.

4. Animals §95(1)—Impounder entitled only to damages.

The only damages which the impounder of animals damage feasant is entitled to recover, in an action for trespass against their owner, are such as were occasioned by the particular trespass which they were committing when they were taken to be impounded.

5. Animals §95(1)—Distrainer not entitled to expenses of keeping.

The distrainer of beasts damage feasant was not entitled under the common law to compensation for expenses incurred in connection with their keeping, and such distrained beasts were not subject to sale by the distrainer in order that the proceeds might be applied in satisfaction of the damages sustained or expenses incident to the care and keeping of the beasts while distrained.

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by John A. Kelly against L. F. Easton and others for trespass to real property. Judgment for plaintiff for damages but denying a lien upon distrained animals damage feasant, or compensation for their care and keep while distrained, and plaintiff appeals. Affirmed.

Lot L. Feltham, of Weiser, for appellant.
Harris, Stinson & Harris, of Weiser, for respondents.

BUDGE, J. This action was brought by appellant for trespass to real property. From the record it appears that appellant

leased from the Ranch Company, in 1916, 80 acres of land, which was a portion of a tract owned by the company. The entire tract was inclosed with a legal fence, but there was no division fence between the premises leased to appellant and the balance of the tract. Appellant continued in the occupancy of the leased premises until the fall of 1919, holding over under his lease. About September 25, 1919, respondents Hortense A. Ford and E. D. Ford, over appellant's protest, turned into the inclosed tract 10 horses and 11 head of cattle owned by them and the Ranch Company, subject to a mortgage held by respondent Easton. Respondents permitted this live stock to range over and upon the leased premises, grazing upon, destroying, and trampling down grain growing thereon, until seized and impounded by appellant on November 2, 1919, and held by him for 103 days thereafter.

Appellant prayed for judgment against respondents in the sum of \$600, together with costs and the expense of care and keeping of the live stock while impounded by him; that the stock be sold at public sale and the proceeds contributed towards the payment of the judgment and costs, accrued and accruing, and for a deficiency judgment. The cause was tried to the court and a jury. The jury found for appellant in the sum of \$370 for his damages, and allowed him 20 cents per day per head for the care and feeding of the stock while in his possession. The court rendered judgment for \$370 in favor of appellant, but refused to allow him any lien upon the stock or any compensation for the care and keeping thereof while in his custody.

This appeal is from that portion of the judgment refusing to allow appellant any lien upon or compensation for the care and keeping of the stock while impounded. In his assignments of error, appellant attacks the action of the court in denying him a lien upon the distrained stock for his damages, in denying him a lien for the expense of care and keeping said stock, and in refusing to give him judgment for any sum for the care and keeping of the stock while distrained.

[1] The right of distress damage feasant existed under the common law, and is applicable to this state in so far as it is not repugnant to or inconsistent with our Constitution and laws. C. S. § 9460, provides that—

"The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."

As was held in *Rust v. Low*, 6 Mass. 90, 97:

"Every person then may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle, unless the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies, or by prescription."

[2] The common-law rule that every man must confine his own cattle to his own land does not obtain in this state (*Johnson v. O. S. L. Ry. Co.*, 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744), and in *Stroug v. Brown*, 26 Idaho, 1, 140 Pac. 773, 52 L. R. A. (N. S.) 140, Ann. Cas. 1916E, 482, it is held that under our statute (C. S. c. 82), if a landowner fails to fence out cattle lawfully at large, he may not recover for loss caused by such live stock straying upon his uninclosed land. The statute would seem, however, to have reference to landowners as between themselves and the public, and is not applicable to the relation existing between a landlord and tenant, in the absence of a specific agreement to the contrary.

The correct rule in this regard was, we think, announced in *Henly v. Neal*, 2 Humph. (Tenn.) 551, that, when one man rents to another a given portion of a field in one inclosure, he is prohibited from doing anything, or so using the remainder of the field, as to defeat the very object for which the tenant had rented the land, and, if he put his stock into the inclosure so as to cause injury to the tenant, he is liable to the latter for the damages.

If the landlord interrupt the enjoyment of the leased premises, by permitting his cattle to enter and destroy the tenant's crop, he should be liable for all the damages occasioned by such trespass, for which the tenant may distrain the cattle damage feasant or resort to an action at law.

The questions then arise as to what constitutes distress damage feasant, whether the distrainer has or is entitled to an enforceable lien upon the distrained beasts for the damage caused by the trespass and for the expense of their care and keeping, if he is entitled to recover for such expense.

[3] A person finding the animals of another trespassing on his grounds damage feasant may, by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals. 2 A. & B. Enc. of Law (2d Ed.) p. 358; 1 Cooley on Torts (3d Ed.) 77; 3 C. J., Animals, § 407, p. 135. As was said in *Bonner v. De Loach*, 78 Ga. 50, 2 S. E. 546:

"The provisions of the common law (Broom's Commentaries, 781-2) regulating this matter, render the defendant answerable 'for not only his own trespass, but that of his cattle also; and if, by his negligent keeping, they stray upon the land of another (and much more if he prompts or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for

which the owner must answer in damages; and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus damage feasant * * * till the owner shall make him satisfaction, or else by leaving him to the common remedy in foro contentioso by action, wherein, if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess.'"

See, also, 3 Blackstone, Comm. 208, 211; 2 Jones' Blackstone, § 277, p. 1784; 2 Cooley's Blackstone (4th Ed.) 1009; S. F. & W. Ry. Co. v. Geiger, 21 Fla. 669, 681, 58 Am. Rep. 697.

The common law permitted a landowner to be his own avenger, or to minister redress to himself by distraining another's cattle damage feasant. 3 Blackstone, Comm. 7; *Mosher v. Jewett*, 63 Me. 84, 88; *Cook v. Gregg*, 46 N. Y. 439. By the common law, one citizen may distrain the cattle of another, damage feasant on the soil of the former. *Jarman v. Patterson*, 7 T. B. Mon. (Ky.) 644, at 647. This right existed at common law and was not introduced by statute (*Hamlin v. Mack*, 33 Mich. 103, 105), but the matter is now regulated by statutory enactments in the several states, providing for the seizure and impounding of cattle taken damage feasant, and for their sale. Note, 8 Am. St. Rep. 271.

In *Hamlin v. Mack*, supra, it is said:

"* * * The plaintiff personally took the beast when trespassing on his land, and confined it in his barn there. Before this act the beast in contemplation of law was in the owner's possession, but the seizure of it damage feasant, and immediate confinement of it by the plaintiff in his barn there, took it out of the owner's possession and into the plaintiff's custody, and this was enough to constitute a distress damage feasant. 3 B. C. 6; *Broom and Had. Com.*, B. 2, p. 74."

In *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78, the court said:

"* * * Where cattle are found upon land doing an injury, the owner * * * is allowed to seize and detain them as a pledge or security for the payment of the damages he has sustained."

Cattle damage feasant were impounded at common law on the premises of the distrainer. *Green v. Duckett*, 11 Q. B. D. 275, at 278. Subsequently by statute the distrainer was required to have the damages appraised, and to put the distrained beasts in the nearest pound, where, after notice and failure on the part of the owner to redeem, they might be sold. 2 Jones' Blackstone, § 14, p. 1503; *Rockwell v. Nearing*, 85 N. Y. 302, 308, 309.

[4] At common law the distrainer of animals damage feasant had only a lien thereon for the damages sustained and could not

sell them to reimburse himself for any injuries occasioned by them or expenses incurred in connection with their keeping. 1 R. C. L., Animals, § 83, p. 1142. No authority to sell existed at common law. *Caldwell v. Eaton*, 5 Mass. 399; *Acme Harvesting Machine Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482, 21 Ann. Cas. 743. The common-law remedy of distress was considered only in the light of a pledge. *Davis v. Arledge*, 3 Hill (S. C.) 172, 30 Am. Dec. 361.

In 3 Blackstone, Comm. 10-14; 2 Cooley's Blackstone (4th Ed.) 862-865; 2 Jones' Blackstone, §§ 14, 19, 20, and 21, pp. 1503-1507, it is said:

"* * * The law of distresses is greatly altered within a few years last past. Formerly, they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken damage feasant. * * *

"When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held, that the distrainer is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken damage feasant, * * * which must remain impounded, till the owner makes satisfaction; or contests the right of distraining, by replevying the chattels.

"To replevy (replegiare, that is to take back the pledge), is, when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainer.

"This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to him, yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainer. * * *

The common law, as we understand it, gave the distrainer of animals damage feasant no right of confiscation, but authorized him only to impound and hold them until compensated for the damage sustained. Note 90 Am. St. Rep. 212, 213. The detention of the cattle is only for the purpose of indemnity, and they must be surrendered when satisfaction is made. In the meantime the distrainer must feed and care for them properly (*Cooley on Torts*, supra), and the only

damages which the impounder of animals damage feasant is entitled to recover, in an action of replevin against him for the animals by their owner, are such as were occasioned by the particular trespass which they were committing when they were taken to be impounded. *Holden v. Torrey*, 31 Vt. 690.

[5] From a consideration of the authorities it would appear that the distrainer of beasts damage feasant was not entitled under the common law to compensation for expenses incurred in connection with their keeping, and that the lien which he acquires by the distraint, if it be a lien, is purely passive and not an enforceable lien as that term is generally understood. At common law distrained beasts were not subject to sale by the distrainer in order that the proceeds thereof might be applied in satisfaction of the damages sustained or expenses incident to the care and keeping of the beasts while distrained.

Moreover, the law does not seem to contemplate that a person may continue to hold cattle distrained damage feasant after the recovery of a judgment for the trespass in an action at law. As is said in *Colden v. Eldred*, 15 Johns. (N. Y.) 220:

"Where beasts, damage feasant, have been distrained, or even impounded, the distrainer may relinquish the proceedings by distress, before satisfaction for the damage which has been sustained, and bring the action of trespass."

And in *Rockwell v. Nearing*, supra, it was observed that—

"The remedy by distress was cumulative, and satisfaction obtained in this mode was a bar to an action for damages."

Distress damage feasant is no remedy at all to the distrainer if the owner continues obstinate and will make no satisfaction for the trespass. 3 Blackstone, Comm. 13; 2 Cooley's Blackstone, supra, 865; 2 Jones' Blackstone, § 21, p. 1507. Upon recovery of the judgment against respondents, it was incumbent upon appellant to relinquish the distress, and it could not ripen into a lien subject to the judgment.

From what has been said it follows that the judgment of the trial court should be affirmed, and it is so ordered. Costs are awarded to respondents.

McCARTHY and DUNN, JJ., concur.

(35 Idaho, 418)

ROBISON et al. v. HOTEL & RESTAURANT EMPLOYEES, LOCAL NO. 782, OF BOISE et al. (No. 3597.)

(Supreme Court of Idaho. April, 1922.)

1. Good will ⇨1—Property ⇨2—Right to conduct business together with good will is property.

A right to conduct a business, together with the incidental right to the good will thereof, is property.

2. Injunction ⇨101(1)—Laborers may form unions, may strike for lawful purposes, and acquaint public with causes and request withholding of patronage.

Laborers for wages have a right to form unions for the purpose of improving their economic and social conditions. They have a right to strike in concert for a lawful purpose. In aid of a lawful strike, they have a right to acquaint the public with the fact of its existence and the causes thereof, and appeal, by peaceful persuasion, for public support and to request the public to withhold its patronage from the other party to the labor dispute.

3. Injunction ⇨101(1) — Combination to strike for an unlawful object, or use of illegal means to aid lawful strike, are wrongs for which the law affords a remedy.

A combination to strike to accomplish an object which is not regarded as lawful, or the use of illegal means in aid of a lawful strike, are wrongs for which the law affords a remedy.

4. Injunction ⇨101(3)—Means employed in aid of lawful strike must be free from falsehood, libel, defamation, physical violence, or coercion.

The means employed in aid of a lawful strike must be free from falsehood, libel, or defamation, and from physical violence, coercion, or moral intimidation.

5. Injunction ⇨101(1)—The persuasion the law permits in aid of a lawful strike is such as appeals to judgment, reason, or sentiment.

The persuasion which the law permits in aid of a lawful strike is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition.

6. Constitutional law ⇨90—Guaranty of free speech is not encroached upon by affording appropriate remedy for its abuse.

The constitutional guaranty of freedom of speech is not encroached upon by affording appropriate remedies for the abuse of the privilege of free speech.

7. Injunction ⇨101(3)—Use of the words "unfair to organized labor," if truthful, will not be enjoined, but the use of defamatory, coercive, or intimidatory expressions will be enjoined.

The use of the words "unfair to organized labor," if truthful, will not be enjoined. The use of expressions in aid of a strike which convey covert implications, calculated to defame, coerce, or intimidate, will be enjoined.

8. Injunction ⇨101(1)—Posting pickets on street in front of business place does not of itself constitute trespass on abutting property.

Posting of pickets on the street in front of a place of business does not of itself constitute a trespass upon the premises of the owner of the abutting property.

9. Monopolies ⇨12(2)—Lawful strike held not within the anti-trust provisions of state Constitution and statutes.

A lawful strike is not within the purview of section 18, art. 11, of the Constitution, or sections 2531 and 8512 of the Comp. Stats., commonly known as the anti-trust provisions of the Constitution and statutes of the state of Idaho.

10. Injunction ⇨101(3)—Placing pickets in front of or near restaurant necessarily results in intimidation or coercion and is properly enjoined.

Placing of pickets in the street, in front of or near to a restaurant, necessarily results in intimidation and coercion of prospective customers, and is properly enjoined.

Appeal from District Court, Ada County; Charles F. Reddoch, Judge.

Action by W. P. Robison and others against the Hotel & Restaurant Employees, Local No. 782, of Boise, Idaho, and others. Judgment for the plaintiffs, and the defendants appeal. Remanded, with directions to modify injunction so as to accord with views expressed in opinion.

Perky & Brinck, of Boise, for appellants. Henry Z. Johnson and C. C. Cavanah, both of Boise, for respondents.

RICE, O. J. Respondents are proprietors of certain restaurants in Boise. The appellants are members and officers of the Hotel and Restaurant Employees, Local No. 782, of Boise, which is a voluntary unincorporated association, or labor union.

In their complaint, respondents allege:

"That the defendants did on or about the 20th day of March, 1920, order all of the employees of the plaintiffs then belonging to the said Hotel and Restaurant Employees, Local No. 782, of Boise, Idaho, to strike and cease at once working for or continuing in the employment of the plaintiffs at the plaintiffs' said places of business, and in compliance with said order, all of the said employees of the plaintiffs left the plaintiffs' employment and places of business. That since said date the plaintiffs have endeavored to carry on their said business, and to employ other men and women to fill the places of those who left the employ of the plaintiffs, but the defendants, their agents and servants, have in pursuance of said order and a conspiracy and a confederation and combination entered into by and among them to carry out said strike, did unlawfully, willfully, and maliciously on the 20th day of March, 1920, establish and ever since have maintained a boycott of the plaintiffs' said business by

placing and maintaining immediately in front of and close to the entrances of the plaintiffs' said places of business on the sidewalk, a picket patrol during the hours of from 7 to 9 o'clock a. m. and from 11 a. m. to 2 o'clock p. m. and from 5 p. m. to 8 o'clock p. m., which are and were the hours of the day when the greatest number of meals are served by the plaintiffs to their patrons. That the pickets of said picket patrol are now and have been during said hours unlawfully, willfully, and maliciously wearing a badge consisting of a plain, white placard pinned upon their clothing where the same can plainly be seen, with the words, 'This house is unfair to organized labor,' and have been and are during said hours carrying the same back and forth on said sidewalks immediately in front of and close to the entrances of the plaintiffs' said places of business, and while doing so are now and have been during said hours, unlawfully, willfully, and maliciously calling out in a raucous voice to the patrons and prospective patrons of the plaintiffs and persons passing by and to patrons when entering and leaving the plaintiffs' said places of business: 'This house is unfair to organized labor. Why patronize an unfair house! Why not patronize a house with organized labor! This house is unfair to organized labor. Why not patronize a union house! Go where they have all white help. This beanery is on the bum. Why not patronize a union house, and you won't have to turn your back to the public and you will not be ashamed! This house is unfair and will be unfair to you.' And that by reason thereof the defendants are now and have been during said hours unlawfully, willfully, and maliciously threatening and intimidating persons who desire to enter the plaintiffs' said places of business for the purpose of engaging in the employment of the plaintiffs, and the patrons and prospective patrons of the plaintiffs and persons passing by said places of business, which is and has deterred such persons from entering and patronizing the plaintiffs' said places of business, and entering the employ of the plaintiffs and is calculated and intended to give notice, and does give notice, to such persons passing the plaintiffs' said places of business or intending to patronize the same, that said places of business were under boycott and that its patronage was opposed by organized labor. That by reason of the presence of said pickets and the unlawfully, willfully, and maliciously maintaining of the said picket patrol and the threats and intimidations as aforesaid by the defendants, a great many of the plaintiffs' patrons have been intimidated, and in consequence thereof have ceased to and refrained from patronizing the plaintiffs' said places of business, and that they will continue so to do as long as said pickets are maintained in front of the plaintiffs' said places of business and said boycott continue, and have diverted a large part of plaintiffs' said business, reducing their daily receipts by large sums, averaging from \$180 to \$75 per day of the said business of the plaintiffs W. P. Robison and O. C. Robison, and from \$350 to \$200 per day of said business of the plaintiffs Charles Peroni, Vincent Peroni, and Earnest Jaeger, and from \$175 to \$75 per day of said business of the plaintiffs E. Wood and H. D. Mix, and from \$250 to \$150 per day of said business of the plaintiff Jim

Kelly, and from \$90 to \$50 per day of said business of the plaintiff Jake Geb, and from \$200 to \$85 per day of said business of the plaintiffs Jack Troy, W. E. Reber, and A. W. Liedloff.

"That all of said acts and conducts of the defendants were and are a part of a scheme to prevent persons from entering the employment of the plaintiff, and continuing in their employment, and from patronizing them at their said places of business. That the defendants threatened and intend to continue their said unlawful, wrongful, willful, and malicious acts and conducts, and that they and their agents and servants are now, and have been ever since said boycott and picketing were established, a nuisance and obstruction to the plaintiffs and to persons in their employ, or intending to trade with or patronize the plaintiffs at their said places of business."

Appellants demurred to the complaint. Upon the filing of the complaint, the court issued an order to show cause why an injunction pendente lite should not be granted, and also entered a restraining order requiring that—

Appellants " * * * absolutely desist and refrain from in any manner interfering with or hindering or obstructing plaintiffs and each and every of them, whether by picketing or otherwise, in the free use and enjoyment and occupancy of their several properties, property rights and business and the conduct thereof; and from entering thereon or therein or in any manner coercing or compelling or inducing or attempting to coerce or induce by any species of threat, intimidation, force or fraud or violence any employees of plaintiffs or either of them from performing their several duties within the scope of their several employments or service; and from preventing or attempting to prevent by any species of threat, intimidation, force or fraud or violence any person or persons from entering the employment or service of plaintiffs or either of them; and from preventing or attempting to prevent by any species of threat, intimidation, force or fraud or violence, exostulation or entreaty, patrons or prospective patrons of plaintiffs or either of them, or any other person or persons from trading with or transacting business with plaintiffs or either of them and from harassing or annoying them with insults, gibes or jeers or language importing the same or displaying on their person or aloft placards or banners or other emblems or insignia containing covert or open or other threats or intimidations or the like to the annoyance of plaintiffs' patrons or prospective patrons, or other person or persons, while going about their business to or from or with plaintiffs' or each and every of them; and from parading in front of or congregating whether singly or collectively, in the vicinity of the entrance to or at or near the premises of the plaintiffs herein and each and every of them, as follows, to wit, * * * for the purpose of intimidating or threatening, whether by force or fraud or coercion or exostulation, plaintiffs' employees or patrons or prospective patrons or any other person or persons from trading with or continuing in the employment of, or seeking employment with

plaintiffs or either of them; and from engaging in what is commonly known and designated as picketing, or establishing and maintaining a picket patrol in any manner whatever, whether singly or collectively, the entrances to the several premises hereinbefore described of the plaintiffs herein or adjacent thereto or in the vicinity thereof."

Upon the return day of the order to show cause, appellants filed affidavits to the effect that pickets were instructed to and did walk at least 10 feet away from the buildings wherein the business of respondents was conducted, and that they were instructed to and did make no remarks except in an ordinary tone of voice; that not more than two pickets were so engaged at any one time and place; and that for the most part the pickets were waitresses belonging to appellants' organization. The affidavits further stated that appellants were not actuated by malice against respondents, and that the picketing was not conducted with the purpose or intent of destroying the business of respondents, or damaging the same, but was conducted for the sole purpose of the economic betterment of the members of the organization as laborers and in pursuance and furtherance of the purposes of the strike; that the means used were not calculated to and did not intimidate any person or persons from exercising their own free will as to patronizing or not patronizing the respondents' place of business.

Questions similar to those here for review have recently been considered by the Supreme Court of the United States in the cases of *American Steel Foundries v. Tri-City Central Trades Council et al.*, 257 U. S. —, 42 Sup. Ct. 72, 66 L. Ed. 103, and *Truax v. Corrigan*, 257 U. S. —, 42 Sup. Ct. 124, 66 L. Ed. 132. In the latter case it was held that a statute of the state of Arizona, very similar to section 20 of the Clayton Act, 38 Stat. at L. 738, c. 323, U. S. Comp. Stat. § 1243d, 6 Fed. Stat. Anno. (2d Ed.) p. 141, was invalid as obnoxious both to the due process clause and the equal protection clause of the Fourteenth Amendment to the federal Constitution. Idaho has no such statute.

In the case of *Keuffel & Esser v. International Association of Machinists et al.*, 116 Atl. 9, the New Jersey Court of Errors and Appeals appears to have assumed that the decision of the Supreme Court in the *Tri-City Case* was of controlling authority in cases arising in the state courts. The court said:

"Since the present case was argued, the Supreme Court of the United States has decided the general principle underlying the present facts in a case that has been pending for several years, since, at the latest, 1916. *Tri-City Central Trades Council et al. v. American Steel Foundries*, 238 Fed. 728, 151 C. C. A. 578; *American Steel Foundries v. Tri-City Central Trades Council et al.*, 257 U. S. —, 42 Sup. Ct. 72, 66 L. Ed. —. The authority of that high tribunal is of such weight as to be

practically controlling on us in a class of cases in which it must often, and may always, have the full force of a binding authority. It would be unwise in us to assume to sit in review even if the reasoning of the opinion did not commend itself to our minds as in fact it does."

What was said by the Supreme Court in the case of *Truax v. Corrigan* as to the equal protection of the laws can have no bearing here, since our statute relating to injunctions contains no exceptions as to any classes of persons, but applies alike to all persons within the jurisdiction of the courts of this state. With reference to the due process clause of the federal Constitution, the court said:

"A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment.

"The opinion of the state Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful."

The court was dealing with a statute enacted by the Legislature of a state. Whether it was intended to hold that a like limitation exists as to the power of a state, acting through its courts, in giving effect to its common law, is not clear. Mr. Justice Holmes, in his dissenting opinion, alludes to the matter as follows.

"I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statute by courts with whom I agree."

[1] A right to conduct a business is property. Incident to this property right is the good will of the business, and the right to appeal to the public for patronage. One may conduct his business in his own way, and may employ whom he will upon such terms as may be agreed upon, and may discharge any employee at will unless restrained by a valid contract so long as he violates no law. These rights are entitled to the protection of the law. But because of the conflicts which sometimes arise between absolute rights, the law does not afford a remedy for every interference with or encroachment upon rights as such.

[2] Those who labor for wages have certain rights equally unquestioned. They may contract for employment on whatever terms they see fit, and, unless restrained by a binding contract, may cease employment when they please. They have a right to form unions for the purpose of improving their economic and social conditions, or to refrain from joining such unions if they choose. They have a right to strike in concert when the object of the strike is for their collective

benefit. They have a right to acquaint the public with the fact of its existence and the causes thereof, and appeal for sympathetic aid by a request to withhold patronage. *Truax v. Corrigan*, supra.

It is clear that any resort to the primary boycott, if in any degree successful, will result in damage to the business of the person boycotted; but, where it is lawfully conducted, this is one of the inconveniences for which the law does not afford a remedy.

[3] A combination to strike for the purpose of accomplishing an object which is not regarded as lawful, or the use of illegal means in aid of a lawful strike, are wrongs for which the law affords a remedy. *Duplex Printing Press Co. v. Deering et al.*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 198.

[4, 5] In the case at bar, no question is raised as to the legality of the object for which the strike was called. The question we must decide relates entirely to the legality of the means employed in aid thereof. Speaking generally, the means employed must be free from falsehood, libel, or defamation, and from physical violence, coercion, or moral intimidation.

"The persuasion that the law permits in these circumstances is such as appeals to the judgment, reason or sentiment, and leaves the mind free to act of its own volition. Where there is no such freedom of action, more than mere persuasion has been exercised, and it amounts to duress, intimidation, coercion, or other like influence." *McMichael v. Atlanta Envelope Co.*, 151 Ga. 776, 108 S. E. 226.

In challenging the legality of the means used in this case, respondents call attention to the language employed by appellant and their representatives in appealing to the public, and also to the stationing of pickets in front of their respective places of business.

[6] Confining our attention first to the language used: We do not think the right of free speech guaranteed by section 9, art. 1, of our Constitution, is directly involved. We are concerned only with the abuse of the freedom of speech. The law accords the remedy of injunction in this class of cases only because of the inadequacy of the ordinary remedies at law.

[7] We think it is clear that the words, "This house is unfair to organized labor," printed upon a placard, are permissible. The expression, "unfair to organized labor," is a term well understood and is thus defined in *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165:

"In reference to the word 'unfair,' it clearly appears that as employed by the defendants and labor organizations generally, it has a technical meaning well understood by the plaintiff and by all the persons to whom the council sent notices that the plaintiff had been declared unfair. Such declaration means, and in this in-

stance was understood by all parties concerned to mean, not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it."

See, also, *Greenfield v. Central Labor Council* (Or.) 192 Pac. 783; *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E, 383.

Neither do we think legitimate objection can be made to the words: "This house is unfair to organized labor. Why patronize an unfair house! Why not patronize a house with organized labor!" The expression, "This house is unfair to organized labor. Why not patronize a union house! Go where they have all white help," is legitimate, or not, according to the truthfulness or falsity of the implication that the house is employing other than white help. The expression, "This beanery is on the bum," cannot be upheld. Although it may not have been intended seriously, it carried with it an implication of deterioration of service and is not permissible. The expression, "Why not patronize a union house and you won't have to turn your back to the public and you will not be ashamed," is not permissible, because this evidently was intended to cause moral intimidation upon the patrons of the place and doubtless with many people would have that effect. Neither do we think justifiable the expression, "This house is unfair and will be unfair to you." This was addressed to the patrons of the restaurants, and, when addressed to the public generally, carried an implication of dishonesty or lack of integrity.

[8, 9] The most important question for consideration in this case arises out of the action of the trial court in enjoining the stationing of pickets in front of and near to the respective places of business of respondents. It is a case of first impression in this state.

It is claimed by respondents that the pickets were guilty of trespassing upon their property; that, although the streets have been dedicated to the use of the public, the title in front of their property to the center of the street is vested in the owner, and the dedication is only to the usual and customary user by the public. We are of the opinion, however, that the lawfulness of the use of the streets by appellants must be determined solely by considerations other than those growing out of the ownership of the servient estate. The pickets constitute a portion of the public for whose use the streets were dedicated. The owner cannot object to an unlawful use on their part because of his ownership of the soil, for by the very act of dedication he has divested himself of that right. He must have some other basis for his objection, such, for instance, as the creation of a private or public nuisance. The special rights of free access and egress enjoyed by

the owner of abutting property rest upon a different basis.

Our attention has been called to the case of *Campbell v. Motion Picture Machine Operators Union* (Minn.) 186 N. W. 781. In that case it was held that a combination to boycott a motion picture theater is one in restraint of trade, and forbidden by the terms of the anti-trust statute of Minnesota (section 8973, Gen. Stats. 1913). There are both statutory and constitutional provisions somewhat similar in this state. C. S. §§ 2531 and 8512; Const. § 18, art. 11. We are of the opinion, however, that this case does not fall within the purview of those statutory and constitutional provisions. The purpose of appellants was, not to fix the price, or regulate the production of any article of trade or commerce, but to better their own economic condition. Labor is not a commodity, or an article of commerce within the meaning of our Constitution and statutes. The anti-trust statute of the state of Texas referred to in *Webb v. Cooks', Waiters' and Waitresses' Union* No. 748 (Tex. Civ. App.) 205 S. W. 465, is materially different.

On behalf of appellants, it is urged that having a right to acquaint the public with the facts concerning the strike, and to appeal for sympathetic aid, they should be permitted to make use of this right in the most effective manner, by bringing the knowledge of their dispute with respondents to the notice of intending patrons; that they should be permitted to go where the patrons are most likely to be; and that they are therefore within their rights so long as they are peaceable and their conduct is not unseemly and so long as they do not obstruct the entrance to or egress from the business houses of respondents. There is much force in this position. But in our opinion it is overcome by the fact that the act of stationing pickets in front of places of business of respondents inevitably leads to results directly opposite to appellants' intentions and protestations.

It is said that the term "peaceful picketing" involves a contradiction in terms; that the word "picket" carries with it a sinister implication and is selected from the nomenclature of war. *Truax v. Corrigan*, supra. Accordingly, in the case of *American Steel Foundries v. Tri-City C. T. Council*, supra, it was held that, while picketing should be enjoined eo nomine, the defendants in that case would be entitled to station, at each point of ingress or egress from the company's works, one "missionary." We are concerned with facts rather than names.

In the case of *Pierce v. Stablemen's Union*, Local No. 8760, 156 Cal. 70, 103 Pac. 324, it is said:

"The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to, and naturally do, incite to crowds, riots, and

disturbances of the peace. A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. * * * We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public."

Where the principal purpose of picketing is to appeal to the intending patrons, consisting of men, women, and children, of a business house, such as a restaurant, we think the following from the opinion in the case of *Local Union No. 313 v. Stathakis*, 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894, is worthy of consideration:

"And can there be any real question as to the meaning of the presence of the pickets? Were they not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? Were they not saying, even though it was silently said: 'See what we are doing to this man, because he has incurred our displeasure! Beware a similar fate!' And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee, simply because there was a controversy in which they did not desire to even appear to be parties?"

In view of the thought suggested by this quotation, added emphasis is placed upon the allegation of the complaint that prospective patrons of the respondents were deterred by intimidation from entering respondents' places of business.

[10] We confine our decision to the facts presented by the case at bar. We are not dealing in this case with questions which might arise in a case where a manufacturing or other plant, having no direct dealings with the general public, is involved, nor with any question relating to a secondary boycott. We conclude that the stationing of pickets in front of or near to respondents' places of business in this case was necessarily intimidating in character, and was properly enjoined. This does not mean, however, that appellants are to be debarred from the use of the streets generally, or from displaying

truthful placards and banners, or using other legitimate means of appealing for support.

Reference to the notes found in 6 A. L. R. 909, and 16 A. L. R. 230, will direct those interested to many of the authorities dealing with the matters herein discussed.

We come now to the terms of the injunction issued by the trial court. In view of the foregoing discussion, and the facts disclosed by the record, the injunction was broader than is justified. There was no occasion to enjoin the use of force or violence, since none had been used or was threatened. The injunction should not require the appellants to absolutely desist or refrain from in any manner interfering with the business of respondents. Neither should it include every species of expostulation or entreaty.

The case is remanded, with directions to modify the injunction so as to accord with the views herein expressed. No costs awarded.

BUDGE, McCARTHY, DUNN, and LEE, JJ., concur.

(35 Idaho, 333)

MEDLING et al. v. SEAWELL. (No. 3627.)

(Supreme Court of Idaho. April 11, 1922.
Rehearing Denied May 27, 1922.)

1. Accord and satisfaction ¶25(2)—Complaint must state that offeree agreed to accept payment in full.

In order to constitute a statement of a cause of action on an accord, the complaint must state that the offeree agreed to accept as payment in full the amount which the offeror agreed to pay.

2. Pleading ¶433(3)—Defective allegation of good cause of action cured by judgment in absence of demurrer.

A defective allegation of a good cause of action, in the absence of a demurrer, is cured by judgment.

3. Interest ¶19(1)—On a claim for unliquidated damages not susceptible of ascertainment by computation, interest will not be allowed prior to judgment.

Where a claim is for unliquidated damages, the amount of which is not susceptible of ascertainment by computation or by reference to market values, interest will not be allowed prior to judgment.

Appeal from District Court, Payette County; B. S. Varian, Judge.

Action by J. C. Medling and another against Lester C. Seawell for breach of contract. Judgment for plaintiffs, and the defendant appeals. Modified and affirmed.

O. M. Van Duyn, of San Francisco, Cal., and Frank T. Wyman, of Boise, for appellant.

James S. Bogart and Harry L. Fisher, both of Boise, for respondents.

McCARTHY, J. Paragraph 1 of respondents' complaint is as follows:

"That on the 21st day of August, 1917, the plaintiffs entered into a contract by and with the said Lester C. Seawell, defendant, under and in pursuance of which said defendant in consideration of payments therein mentioned to be made by plaintiffs, said defendant sold and agreed to deliver to plaintiff certain ewe sheep and to turn over to plaintiff as part of the consideration therein stipulated, certain range or permits to range sheep in the Payette National Forest of Idaho, which range rights or permits the said defendant represented to plaintiffs that he owned and would deliver same together with the said ewe sheep between the 1st and 15th day of October, 1917, a copy of which contract marked 'Exhibit A' is hereto annexed and made a part hereof."

The second paragraph alleges that respondents paid the amount called for by the contract, and appellant delivered the sheep; that respondents demanded of appellant that he turn over to them the range or permits contracted for. Paragraph 3 reads as follows:

"That at the time of the delivery of said sheep and the payment in full pursuant to said contract on or about October 12, 1917, defendant assured plaintiffs that said range rights or permits would be duly turned over to plaintiffs, that thereafter in the spring of 1919, defendant informed plaintiffs that he was unable to fulfill his contract and turn over to plaintiffs said range rights, or permits and agreed to reimburse and return to plaintiffs the sum of \$6,000, which defendant agreed was the value of said range right or permit; that said sum of \$6,000 is the reasonable value of said range right or permit; that plaintiffs demanded of defendant that said defendant pay to plaintiffs said sum of \$6,000, which defendant has agreed and several times promised to pay; that notwithstanding said demands on the part of plaintiffs and the promises on the part of the defendant, said defendant has failed and refused, and still fails and refuses, to pay to said plaintiffs said sum of \$6,000."

The case was tried to the court without a jury. The court found:

"That on or about the 21st day of August, 1917, the plaintiffs and defendant entered into a written contract at Boise, Idaho, for the sale and purchase of certain ewe sheep and forest range rights or permits, said contract reciting sale of 7,400 ewes, the Hunt ewes, 5,500 to be yearlings, ones, twos, threes, and fours, and the balance to be full mouth ewes, course wool ewes at \$16.50, fine wool ewes at \$16.00 and Hunt to turn range to Cummins and Medlings order."

"The contract further acknowledged the receipt of the sum of \$11,000 as part payment of the above-mentioned live stock and that the time and place of delivery was on or before October 15, 1917, at Cascade.

"(2) That on or about the 6th day of October, 1917, defendant delivered to and plaintiffs accepted certain ewe sheep at Cascade, Idaho, in pursuance of the conditions of said written contract, and settled with and paid the defendant in full and balance due on said contract on or about October 12, 1917, and demanded of defendant that he turn over to plaintiffs the forest reserve right or permit, which said defendant at the time agreed to do.

"(3) That said range right or permit at the time of signing the contract and at the time of the delivery of said sheep was of a reasonable value of \$6,000, that said \$6,000 was the agreed value of said range rights or permit between said parties, and was part of the consideration paid by plaintiffs to defendant, and included in the price of the sheep contracted and paid for by plaintiffs to defendant.

"(4) That defendant on January 9, 1919, informed plaintiffs that he was unable to deliver the range right or permit called for in said written contract, and agreed to reimburse and return to plaintiffs the said sum of \$6,000, the value of said range right or permit.

"(5) That plaintiff several times demanded of defendant before the commencement of this action that he turn over to plaintiffs said range rights or permit, or in lieu thereof refund to or reimburse plaintiffs in the sum of \$6,000, and that said defendant did promise and agree to pay to said plaintiffs said sum of \$6,000."

Judgment was rendered for respondents and against appellant in the sum of \$6,000, with 7 per cent. interest from October 12, 1917, amounting to \$980.

[1] The principal point urged by appellant is that the complaint does not state a cause of action. He contends that the only cause of action set forth in the complaint is on an accord. He further contends that it does not state such a cause of action, because it alleges that appellant agreed that \$6,000 was the value of the range rights or permits, and agreed to return to respondents the sum of \$6,000, but does not allege that respondents agreed that \$6,000 was the value or agreed to accept it. The latter contention is sound. Because of failure to plead that respondents agreed to accept \$6,000 as the value of the range rights or permits, the complaint fails to state a valid cause of action on an accord. 3 Williston on Contracts, § 1838, p. 3160. Unless the complaint states some other cause of action, the judgment must be reversed.

At the beginning of the trial, in response to a motion to elect, respondents' counsel stated that they sued upon the original contract as modified. The court denied the motion saying:

"The complaint seems to state a cause of action based on an oral modification of the contract."

We are not bound by the theory announced by counsel and the court at the trial of the case unless the adoption of that theory caused the trial to take such a course that

the sustaining of the judgment upon any other theory would work an injustice.

[2] The complaint states in the first paragraph that respondents and appellant entered into a contract for the purchase and sale of certain sheep, forest range rights, and permits in consideration of certain payments to be made by respondents. In paragraph 3 it alleges that appellant informed respondents that he was unable to turn over to them the range rights or permits, and that \$6,000 is the reasonable value of them. To this complaint no demurrer or motion was interposed. In the brief, after suggesting that the complaint sets out sufficient facts to constitute a good cause of action for money had and received, respondents definitely take the position that the cause of action is one for damages for breach of contract. Such a cause of action is not well stated in the complaint. In the first place, the complaint does not directly allege that appellant did not turn over the range rights or permits. This is indirectly stated, however, in the allegation that appellant informed respondents that he was unable to turn them over. The complaint does not allege what was the reasonable value of the forest range rights and permits at the time of the alleged breach of the contract, but says that their value is \$6,000 at the time of bringing the suit. Appellant contends that this is fatal to the cause of action viewed as one for breach of contract.

"A pleading should be more liberally construed after judgment, especially when the point is first raised in the appellate court, than on demurrer or motion before trial." *Boggs v. Seawell*, 34 Idaho, —, 205 Pac. 262.

"Where a complaint is attacked after a judgment upon the ground that it does not state facts sufficient to constitute a cause of action, every reasonable intendment is indulged in favor of the sufficiency of the complaint, and all inferences of fact which may be drawn from the facts alleged must be deemed, within reasonable limits, to be alleged in order to sustain the judgment." *Newport Water Co. v. Kellogg*, 31 Idaho, 574, 174 Pac. 602.

The Mode, Ltd., v. Myers, 30 Idaho, 159, 164 Pac. 91. Applying this rule, we conclude that the complaint contains a statement of a cause of action for breach of a contract to deliver the forest range rights and permits, sufficient to support the judgment. The findings of the court are sufficient to sustain the judgment upon this theory, and, while there is a conflict, the evidence is sufficient to support the findings. Sustaining the judgment on this theory does not work any injustice. Appellant contends that there is no evidence as to the reasonable value of the range rights. He testified that he told Medling, one of the respondents, that if a person got a range of that kind it was worth \$6,000, and also told him that if he did not want to take the range he would knock off

\$6,000. This testimony itself makes out a prima facie case that the range was reasonably worth \$6,000.

[3] Appellant also complains because the court allowed interest from October 12, 1917, in the amount of \$980, that being the date on which it found respondents demanded of appellant that he turn over the range to them. As above pointed out, the action can stand only as one for damages for breach of the original contract; the measure of damages being the reasonable value of the range rights.

"Where a claim is for unliquidated damages, the amount of which is not susceptible of ascertainment by computation or by reference to market values, interest will not be allowed prior to judgment." *Storey & Fawcett v. Nampa, etc., Irr. Dist.*, 32 Idaho, 713, 187 Pac. 946; *Barrett v. No. Pac. Ry. Co.*, 29 Idaho, 139, 157 Pac. 1016; *Austin v. Brown Bros. Co.*, 30 Idaho, 167, 164 Pac. 95; *Graham v. Brown Bros. Co.*, 30 Idaho, 651, 168 Pac. 9.

The reasonable value of the range was not susceptible of ascertainment by computation. It does not appear from the record that it was ascertainable by reference to market values. It could be established only by evidence in court or by an accord between the parties. We conclude that it was error to allow interest before judgment.

We have examined appellant's other specifications of error, and find nothing in them calling for a reversal of the judgment.

As appellant was forced to take this appeal to obtain a correction of the judgment as to the interest, he is entitled to his costs. The judgment is modified by striking out the amount of the interest allowed before judgment, or \$980. As so modified, it is affirmed, with costs to appellant.

RICE, C. J., and BUDGE and LEE, JJ., concur.

(60 Utah, 173)

IN RE ROMNEY'S ESTATE. (No. 3736.)

(Supreme Court of Utah. April 4, 1922.
Rehearing Denied May 24, 1922.)

1. Taxation \S 866—Stock indorsed to the corporation organized by stockholder held subject to inheritance tax.

Where a father organized a corporation, transferred his real estate to the corporation in payment of the stock, divided most of this stock among his children, and at the same time indorsed certificates of stock in other corporations to the corporation organized, remained the owner of record of the stock indorsed, received the dividends thereon, and thereafter transferred some of the indorsed stock to others without the consent of the corporation organized by him, on the death of the father the indorsed stock was subject to the inheritance tax under Comp. Laws 1917, \S 3185, as amended by Laws 1919, c. 64, \S 1; the enjoyment and beneficial interest of the indorsed stock having remained in the father during his lifetime.

2. Corporations \S 155(1) — Term "dividend" defined.

The term "dividend," as applied to corporations in a legal sense and as generally understood in common usage, means earnings or profits which are distributed in proportion to the shares of stock in the corporation owned by the several stockholders.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend.]

3. Taxation \S 866 — Where a father, daughter's sole heir, assigned interest in daughter's estate, without consideration, before property was reduced to possession, the property was not subject to inheritance tax upon father's death within three years.

Where a father, who was daughter's sole heir, assigned all his right, title, and interest in and to the daughter's estate to a son, without consideration, pursuant to a request made by the daughter prior to her death, and which property was never reduced to possession by the father, and title to which had never been confirmed in him by a decree of court, and no administrator had been appointed in the daughter's estate prior to the assignment of property, the property was not subject to an inheritance tax on the father's death as a part of his estate; the property at no time having been a part of the father's estate.

4. Taxation \S 893—Stock transferred to corporation and distributed to stockholders as dividends not subject to inheritance tax in action to which stockholders were not parties.

Where a father organized a corporation and distributed most of the stock between his children, and assigned stock of other corporations to the corporation so organized, which was subsequently distributed to the children in the form of dividends, the stock so distributed could not be declared subject to inheritance tax upon the father's death, where the children were not parties to the proceeding.

On Application for Rehearing.

5. Appeal and error \S 748(2)—Supplemental assignment of error, made under order of court on seasonable application, considered.

Where original assignment of error, complaining of the insufficiency of the evidence, did not comply with Supreme Court rule No. 26 (196 Pac. ix) because of failure to specify wherein the evidence was insufficient to support the findings, a supplemental assignment of error, filed under order of a justice of the court made on seasonable application, in the absence of a showing of prejudice to the respondent, will be considered.¹

Appeal from District Court, Salt Lake County; G. A. Iverson, Judge.

In the matter of the estate of George Romney, deceased, on petition of William D. Sutton, as State Treasurer, for an order citing the George Romney & Sons Company and William S. Romney, as administrators of the

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ *Baglin v. Earl-Eagle Min. Co.*, 54 Utah, 582, 164 Pac. 196.

estate of Jane Agnes Romney, deceased, to show cause why an inheritance tax should not be paid by each on certain property alleged to have been transferred to them by the deceased, George Romney. Judgment dismissing petition, and petitioner appeals. Affirmed in part, and reversed and remanded in part.

H. H. Cluff, Atty. Gen., and L. A. Miner, Asst. Atty. Gen., for appellant.

Stewart, Stewart & Alexander and L. E. Cluff, all of Salt Lake City, for respondents.

GIDEON, J. William D. Sutton, as State Treasurer, filed petition in the probate proceedings in the estate of George Romney, deceased, late of Salt Lake county, praying for an order citing the respondents, George Romney & Sons Company and William S. Romney as the administrator of the estate of Jane Agnes Romney, deceased, to show cause before the court why an inheritance tax should not be paid by each respectively upon certain property alleged to have been transferred to them by the deceased, George Romney. In response to the order of the court respondents filed separate answers. The answers denied the right of the state to have or collect an inheritance tax on any property held by either. On the issues thus joined the court heard evidence, made elaborate findings, and entered judgment dismissing the petition on its merits as to both respondents and awarded costs against the State Treasurer. From that judgment the State Treasurer appeals, and the entire record is before this court for review.

The appellant relies on Comp. Laws Utah 1917, § 3185, as amended by chapter 64, Laws Utah 1919. The section, so far as material to the question under consideration on this appeal, reads:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after the death of the grantor, vendor or donor, to any person in trust or otherwise, and, for the purposes of this act, any transfer of a material part of any such property in the nature of a final disposition or distribution thereof made by the decedent within three years prior to his death, except in case of a bona fide sale for a fair consideration in money or money's worth, unless shown to the contrary, shall be deemed to have been made in contemplation of death, shall be subject to the following tax, after the payment of all debts, for the use of the state. * * *

Many errors are assigned. We shall not, however, attempt to consider them in detail.

There is little, if any, dispute as to the material facts. The duty of the court, therefore, is to apply to such facts the rules of law governing the rights of the parties.

It appears that on May 14, 1903, the deceased and 10 of his sons entered into articles of agreement for the incorporation of the George Romney & Sons Company as a corporate entity under the laws of the state of Utah. The authorized capital stock was \$200,000, divided into 2,000 shares of the par value of \$100 each. George Romney subscribed for 1,990 of the 2,000 shares. One share each was taken by the other incorporators. Upon the organization of the company, George Romney transferred 1,982 of the 1,990 shares owned by him to his sons and daughters, 24 in number, giving 82 shares to each son and 83 shares to each daughter. The entire capital stock was fully paid by George Romney conveying to the corporation certain real property described in detail in the articles. The corporation received the real estate in full payment of its authorized capital stock, and no question is raised anywhere in the record that the real estate so conveyed was not of the full value of the stock issued.

It is without dispute that the real estate prior to such conveyance to the corporation was exclusively the property of George Romney, and it seems to be conceded that the conveyance was made contemporaneously with the execution of the articles of incorporation.

On May 20, 1903, George Romney executed a paper denominated "Transfer," in which, for the consideration of \$1 "and for good and valuable consideration," it is recited that he sold, conveyed, and delivered to the George Romney & Sons Company a long list of enumerated corporate stock representing his holdings in various other corporations. It is alleged in the petition that the value of this stock was \$500,000. In the transfer it is also recited that the certificates had been "indorsed and delivered" to the George Romney & Sons Company. On May 9, 1908, George Romney executed two additional papers, purporting to "sell and assign" to the George Romney & Sons Company certain bonds and other corporate stock. The consideration mentioned in each of these papers was \$1 and other good and valuable consideration. At the dates of the transfers, in 1903 and in 1908, none of this corporate stock was surrendered to the corporations issuing the same; nor were any certificates issued to the George Romney & Sons Company evidencing ownership thereof during the life of George Romney. No new certificates were issued by any of the corporations during his lifetime, except for the purpose of having other certificates issued to George Romney or to certain of his heirs in the year 1918. With the exception of a few shares of stock in the

Z. C. M. I. and in the George Romney Lumber Company, the record shows no exception to that method of treating these various stocks. It is in the record that these stocks, after indorsement, were placed in a safety box in a savings bank rented in the name of the respondent company, to which George Romney, as president, had a key during his lifetime. There is some testimony that one of his sons, as vice president, during a part of the time, also had a key which gave him access to this box. The stock represented by these various certificates upon the books of the corporations issuing the same stood in the name of George Romney until the date of his death, with the exception of the stock in the Amalgamated Sugar Company, Utah-Idaho Sugar Company, Deseret National Bank, Home Fire Insurance Company, and possibly one or two others. Reference will be made to the disposition of these stocks later in this opinion.

The dividends upon these various certificates of stock from the claimed transfer were all paid to George Romney personally. There is nowhere in the record any proof, competent or otherwise, showing that \$1 of these various amounts paid in dividends ever found lodgment in the treasury of the respondent corporation. On the contrary, the affirmative proof of the officers of the different corporations issuing these various certificates of stock is that all dividends had been paid to the record holder of the stock, namely, George Romney. Canceled checks representing \$5,000 in dividends paid by the Amalgamated Sugar Company on the stock in that company from January, 1912, to December, 1917, are in the record. They are all made payable to George Romney. No effort was made to show that \$1 of that amount was ever credited to the account of the respondent company.

As illustrative of the control over this corporate stock retained by George Romney we shall consider the stock owned by him in two of the corporations, namely, the Z. C. M. I. of Salt Lake City and the Amalgamated Sugar Company of Ogden.

The Z. C. M. I. stock owned by George Romney was included in the list transferred May 20, 1908. Other and additional stock in the same concern was sold and assigned by the paper executed in May, 1908. All of these certificates so transferred and sold were indorsed to George Romney & Sons Company. Notwithstanding such sale and transfer and indorsement, it appears that as late as November 8, 1917, these certificates of stock were surrendered, and new certificates issued therefor in the name of George Romney. On November 10, 1917, these new certificates were indorsed to George Romney & Sons Company, but at a later date the indorsee's name was "scratched out" and the stock re-

issued in various amounts to the children of George Romney. No record is found that the respondent corporation ever consented to the surrender of this stock, or ever consented to its indorsement to any one else—in fact, there is no record that the corporation ever exercised any control over it. This stock, with other corporate stock aggregating many thousands of dollars in value, and which it is claimed was given to the respondent corporation by the papers executed in 1903 and 1908, was re-indorsed, and other indorsee's names inserted in the indorsement, and the stock surrendered and passed to others, without any action on the part of the corporation so far as its records show.

In the case of the stock in the Amalgamated Sugar Company, the original certificate, known as No. 22, for 67 shares, was indorsed by George Romney to the respondent corporation May 20, 1903. It remained, however, in the name of George Romney upon the books of the sugar company until December, 1914. It was then surrendered, and a new certificate issued to George Romney for 100 shares. In November, 1917, this certificate was surrendered, and in lieu thereof four other certificates for 250 shares each were issued to George Romney. These certificates represented other stock which the holder of the original certificate was entitled to upon a stock dividend declared. These new certificates were indorsed by George Romney in blank. On February 7, 1918, the certificates were surrendered, and in lieu of them shares of stock to 15 different persons were issued in various amounts, representing the 1,000 shares of stock received by George Romney in November, 1917.

The final distribution of the stock in the Utah-Idaho Sugar Company, in the Deseret National Bank and in the Home Fire Insurance Company was similar to the disposition of the Z. C. M. I. and the Amalgamated Sugar Company stock.

Other stock mentioned in the transfers of 1903 and 1908 remained in the name of George Romney on the books of the corporations issuing same until after his death. At that date the stock indorsed by him was surrendered, and other stock issued therefor in the name of the respondent corporation.

[1] It would serve no good purpose to further review the history of the control over this stock or the certificates of stock representing the interests in the various corporations by George Romney during his lifetime. It is enough for the purpose of the question presented by this appeal to state that no other conclusion is logical or reasonably inferable from the history of the entire transaction than that the enjoyment and beneficial interest of the stock that finally found resting place in the name of the respondent cor-

poration did not vest in such corporation during the life of the donor.

The law here applicable is concisely stated in the third headnote to *Reish, Adm'r, v. Commonwealth*, 106 Pa. 521, which clearly reflects the decision in that case, and which reads as follows:

"The owner of an estate cannot defeat the plain provisions of the Collateral Inheritance Law (Act of April 7, 1826) by any device which secures to him, for life, the income, profits and enjoyment of his estate. Said law can only be defeated by such a conveyance as parts with the possession, the title and the enjoyment during the grantor's lifetime."

See, also, *Dubois' Appeal*, 121 Pa. 368, 15 Atl. 641.

It stands as an admitted fact, and that should be borne in mind at all times in the consideration of the ownership of this stock, that all of the stock was originally the individual property of George Romney. If the naked legal title to that stock or the enjoyment of the beneficial interest, or both, ever vested in the respondent corporation, such vested interest is based wholly upon the voluntary relinquishment and transfer by the act of the donor.

We need not determine in this proceeding whether the facts warrant the conclusion that there ever had been a completed gift even of the naked title. There is no dispute in the law as to what acts are requisite to constitute a completed gift. 12 R. C. L. 932; *Maxler v. Hawk*, 233 Pa. 316, 82 Atl. 251, Ann. Cas. 1913B, 559. The difficulty arises in applying such rules to the multitudinous and complicated transactions of men. *Cook v. Lum*, 55 N. J. Law, 373, 26 Atl. 803. In the district court the Attorney General tried this case upon the theory that the beneficial interest and enjoyment had not vested in the donee until the death of the donor, and the case has been argued upon that theory here. We are clearly of the opinion that the undisputed facts sustain that theory, and that no other conclusion is permissible than that such interest and enjoyment did not vest in the respondent corporation until the death of George Romney.

No ledger or other account was ever kept by the corporation showing its receipts and disbursements. No record was produced of any minutes of the meetings of the directors or of the stockholders during the 17 years between the date of the incorporation of the company and the death of its president and manager. The district court and this court are without a scintilla of evidence to support the contention of the respondent corporation that it exercised control and received the benefits and enjoyment of the dividends paid from time to time upon the corporate stock hereinbefore referred to, and which it is now claimed should be exempt from taxa-

tion by reason of the gifts made in the years 1903 and 1908, except the mere fact of the indorsement of such stock by George Romney. If there were any evidence in the record supplementing or in addition to the written indorsements and the placing of the certificates of stock in the safety deposit box, there might be some foundation upon which to base such contention. On the contrary, there is positive proof that the dividends were paid to the original holder of the stock, namely, George Romney. As stated elsewhere in this opinion, there are in the record canceled checks aggregating the sum of \$5,000, which, by their indorsements, show that George Romney received such dividends personally. No evidence is found nor any facts stated from which a reasonable inference can be drawn that any such dividends ever passed to the credit of the treasurer of this respondent corporation. There was testimony introduced with a view of showing that the stockholders had received dividends at various times, and from that it is argued that this respondent must have received the dividends from this corporate stock. The total amount of the dividends paid by the respondent to its stockholders, according to the highest estimate of any witness, does not exceed \$75,000. It should be remembered that \$200,000 in value of real estate was turned into the corporation at the date of its organization. The record is replete, both in the testimony and in the briefs of counsel, that the George Romney & Sons Company was a prosperous corporation; that George Romney was an able, astute business man, retaining his faculties to a remarkable age, and that he was for many years one of the leading business men of this community. Dividends in the sum of \$75,000 from a capitalization of \$200,000 under such management and during the prosperous years from 1903 to 1920 ought not be considered very strong or conclusive evidence that the respondent corporation was receiving and applying to the benefit of the stockholders an income from property in addition to its real property. It is also in the record that none of the officers, save the president, George Romney, received any salary for their services in connection with such corporation. There is no testimony showing what salary the deceased did receive, but he was permitted to take such salary for his services as he felt that he was entitled to receive. In other words, the stockholders had absolute confidence in his integrity, and felt assured that he would never take anything from the treasury of the corporation to which he was not entitled.

Much is said in the arguments to the effect that the stockholders of the corporation, soon after its organization, by resolution, gave to its president practically unlimited authority in the control and management of

the corporate affairs. It is argued on the part of the Attorney General that such fact is evidence that the control and ownership of this property, both real and personal, remained with the deceased, and the use and enjoyment of the same did not pass to his heirs until after his death. The deceased was a man of recognized business ability. He had given to this corporation all the property it possessed. Its stockholders were his children and heirs. In view of these matters it was only natural that the stockholders should repose absolute confidence in his management of the affairs of the corporation, and under these circumstances the control of the corporation by the deceased can be given no serious consideration in the determination of the questions presented by this record.

[2] It is claimed that there is testimony tending to show ownership and control of these various stocks by the respondent corporation, based upon an alleged dividend paid by the corporation to its stockholders in the early part of 1918. At that time much of the corporate stock and the stock received as dividends upon the original certificates of stock named in the transfers of 1903 and 1908 was distributed to the stockholders of the respondent corporation. These individual stockholders were children of the deceased. As stated before, no record of the action taken by the directors in declaring this dividend is found. One witness placed the time of the meeting of the directors as December, 1917, and another witness thought it was in January, 1918. The amount of the so-called dividend was not based upon or determined by the earnings of the corporation. The corporation had from time to time loaned or advanced to the different stockholders various sums of money and taken notes from such stockholders for such amounts. The largest amount loaned to any one stockholder was \$13,000. In order to liquidate this indebtedness it is claimed that the largest amount owing by any one stockholder was selected as the basis upon which to declare a dividend. That amount was multiplied by the number of stockholders and a dividend aggregating the multiple was agreed upon. Stock of these various corporations representing the difference in value between the amounts owing by each individual stockholder and the amount of the dividend was transferred and caused to be issued to such stockholder. That is, the stockholder owing \$13,000 would receive no stock and the one owing \$5,000 would receive stock representing the difference in value between \$13,000 and \$5,000. The deceased was at that meeting. He was then 86 years of age, but in good health and of sound mind. Other directors were present. The deceased's son-in-law, an experienced attorney at law, was also present, called there by the deceased. It is passing

strange that, if it was then recognized and accepted by the deceased and others interested in this corporation that not only the legal title but the use and enjoyment of these various corporate stocks had theretofore vested in the respondent corporation, no record of the action of the directors in thus distributing the assets of the corporation, aggregating in value more than \$100,000 was thought necessary. The amount of the dividend was not determined by the earnings of the corporation. No claim or contention is made that such is the fact. The earnings of the corporation were in no way considered in arriving at the amount of the dividend. The term "dividend," as applied to corporations, in a legal sense and as generally understood in common usage, means earnings or profits. 6 Fletcher Cyc. Corps., § 3649. Such earnings or profits are distributed in proportion to the shares of stock in the corporation owned by the several stockholders. The deceased, as appears from the inventory filed in the estate, was a stockholder, and yet it nowhere appears in the distribution of this dividend that he received his pro rata share, or that such was given or allowed him. The conclusion seems irresistible that no one considered or treated the distribution of this stock to the various children of the deceased as a dividend paid by the corporation, but, rather, as effectuating a desire on the part of the deceased to relieve his children from the indebtedness owing by some of them to the corporation and at the same time distribute his estate equally among his various children entitled to share in the distribution of the same. The will of the deceased, made in the year 1917, and the codicils thereto, emphasize the fact that it was the desire of George Romney that his children should share equally in his estate and in all property emanating therefrom.

In our judgment there is no evidence in the record to support the claim that at the time George Romney organized the respondent corporation in 1903 and conveyed to it certain real property and afterwards gave to his several children practically all of the capital stock of that company he did so in contemplation of death. On the contrary, the evidence is undisputed that at that time Mr. Romney was in good health and actively engaged in business. He continued to look after the business of the company for many years. The title to the real property so conveyed remained continuously in the name of the corporation, and the control and management of the same was under its direction. In our judgment there is in the record competent substantial testimony to support the finding of the trial court that the real property passed from the control of the deceased.

[3] Respecting the right of the state against the administrator of the estate of

Jane Agnes Romney, deceased: Miss Romney died in May, 1918. Her father, George Romney, as the surviving parent, was the sole heir to her estate. In November, 1918, George Romney, by deed of transfer, assigned all of his right, title, and interest in and to the property of the estate of his daughter to William S. Romney, a son of George Romney. Admittedly the transfer of George Romney's interest in his daughter's estate to William S. Romney was within three years prior to the death of George Romney, and was without consideration except carrying into execution a verbal trust or request of his daughter. It appears that the daughter had requested her father that if he survived her he should, as her sole heir, give or transfer her property to her brother William S. Romney. This brother, it seems, knew what disposition she wished made of her property. In carrying into effect that request the transfer or assignment was made. No case has been called to the court's attention in which the facts are analogous to the facts here recited. No principle or rule of law is suggested why the property of the daughter's estate should be subject to a tax as a part and parcel of the property of the estate of George Romney, deceased. The property was never a part of his estate. He never reduced it to his possession by having a decree of court confirming his title. He at no time exercised ownership or control over this property. William S. Romney was not appointed administrator until after his father's death. George Romney, by virtue of the statutes of this state, was entitled to receive this property as sole heir, but before reducing it to possession, in November, 1918, he divested himself, and thereby his estate, of any claim or interest in the property of his daughter's estate. In our judgment the court was clearly right in refusing to treat this property as a part of the property of the estate of George Romney, deceased, liable to an inheritance tax.

[4] No order is or can be made respecting the right of the state to collect a tax on the corporate stock given or distributed to the various children of the deceased, George Romney, by the claimed dividend distribution made in the early part of 1918. The parties to whom that stock was transferred are not parties to this action. As indicated herein, we are clearly of the opinion that the right to the use and enjoyment of this corporate stock never at any time vested in the corporation. That right to the use and enjoyment of it at all times remained in the deceased until he was divested of it by the transfers made in 1918. If it be claimed that the naked title, by the transfers and conveyances made in 1903 and 1908, vested in the respondent corporation, it can reasonably be held that the corporation, by its acts as testified to by some of its officers, consented

that the legal title should follow the use and enjoyment at the time the transfers were made and the stock reissued in the early months of 1918.

The judgment of the district court denying to the appellant any right to an inheritance tax against the real property conveyed to the respondent corporation, and denying judgment to the appellant against the administrator of the Jane Agnes Romney estate, is affirmed; the court's judgment refusing to enter judgment against the respondent corporation for a tax based upon the value of the stock which passed into the name of that corporation, and which was included in any of the transfers made in 1903 and 1908 is reversed and set aside. The cause is remanded to the district court of Salt Lake county, with directions to modify its judgment in compliance with the views herein expressed, and to cause an appraisal to be made of the corporate stock as of the date of the death of George Romney and to enter judgment against the respondent corporation for such amount in conformity with the statute authorizing an inheritance tax. The costs of the appellant are allowed against the respondent corporation, and the costs of the respondent William S. Romney, administrator, are allowed against the appellant.

CORFMAN, C. J., and WEBER, THURMAN, and FRICK, JJ., concur.

On Application for Rehearing.

GIDEON, J. George Romney & Sons Company, respondent, and the State Treasurer, appellant, have each petitioned for a rehearing.

[5] The respondent complains that the court was without authority or right to consider the assignment of errors relating to the insufficiency of the evidence to support the findings of the lower court. It is argued that the original assignment failed to comply with rule 26 of this court (196 Pac. ix), in that such assignment did not specify or point out wherein the evidence is insufficient to support the findings.

The case was argued and submitted on February 24, 1922. On the 15th of that month the appellant applied to a member of this court, and was given authority to file a supplemental assignment of errors. That order has never been revoked. The assignment of errors then filed, of necessity, is a part of the record on this appeal. It is not contended that the court is without authority to make such an order.

This court, in *Baglin v. Earl-Eagle Min. Co.*, 54 Utah, 588, 184 Pac. 196, in discussing a question similar to the one now urged by counsel, says:

"Even admitting that in certain cases the appellant may be permitted to file an assignment

of errors after the time expires, or to amend an assignment already filed, upon seasonable application, where no prejudice inures to the opposing party, still, in our opinion, it would be an unwarranted extension of the privilege to permit an appellant to amend its assignment under circumstances such as exist in the present case. Here the appellant failed to assign as error the matter in controversy at the time he filed his assignment of errors. The respondent's brief called attention to the fact that there was no assignment of error as to that question, the case was argued and submitted, an opinion was rendered reversing the case partly on the ground that the evidence as to damage was insufficient, respondent applied for a rehearing, and again makes the point that there was no assignment of error as to one of the points upon which the case was decided. Then, for the first time, appellant asks for leave to amend."

In the instant case the application was seasonably made, and it is not shown that respondent was in any way prejudiced. In the very nature of things prejudice to the respondent could not result, as it simply brought the matter before this court with such a record that the court could examine the whole case and determine it upon merits. This contention, therefore, cannot prevail.

We are satisfied with the conclusions reached on the merits of the case as the same affect respondent George Romney & Sons Company. In fact, a further consideration of the record convinces this court that the respondent received every consideration to which the facts entitled it both in the district court and in this court.

The burden of the petition of the State Treasurer seems to be that the court, in determining that the estate of George Romney, deceased, was not liable for an inheritance tax upon the property of the estate of Jane Agnes Romney, deceased, has gone outside of the issues made by the pleadings. It is now insisted that it was not sought to subject the estate of George Romney, deceased, to an inheritance tax upon the property of the Jane Agnes Romney estate. If that be true then William S. Romney, as administrator of the estate of Jane Agnes Romney, is not a proper party to this proceeding. It was not the intention of this court, nor do we think a fair reading and interpretation of the opinion warrants any such conclusion that the court did intend to determine that William S. Romney was not liable to pay an inheritance tax to the state upon the property of the Jane Agnes Romney estate. The writer, at least, assumed that it was understood that William S. Romney, as administrator, had paid or would pay the inheritance tax on the property of the estate being administered by him. If he decline to do so, necessarily the proper proceeding is to apply to the court in that estate, and not in the matter of the

George Romney estate. The facts disclose that George Romney, as the sole heir of his deceased daughter, elected to carry into effect an oral trust of the property to the beneficiary. The court was of the opinion and held that his estate was not liable for the inheritance tax. Nothing else was passed upon, nor intended to be passed upon, by the decision of the court in that regard.

The petitions for rehearing are denied.

CORFMAN, C. J., and WEBER, THURMAN and FRICK, JJ., concur.

(60 Utah, 189)

PARADISE LAND & LIVE STOCK CO. v. DAVIS, Agent. (No. 3743.)

(Supreme Court of Utah. April 28, 1922. Petition for Modification of Order as to Costs Granted May 28, 1922. Remitted May 26, 1922.)

1. Carriers \S 230(1)—In an action for negligence in transporting sheep, motions for nonsuit and directed verdict properly overruled.

In an action for negligence in transporting sheep motions for a nonsuit and a directed verdict held properly overruled.

2. United States \S 111—Federal statute on assignments of claims against United States held inapplicable to claims against carrier under federal control.

An assignment of a claim for damages arising out of an injury to sheep while they were being shipped on a railroad under federal control was not within Rev. St. U. S. \S 3477 (U. S. Comp. St. \S 6383), stating the requisites of a valid assignment of a claim against the United States, since under section 12 of the Federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, \S 3115 $\frac{1}{2}$), such a claim was payable out of the general receipts of the railroad.

3. Carriers \S 218(7) — Shipper, stipulating value of sheep in consideration of lower rate, not entitled to recover more.

Where a shipper of some sheep, in consideration of a lower rate, placed a stipulated value of \$5 each on the sheep, he cannot recover more; the contract being fair and reasonable, and no fraud being practiced by the carrier.

4. Carriers \S 150—Rule allowing carrier to contract against common-law liability for loss applies to loss caused by negligence.

A common carrier, in the absence of statutory regulations to the contrary, may, by a reasonable contract with shipper, limit its common-law liability for the loss or damage to property consigned to it for transportation, and no different rule applies to a loss caused by the carrier's negligence.¹

¹ Benson v. O. S. L. R. R. Co., 35 Utah, 241, 99 Pac. 1072, 136 Am. St. Rep. 105, 19 Ann. Cas. 803; Larsen v. O. S. L. R. R. Co., 38 Utah, 130, 110 Pac. 983; Bingham v. S. P., L. A. & S. L. R. R. Co., 39 Utah, 400, 117 Pac. 606.

5. Carriers §219(8)—Whether action in tort or on contract, carrier liable only for stipulated value of sheep.

Whether an action is in tort or on a contract, carrier is liable only for the stipulated value of sheep in consideration of a lower rate.

Appeal from District Court, Cache County; A. A. Law, Judge.

Action by the Paradise Land & Live Stock Company against James C. Davis, as Agent of the President, etc. Judgment for plaintiff, and defendant appeals. Remanded, with instructions to modify the judgment.

Geo. H. Smith, J. V. Lyle, R. B. Porter, and F. C. Loofbouroow, all of Salt Lake City, and Roy D. Thatcher, of Logan, for appellant.

Stewart, Stewart & Alexander and Walton & Walton, all of Salt Lake City, for respondent.

WEBER, J. The complaint contains two causes of action, one to recover for the loss of sheep shipped by plaintiff on April 22, 1919, from Wendover, Utah, to Hyrum, Utah, and the other on an assigned claim from Peterson & Sons for damages alleged to have been sustained by them on a shipment of sheep made at the same time and in the same train. It is alleged in each count of the complaint that on April 21st plaintiff requested defendant to furnish cars and facilities for the transportation of certain sheep, from Wendover, Utah, to Hyrum, Utah; that defendant promised and undertook to furnish proper transportation, feeding, unloading, and general transportation facilities, and undertook to carry said sheep safely, securely, and expeditiously, and to deliver the same at Hyrum in the same condition as when received, excepting only ordinary deterioration, and that plaintiff undertook to pay, and did pay, in consideration for this service, the regular tariff charges therefor. It is further alleged that said sheep were ewes and were heavy with lamb, which fact the defendant well knew, and by reason of that fact it was necessary that transportation should proceed with dispatch, and that said shipment should be carefully handled and promptly delivered at its destination; that defendant failed to carry or transport said sheep safely or expeditiously, but, on the contrary, negligently and carelessly failed and omitted to furnish cars for an unreasonable length of time, to wit, about four hours after the time at which it promised to furnish the same; that defendant negligently and carelessly held said stock in its yards at Salt Lake City for an unreasonable length of time, 4 hours; that it negligently and carelessly delayed said shipment at Wellsville, Utah, for an unreasonable length of time, about 2½ hours; that it negligently and unreasonably delayed said shipment between all of said points, and un-

necessarily and negligently operated its trains so as to jolt, jar, bruise, and bump the said sheep in the said trains, and negligently and carelessly failed and omitted to furnish or provide unloading facilities, yards, or corrals, but, on the contrary, the yards and corrals furnished by said defendant at destination were smaller than required for said purposes of unloading, and one of them was practically useless by reason of its having a large mudhole therein. Defendant denied all the allegations of negligence, and affirmatively pleaded the contracts of shipment, and that under said contracts of shipment plaintiff and its assignors, Peterson & Sons, had declared the value of the sheep to be \$5 per head, and that plaintiff was precluded from recovering more than \$5 per head for the sheep that were lost. The verdict was in favor of plaintiff upon both causes of action. Defendant appeals.

The evidence adduced by respondent is to the effect that when the cars were ordered from the railroad agent the shippers were advised to be prepared to load at daylight, and the shippers told the agent that they would be ready at that time; that the cars were already on the side track, but they were not spotted until 11 a. m. The loading was finished at about 7 p. m. The train left Wendover at 10 p. m. There were about 40 cars of dead freight and 17 cars of sheep. The time made was unusually slow, and there was much jerking of the cars, and more than ordinary jarring and concussion in starting and stopping trains; that by the jerking and jarring the sheep were piled up in the ends or back of the cars. Sometimes when the shippers who accompanied the sheep were standing up in the car they had to brace themselves in order to avoid being knocked over by the jerking. The trip from Wendover to Salt Lake was usually made in 6 hours. This trip took from 10 p. m. to 7:30 the next morning. The sheep arrived at Hyrum at about 7 p. m. April 23d. In the corral at Hyrum there was a mudhole extending the entire length of the corral. The mudhole had been there for months. Between 300 and 400 of the sheep had to be helped or pulled out of the mudhole. When the train arrived at Hyrum, each car contained from 10 to 30 dead sheep, an unusual condition in shipping from Wendover to Hyrum; 400 or 500 head could not unload themselves at destination. The shipment consisted of ewes in a visibly pregnant but otherwise good condition. The sheep were worth about \$20 per head.

On the part of appellant the evidence was to the effect that the train made good time; that no unusual delays occurred, that there was no unusual jerking, and that the train moved along with extraordinary smoothness. Experts were produced by appellant, who testified that blood poisoning was the cause

of the death of the sheep, and also the cause of the abortions.

[1] Appellant insists that the court erred in overruling the motions for nonsuit and a directed verdict. It is apparent from what has been heretofore said that there was some evidence of negligence from which the jury could conclude that appellant was blamable for the death of some of the sheep and injury to others. True, all the evidence in behalf of respondent was contradicted, but we cannot say that as a matter of law no substantial evidence was adduced to sustain the material allegations of respondent's complaint. The motion for nonsuit and the motion for a directed verdict were therefore properly denied.

[2] It is contended by appellant's counsel that it was error to admit evidence of the assignment to respondent from Peterson & Sons for damage to their sheep. It is claimed that this suit is one against the United States, and that assignment of their claim by Peterson & Sons was absolutely null and void, for the reason that by section 3477, Rev. St. § 6383, U. S. Comp. Stat. (U. S. Comp. Stat. 1916, p. 7428) it is declared:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

We do not think that the statute relied upon by appellant is applicable to the assigned claim in this case. This claim was not against the United States, nor was it payable out of the treasury of the United States. By section 12 of the Federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½), receipts from the operation of each carrier are the property of the United States, and, unless otherwise directed by the President, they are to be kept in the custody of the same persons and accounted for in the same way as before federal control. From this fund disbursements are made, without appropriation, in the manner provided by the accounting regulations of the Interstate Commerce Commission, and judgments for damages are chargeable to the operation of the railroad, and are payable out of the general receipts. The same act preserves for claimants and litigants the rights and remedies they had before government control. Among other things, the statute provides:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and

in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government." Section 10 (section 3115½j).

We think counsel's contention wholly untenable, and that the assignment from Peterson & Sons to plaintiff was properly admitted in evidence.

[3] The pivotal question is whether the contract, in which the agreed value of the sheep is stated at \$5 per head, is valid. In that contract it is provided that the value of the sheep did not exceed \$5 per head, and the freight rate for the transportation of the sheep was based upon such valuation. The contract between plaintiff and defendant and that between Peterson & Sons and defendant contained the same agreement. The plaintiff testified that he paid about \$64 per car for freight. According to the contracts, this rate was based upon the minimum valuation of \$5. The contracts further provided that where the valuation declared by shippers exceeded the value of \$5 per head for sheep an addition of 2 per cent. would be made to the rate per car for each 50 per cent., or fraction thereof, of additional declared value per head.

In an unbroken line of decisions from *Hart v. Pennsylvania R. R.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, to *Boston & Maine R. R. v. Piper*, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, the Supreme Court of the United States has held that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated value of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property. A majority of the state courts are in accord with the doctrine announced by the Supreme Court of the United States:

"As a matter of legal distinction, estoppel is made the basis of this ruling—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions upon which it was obtained." *U. P. R. R. v. Burke*, 255 U. S. 317, 41 Sup. Ct. 283, 65 L. Ed. 656.

It seems only fair that when the shipper declares that the goods he ships have a certain value he should not reap the benefit of the lower freight charge if there is no loss, and in case of loss recover a greater amount than the declared and agreed value. 10 C. J. p. 166, § 212. For a carrier to contract against loss through its negligence is against public policy, but it is not against good business morals nor against public policy to agree upon a valuation which shall limit the liability of the carrier, whether for loss arising

ing from negligence or otherwise, when the contract is fair, open, and reasonable, and no fraud or imposition of any kind has been practiced by the carrier. If the agreed value of the sheep had been \$15 per head, as found by the jury, the respondent would have had more freight to pay, and that is what he desired to and did avoid when he agreed to the \$5 valuation. Having obtained the benefit of the freight rate on \$5 sheep, he should in all fairness and good conscience be precluded from recovering a greater amount now.

[4] Counsel for appellant call our attention to *Benson v. O. S. L. R. R. Co.*, 35 Utah, 241, 99 Pac. 1072, 136 Am. St. Rep. 105, 19 Ann. Cas 803; *Larsen v. O. S. L. R. R. Co.*, 38 Utah, 130, 110 Pac. 983, and *Bingham v. S. P., L. A. & S. L. R. R. Co.*, 39 Utah, 400, 117 Pac. 606, in which it is held that a common carrier, in the absence of statutory regulation to the contrary, may, by an express contract which is just and reasonable and fairly entered into with the shipper, limit its common-law liability for the loss or damage to property consigned to it for transportation. We agree with the proposition advanced by counsel that no different rule should be applied in the event of loss from negligence than in event of loss in some other manner when a valuation has been agreed upon and the contract is fair and reasonable.

[5] Counsel further say that in the instant case it is not apparent whether the action is for breach of contract to carry or for negligence in transporting, and they insist that the action is one for breach of contract to carry. While the writer is of the opinion that the case was properly submitted to the jury on the theory of appellant's negligence, it certainly cannot avail appellant if this is an action on the contract to carry. In either case the limitation of liability is \$5 per head for the sheep, and to that extent appellant is liable whether the action sounds in tort or whether based on contract.

The jury returned a special verdict in which it was found that 360 head of plaintiff's sheep died as result of appellant's negligence and that 367 of plaintiff's sheep were damaged by slipping their lambs, and that such damage was \$4 per head. Of the Peterson sheep the jury found that 140 died as a result of the carrier's negligence, and that 135 slipped their lambs, and that each ewe was thereby damaged to the extent of \$4. The judgment, therefore, should be modified as follows: On plaintiff's first cause of action it should recover for 360 head of sheep at \$5 per head and 367 at \$4 per head; on the second cause of action, for 140 head at \$5 per head and 135 at \$4 per head, with legal interest on the amount of damages thus computed from April 23, 1919, to the time of the entry of judgment.

The judgment is therefore vacated, and

the cause is remanded to the trial court, with instructions to enter judgment in accordance with the views herein expressed. Respondent to recover costs.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

Petition for Modification of Order as to Costs.

WEBER, J. Appellant has filed a petition for a modification of the order granting respondent costs on appeal.

The order relating to costs is hereby modified, and it is ordered that each party pay one-half of the costs on appeal.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

(60 Utah, 161)

CUDAHY PACKING CO. OF NEBRASKA v. INDUSTRIAL COMMISSION OF UTAH et al. (No. 3778.)

(Supreme Court of Utah. April 24, 1922. Rehearing Denied May 23, 1922.)

1. Master and servant \S 375(2)—Injury while going to work held one "arising out of or in course of employment" within Compensation Act.

Where the location of a packing plant near railroad tracks made it necessary for employes going to work to cross the tracks on a public road at a point 100 feet from the entry to the plant and one was struck and killed by an engine while riding to work in an automobile owned by a fellow employe, the death was caused by accident arising out of or in the course of his employment, wheresoever such injury occurred, within the Workmen's Compensation Act, Comp. Laws Utah 1917, \S 3113, amended by Laws 1919, c. 63.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Constitutional law \S 301—Master and servant \S 347—Workmen's Compensation Act not unconstitutional.

Workmen's Compensation Act (Comp. Laws Utah 1917, \S 3113, as amended by Laws 1919, c. 63), authorizing compensation for an injury "wheresoever such injury has occurred," should be construed in connection with and as a part of the entire section, and, when so construed, it follows that the accident, "wheresoever it has occurred," must also arise out of or in the course of employment, and does not infringe the due process clause of Const. art. 1, \S 7, nor Const. U. S. art. 14, \S 1.¹

¹ Ind. Com. v. Daly Min. Co., 51 Utah, 602, 173 Pac. 301; Garfield Smelting Co. v. Ind. Com., 53 Utah, 133, 178 Pac. 57; Ind. Com. v. Evans, 52 Utah, 394, 174 Pac. 825; Reteuna v. Ind. Com., 55 Utah, 253, 185 Pac. 535; Utah Copper Co. v. Ind. Com. (Utah) 193 Pac. 24; Salt Lake City v. Ind. Com. (Utah) 199 Pac. 152.

Proceedings under the Workmen's Compensation Law by the dependents of Joseph Parramore, deceased, against the Cudahy Packing Company of Nebraska, employer, to recover compensation for decedent's death. The Industrial Commission of Utah made an award, and the employer seeks annulment by writ of review. Award affirmed.

Booth, Lee, Badger & Rich, of Salt Lake City, for plaintiff.

Harvey H. Cluff, Atty. Gen., and J. Robert Robinson, Asst. Atty. Gen., for Commission. Frederick C. Loofbourn, of Salt Lake City, for dependents.

GIDEON, J. The plaintiff, Cudahy Packing Company, by writ of review seeks the annulment of an award made by the Industrial Commission in favor of the dependents of Joseph Parramore, deceased. The dependents and the Industrial Commission are made defendants.

There is no dispute about the dependency of the claimants, nor of the fact of employment or wages deceased received.

[1] The plaintiff owns and operates a packing plant in what is known as North Salt Lake, in Davis county, about six miles north from Salt Lake City. More than 40 per cent, of its employes reside in Salt Lake City. Other employes reside in Bountiful, Centerville, and other villages located farther north. Few, if any, of the employes have homes in the immediate vicinity of the packing plant. The plant is approximately one-half mile west of the Salt Lake-Ogden highway. This highway runs north and south. A county road runs west from and at right angles to the Salt Lake-Ogden highway and extends to and beyond the packing plant. A short distance from the highway the county road crosses at right angles the tracks of the Bamberger Electric Railroad. From that point west the county road is the only roadway leading to the packing plant.

The deceased was employed by the plaintiff as an engineer. His hours of work were from 7 a. m. to 4 p. m. On the morning of the accident, August 9, 1921, while riding to work with a fellow employe, he was struck by an engine on the Denver & Rio Grande Western Railroad track and instantly killed. The distance from the place of the accident to the entry to plaintiff's plant was about 100 feet. The Commission, among other things, found:

" . . . That on said date three workmen, including Mr. Parramore, all of whom lived in Salt Lake City, were traveling in an automobile owned by one of the workmen, approaching the plant where they were employed; that while crossing the main line tracks of the Denver & Rio Grande Western Railroad Company, which tracks were alongside the land upon which is located the plant of the Cudahy Packing Company, the automobile in which they were riding was struck by an engine of the railroad company and Joseph Parramore thrown against

a post in the right of way fence, which fence also inclosed the property of the Cudahy Packing Company, and was instantly killed; that within half a mile of the plant of the Cudahy Packing Company, where Mr. Parramore was employed, it was necessary that Mr. Parramore pass over the main line tracks of the Bamberger Electric Railway Company and the main line tracks of the Oregon Short Line Railroad Company, and the main line tracks of the Denver & Rio Grande Western Railroad Company, and three side tracks and transfer tracks between these various lines of railroad; that the Cudahy Packing Company furnished its employes no method of travel or conveyance in coming to or leaving the plant, and most of the employes of the company lived in such localities that it was necessary that they should travel, to and from their work, the road which crossed the railroad tracks above mentioned; that the plant of the Cudahy Packing Company is dependent upon shipping facilities furnished by the railroads, and by necessity the near proximity of the railroads is essential to the successful operation of the plant; that the death of Mr. Parramore occurred about seven minutes before the time at which he was to commence work; that the Cudahy Packing Company does not furnish at its plant either board or lodging; that there are no public conveyances that could carry employes directly to the plant; that employes who went to their work by street cars or by the Bamberger Electric Railway must cross the railroad tracks above mentioned, either on foot or by private conveyance; that Mr. Parramore at the time he was killed was using the most direct and practicable route to the plant of the Cudahy Packing Company and the one ordinarily traveled by a majority of the employes, and by all the employes residing in Salt Lake City."

The findings are supported by competent evidence found in the record. It likewise appears that practically all travel over this county road is that of the employes and others going to the packing plant, or persons having business with the stockyards located just north of that plant. In certain seasons of the year sheep are herded in the western part of the county and are driven over this county road, but it is quite apparent that the way is maintained and kept in repair for the benefit of persons traveling to and from the plaintiff's plant.

Upon substantially the foregoing facts an award was made. Plaintiff assails that award. The controlling question before the Commission, and the one before this court, is: Did the accident which caused the death of Parramore arise out of or in the course of the employment? It is insisted by plaintiff that the findings are not supported by the testimony; that under the admitted facts the injury is not compensable under the Workmen's Compensation Act of this state; that the relation of employer and employe did not exist at the time of the accident. The act provides for compensation to every employe whose employment is subject to the act, if

injured "by accident arising out of, or in the course of his employment, wheresoever such injury has occurred." Section 3113, Comp. Laws Utah 1917, as amended by chapter 63, Laws Utah 1919.

Our Workmen's Compensation Act differs from a majority of the states, in that our statute uses the disjunctive, "or," while in most of the compensation laws the conjunctive, "and," is found. The compensation law as originally enacted in 1917 provided compensation for injuries arising out of and in the course of the employment. The act was amended in 1919 to read as above quoted. It is apparent, therefore, that the Legislature by the amendment intended to include within the statute accidents not covered by the original act.

The courts generally agree in principle respecting the elements to be considered in determining what accidents are included in the words "arising out of and in the course of the employment." The Supreme Judicial Court of Massachusetts, in *Re McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, has given probably as satisfactory and comprehensive a definition of these terms as can be found in any of the cases. It is not, however, necessary or desirable in the determination of this case to attempt a definition of these terms or to differentiate between accidents arising out of or in the course of the employment. If there is liability for the injury under consideration, it must be founded upon the inferable fact that the danger incident to crossing this railroad track, by reason of its location and proximity to the packing plant, must be held to have been within the contemplation of the parties at the date of the employment. The accident would therefore both arise out of and occur in the course of employment. No other theory finds support in the decisions of the reported cases. It is admitted that deceased was not on the premises of the plaintiff at the time of the accident. He was not at that time engaged in any actual work connected with his employment. The engine that ran down the automobile was in no way under the control of the plaintiff, nor was it engaged in any work for or in plaintiff's behalf. The engine was under the control of the railroad company and was running south on the main line of that road.

The Commission also found, and it is undisputed, that the plaintiff did not control nor in any attempt to control the method or manner of travel to or from work by any of its employees. Neither did the plaintiff furnish any means of conveyance. That was left entirely with the individual employee.

It is argued by counsel for plaintiff that the Commission's finding "that the plant of the Cudahy Packing Company is dependent upon shipping facilities furnished by the

railroads, and by necessity the near proximity of the railroads is essential to the successful operation of the plant," is erroneous and is not supported by the evidence. In our judgment that finding is not controlling or of much significance. It is undoubtedly true that the successful operation of a packing plant is dependent upon railroad facilities, but that dependence is common to a large percentage of all manufacturing institutions. The proximity of a railroad is a matter of convenience to industries dependent upon shipping facilities. Such facts alone cannot determine the right of claimants to compensation. As above indicated, if plaintiff is liable for the accident, it must be upon some other ground than the mere fact of the convenience of having a railroad near its plant, or of its dependence upon shipping facilities.

It was customary, in fact absolutely necessary, for employees going to the plant to work to pass over and across these railroad tracks on the public road where the accident happened. No other means or way existed by which employees could get to the plant. Employees in Salt Lake City had three ways of going to their work—either by street railway, along the highway, or over the Bamberger Electric Railroad. That election of the way of travel existed until the employees reached the county road running west from the station of the Bamberger Electric line. That point is approximately one-third mile from the packing plant. In going west from that point over the county road, the employees necessarily cross the main line tracks of Oregon Short Line, the main line tracks of the Denver & Rio Grande Western, and three side tracks and transfer tracks. That condition existed at the time of the employment of deceased and at the time of the accident.

Some stress is laid in the argument on the fact that the roadway over which deceased was traveling was a public highway. No reason or principle is suggested why that fact should be controlling in determining the liability for this accident. It conclusively appears, however, from the testimony, that the road, while known as a county road and presumably kept in repair by the county, is there for the accommodation of the plaintiff and its employees, and it is reasonably inferable that, if the packing plant was not located there, the county highway would be abandoned as such. If the Workmen's Compensation Law authorizes or permits a recovery for an injury to an employee going to or returning from work over private property under particular circumstances or surroundings, there does not seem to be any logical reason why such liability should not exist in favor of a workman going to or returning from work over a public road under like circumstances or surroundings. If the liability exists, it is by reason of the fact

that the plant or manufacturing establishment is so located that there is no other method or means of approach except over railroad tracks or other dangerous places, and that the same are in such close proximity to the plant that the employé has no election or option in determining or selecting his way of approach.

In *Procaccino v. E. Horton & Sons et al.*, 95 Conn. 408, 111 Atl. 594, the facts were similar to the facts here. In that case the deceased was employed in a manufacturing plant located immediately east of a canal. West of the canal were several railroad tracks, and still farther west was a highway. The deceased had his home west of the highway. Two footbridges were constructed over the canal from the plant to the railroad tracks. It was the custom of the deceased and other employés of the defendant manufacturing company in that case and other companies to indiscriminately use these bridges. The deceased was in the habit of going to and from his home over one of the bridges and passing over a pathway across the railroad tracks. On returning to work at the noon hour he was injured by an engine passing along one of these tracks. In discussing the right of the dependents of the deceased, the court says:

"The defendants' employment of the decedent therefore contemplated that he would approach and leave the plant by passing to and from the highway over private property, including either of the footbridges and the railroad tracks parallel with Main street.

"Under these circumstances this employé was within the scope of his employment when he was passing to or from his work at the plant over the private property lying between Main street and the plant; in other words, the use of this method of approach to the plant by this employé was an incidental term of his contract of employment annexed to it by the consent of his employers. *Merlino v. Connecticut Quarries Co.*, 93 Conn. 57, 104 Atl. 396.

"When this employé, under the facts found, entered upon the private property lying between Main street and the defendants' plant, he came within the zone of his employment, and all dangers and perils incident to the use of this method of approach were perils incident to and arising out of his employment."

In *Re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, the court, in considering the right of the claimant for compensation, said:

"Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olson nor Dunne & Co. had control, though they and their employés had the right to use them. These stairs were the only means available for going to and from the premises, where she was employed, the means which she practically was invited by Olsen and by Dunne & Co. to use. In this respect, the case resembles *Moore v. Man-*

chester Liners, *ubi supra*; and that case, decided under the English act before the passage of our statute, must be regarded as of great weight. [Citing cases.]

"It was a necessary incident of the petitioner's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose 'out of and in the course of' her employment."

In the second headnote in *Judson Mfg. Co. et al. v. Ind. Acc. Com.*, 181 Cal. at page 300, 184 Pac. 1, which reflects the opinion of the court, it is said:

"The death of an employé of a manufacturing company resulted from an injury arising out of his employment where he was struck and killed by an engine operated by a railroad company while he was pursuing his way to work along a path crossing the tracks, where such path, although not a public highway, was not only the sole means of ingress and egress for the employés to their place of work, but was the means of access required and authorized by the manufacturing company, and intimately associated with the company's plant as a part of its necessary establishment."

The Supreme Court of West Virginia, in *De Constantin v. Pub. Service Com.*, 75 W. Va. 32, 83 S. E. at page 89, L. R. A. 1916A, 329, in considering a question similar to the one presented by this record, says:

"Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employé, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employé, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

See, also, 1 *Honnold on Workmen's Comp.* 1368, and *Lumbermen's Reciprocal Ass'n v.*

Behnken et al. (Tex. Civ. App.) 226 S. W. 154.

Plaintiff's contention is that the deceased received the injury while on his way to work at a place not under its control, and at a time when the relation of employer and employé did not exist. It is therefore argued that the deceased was exposed to no other or greater dangers than any member of the public traveling over this road; that any accident resulting from such exposure does not entitle the injured person to compensation under the Workmen's Compensation Act, regardless of the fact of employment. Numerous cases are cited in support of that contention, among others the following: In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Honnold Work. Comp. 1917, § 359; Kowalek et al. v. N. Y. Con. R. Co., 229 N. Y. 489, 128 N. E. 888; United D. & R. Co. v. Ind. Com., 291 Ill. 480, 126 N. E. 184; In re Brown, 173 App. Div. 432, 159 N. Y. Supp. 1047, 15 N. O. C. A. 290; Case of Fumicello, 219 Mass. 488, 107 N. E. 349; City of Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327; Wilson v. H. C. Frick Coke Co., 268 Pa. 256, 110 Atl. 723.

Conceding that the weight of authority denies to an employé the right to compensation for an injury received while on his way to or from his employment, the question here, in its final analysis, is: Did the particular facts surrounding this accident make this case an exception to the holdings of the courts? The Commission was of the opinion that the facts in this case warranted the conclusion that the general rule invoked by plaintiff did not apply. It is not easy, and probably not possible or desirable, to state any general rule applicable to every condition or state of facts by or under which compensation can be allowed or denied to an employé. Courts are usually controlled, in allowing or denying compensation, by the peculiar facts of each case. In *Re Bollman*, 126 N. E. 639, the Appellate Court of Indiana says:

"The question in each case must be determined from a consideration of its own facts and circumstances."

That statement is approved by the same court in a later case. *Empire H. & A. Ins. Co. v. Purcell* (Ind. App.) 132 N. E. 664.

Considering the findings of the Commission and the undisputed facts which appear in this record, and weighing the effect of those facts in the light of the authorities, we are of the opinion that there is sufficient competent testimony to support the Commission's findings and that the findings applied to the particular facts in this case support the award.

[2] Since the oral argument and the submission of this case, plaintiff has asked and received permission to file an amendment to its petition for writ of review. The burden of the amendment is that the compensation law contravenes both the state and federal Constitutions—that it in effect deprives the individual of property without due process of law. It is insisted that—

"To hold that section 8113, as amended by Laws 1919, c. 63, which provides, 'Every such employé who is killed by accident arising out of, or in the course of his employment, where-soever such injury has occurred,' etc., means that said provision of the statute extends so as to obligate the employer to indemnify its employées for accidents not a part of the hazard of the industry, and not occurring while actually engaged in the work of the employer, renders the act contrary to the provisions of the Constitution of the State of Utah, to wit, section 7 of article 1 of the Constitution of the State of Utah, which reads as follows: 'No person shall be deprived of life, liberty, or property without due process of law,' and contrary to the provisions of section 1 of article 14 of the Constitution of the United States, providing that, 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law,' for the reason that to so hold makes said statute come under the Constitutions' condemnation of all arbitrary power so prohibited both by the Constitution of the State of Utah and the Constitution of the United States as above set forth."

That the general and underlying principles of the Workmen's Compensation Law do not conflict with any constitutional right of employer or employé is not an open question in this state. *Ind. Com. v. Daly Min. Co.*, 51 Utah, 602, 172 Pac. 301; *Garfield Smelting Co. v. Ind. Com.*, 53 Utah, 133, 178 Pac. 57; *Ind. Com. v. Evans*, 52 Utah, 394, 174 Pac. 825; *Reteuna v. Ind. Com.*, 55 Utah, 258, 185 Pac. 535; *Utah Copper Co. v. Ind. Com.* (Utah) 193 Pac. 24, 13 A. L. R. 1367; *Salt Lake City v. Ind. Com.* (Utah) 199 Pac. 152. The contention here, however, seems to be that that part of section 3113, supra, which authorizes compensation for an injury "where-soever such injury has occurred," is an attempt to charge an industry for something not a part of the hazard of such industry. Of necessity, that phrase should be construed in connection with and as a part of the entire section. When so construed, it follows that the accident, where-soever it has occurred, must also arise out of or be in the course of the employment. So interpreted, we fail to see any infringement of plaintiff's constitutional rights.

We are referred to the opinion of the Supreme Court in *Interstate Commerce Com-*

mission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, as supporting plaintiff's contention. It does not appear in the record before this court that the Commission or any member of it visited the place of the accident. On the contrary, it is affirmatively stated in plaintiff's brief that the Commission did not visit the place of the accident. Presumably, therefore, nothing was considered by the Commission except testimony taken at a regular hearing. We are, however, of the opinion, and so hold, that it affirmatively appears from the testimony found in this record that the Commission's findings are supported by such testimony. The opinion of the Supreme Court in the above case is therefore not applicable or controlling in this case.

The award is affirmed, with costs.

CORFMAN, C. J., and WEBER, THURMAN, and FRICK, JJ., concur.

On Application for Rehearing.

GIDEON, J. In a petition for rehearing, plaintiff complains that the court has grievously erred in stating certain facts. It is especially urged that the testimony does not warrant the conclusion found in the opinion to the effect that the public road over which the deceased was traveling was used and maintained largely, if not wholly, for the accommodation of the plaintiff's employes. In the argument for a rehearing the testimony bearing upon that particular question is set out at length. While we think the record warrants the statement of the court, such statement is not controlling. Neither is it the basis upon which the court rests its opinion. If counsel were right in the conclusion that the court's judgment was founded on such statement, some justification for counsel's argument might have a basis in fact. The exact contrary is the fact, and it so appears from the opinion.

A statement of assumed facts is made in the argument, and counsel seem anxious to know what the judgment of this court would be under such facts. In answer to that suggestion, it is sufficient to say that it will be the duty of this court to determine the rights of the parties as in its judgment the law applicable justifies when such facts as assumed are presented. We reaffirm the statement in the opinion that every case must depend upon its own particular facts. We have determined the rights of the parties to this proceeding under the facts presented in the record. Nothing is advanced in the petition for a rehearing to justify a different conclusion.

The petition for a rehearing is denied.

CORFMAN, C. J., and WEBER, THURMAN, and FRICK, JJ., concur.

PORTER v. HUNTER. (No. 3748.)

(Supreme Court of Utah. April 28, 1922.
Rehearing Denied June 3, 1922.)

1. Brokers \S 86(1)—Evidence showed failure to produce customer within time limit.

In action by broker for commission on the sale of sheep, evidence held to show contract not completed within the time limit.

2. Witnesses \S 266½—Evidence on cross-examination part of evidence in chief.

Evidence elicited from a party on cross-examination must be regarded as part of the evidence given by him in chief.

3. Brokers \S 84(1)—Burden on broker to show fulfillment of his contract.

The burden of proof is on the broker suing for commission to establish that he fulfilled his contract:

4. Brokers \S 50—Rule as to broker's performance of contract within time limit as affecting right to commissions stated.

To entitle a broker to his commissions, he must prove not only the actual rendition of services called for by his contract, but complete performance thereof within the time stipulated or before expiration of extension of time agreed on, but where there is no fraud or bad faith on the part of the employer and the broker does not perform within the time limit, the employer, after expiration thereof, without incurring liability to the broker, may contract with the customer introduced by him within the period for performance, either on the same terms or on others more or less favorable than those that the broker was authorized to offer, and the mere fact that he finds or introduces a prospective customer within the time limit does not entitle him to commissions where payment thereof is conditioned on timely performance of additional duties.

5. Brokers \S 50—Rule as to performance by broker within time limit held to apply to particular case so as to require reversal of judgment in his favor.

Where no fraud or bad faith is charged to the owner or any collusion between him and a purchaser to deprive a broker of his commission, and it appears that he failed, as his contract required, to find a purchaser for sheep before the time the owner was required to put them on feed, the rule that, when a vendor and broker agree on a time in which property is to be sold, no commission is payable unless the sale is made within the time, provided there is no collusion or connivance with the prospective purchaser to prevent a sale during the specified time, applies and a judgment in favor of the broker in such case must therefore be reversed.¹

Appeal from District Court, Salt Lake County; Wm. M. M. Crea, Judge.

Action by I. N. Porter against John E. Hunter. From judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Burt v. Stringfellow, 48 Utah, 330, 159 Pac. 527.

Irvine & Thurman, of Salt Lake City, for appellant.

Chris Mathison, of Salt Lake City, for respondent.

WEBER, J. Plaintiff, a live stock broker, sued for a commission claimed by him for securing a purchaser for a herd of sheep owned by defendant. The case was tried to the court without a jury, and from a judgment in favor of plaintiff defendant appeals.

In his complaint the plaintiff alleges that on or about January 15, 1920, he was employed by the defendant to find a purchaser for 2,200 head of sheep, and the defendant agreed to pay him a commission of 25 cents per head if plaintiff found a person ready, able, and willing to purchase the sheep at a price and upon terms satisfactory to defendant, and that plaintiff found a purchaser to whom the sheep were sold by the defendant. In addition to denying the alleged terms of the agreement as set forth in the complaint, and denying that defendant was indebted to plaintiff, the answer alleges that on or about December 20, 1919, defendant agreed, if plaintiff would secure a purchaser for 2,200 head of sheep before the time when defendant would be required to put them on feed, the purchaser to take with the sheep, at cost price to defendant, all provisions, consisting of hay, potatoes, and other supplies theretofore purchased by defendant for the handling and care of the sheep, that defendant would give plaintiff all moneys received from the sale thereof in excess of \$14.75 a head. The answer further alleges that defendant was required to, and did, put the sheep on feed on or about December 26, 1919, but that plaintiff failed, within the time provided in said offer, or at all, to secure a purchaser.

[1] The undisputed testimony supports the affirmative allegations of defendant's answer. The defendant's testimony was, in substance, as follows: That he met plaintiff on December 22, 1919, in Salt Lake City, and told him he had 2,200 head of sheep, 440 tons of hay, 7 tons of corn, and a ton of potatoes; that, if a sale could be made before the sheep were put on feed, he would sell the sheep at \$14.75 a head and the provisions at cost price to him; that he had made arrangements to graze the sheep until December 25th or January 1st, and expected to put them on feed at that time; that in that conversation plaintiff said he had a party who would take the sheep right away at \$15 per head and the provisions at cost price; that thereupon defendant stated that he did not care what plaintiff made out of the sheep, provided the sheep netted him \$14.75 a head and the sale was made before they were put on feed; that plaintiff then produced J. S. Ostler, with whom defendant entered into negotiations, telling Ostler he would give him till Christmas or the first of the year; that defendant did not hear from Ostler until January 3d,

and at that time the sheep and provisions were still unsold. He thereupon requested Ostler to go out and look at them. On January 14th he received a telegram to meet Ostler at Nephi on the 19th at which time and place a contract was entered into covering the sheep and the remaining provisions. There were eight stacks of hay on hand at the time the sheep were put on feed, and at the time of entering into the contract three of the stacks had been consumed. Ostler took four of the remaining five stacks. About 156 to 160 tons of hay had been consumed between the time the sheep were put on feed and the time they were taken over by Ostler. The price of hay was \$15 per ton, making a total for 156 tons of \$2,340, for any part of which Ostler refused to reimburse defendant. Defendant further testified that he was also put to other expense in feeding and caring for the sheep between the time they were put on feed and the time they were taken over by Ostler, for which expenses Ostler likewise refused to reimburse him.

J. S. Ostler, who finally purchased the sheep, testified that some time in December, 1919, he went to the hotel to meet the defendant at plaintiff's request, and that he and the defendant then entered into negotiations for the purchase of the sheep. The witness told defendant that there were others interested with him, and that he would have to consult them; and the defendant then stated that he would give him until the end of the year. Mr. Ostler did not talk with the defendant again until after the first of the year, when he called defendant by phone and asked him whether the sheep were still for sale, and upon being told that they were Ostler said that he would go and examine them. After seeing the sheep he met the defendant at Nephi, and on January 19, 1920, they entered into a written contract for the purchase of the sheep and certain provisions, and on the 26th of the same month the sheep were delivered to the purchaser with the provisions then on hand with the exception of one stack of hay which he refused to take.

On cross-examination the plaintiff was asked whether anything was said about the sheep going to be put on feed right away, and that the sheep must be sold, if sold at \$15 per head, before they went on feed. Plaintiff answered that there may have been something said to that effect, and that he would not swear whether that was said or not, but that it may have been said in the offer to him. Plaintiff further testified that he did not know when the sheep went on feed.

[2] Plaintiff's testimony is no stronger than what he testified on cross-examination, and the evidence elicited from him on cross-examination must be regarded as part of the evidence given by him in chief. *Wilson v. Wagar*, 26 Mich. 452.

[3] Defendant testified definitely to the

terms of the contract, and, there being no denial by plaintiff on his cross-examination or at any time, it is beyond cavil that the contract was as alleged in defendant's answer, and that the contract as thus established by the testimony was not fulfilled by plaintiff. The burden of proof was upon plaintiff to establish that he had fulfilled the contract. Not a shred of evidence was produced by the plaintiff tending to prove that he procured or produced a purchaser who bought before the sheep had been put on feed. On the contrary, it can be fairly inferred from the evidence that the sheep were put on feed before the 1st of January, 1920. About \$2,000 worth of hay had been fed by January 26, 1920. The hay was on hand when plaintiff and defendant first met and when Ostler, the purchaser, was introduced to defendant by plaintiff. According to the contract of employment, the hay on hand before any of it was fed was to be taken and paid for by the purchaser. The purchaser did not pay for the hay, and when he on January 1st or 2d made inquiry about the sheep the time limit had expired.

[4] As applicable here, the rule of law is as stated in 4 R. C. L. p. 305, § 47:

"To entitle a broker to the payment of his commissions, it is essential that he prove not only the actual rendition of all the services called for by his contract of employment, but that he complete the performance thereof within the time stipulated or before the expiration of such additional period as may have been granted by the employer in extension of that originally agreed upon. * * * But where there is no fraud or bad faith on the part of the employer and the broker does not perform within the time limit, the employer after the expiration thereof may contract with a customer introduced by the broker within the period for performance, either upon the same terms or upon others more or less favorable than those the broker was authorized to offer, without incurring any liability to compensate the latter for his services. The mere fact that a broker finds or introduces a prospective customer within the period prescribed is not sufficient to entitle him to his commissions where payment of the latter is conditioned upon the timely performance of additional duties."

See, also, 9 C. J. pp. 593, 606; 2 Mechem on Agency (2d Ed.) § 2427; Fultz v. Wimer, 34 Kan. 578, 9 Pac. 316; Davis & Co. v. Aabling (Wash.) 202 Pac. 2.

[5] No fraud and no bad faith are charged to the defendant nor any collusion between him and the purchaser to deprive the broker of his commission. The doctrine announced in Burt v. Stringfellow, 48 Utah, 330, 159 Pac. 527, and other Utah decisions cited therein, to the effect that, when a vendor and a broker agree upon a time limit during which property is to be sold, no commission is payable unless the sale be made within the time limit, provided there is no collusion or

connivance with the prospective purchaser to prevent a sale within the specified time applies to this case, and, under the evidence as it appears in the record, necessitates a reversal of the judgment of the district court.

The judgment is therefore reversed, and a new trial granted. Costs on appeal are taxed to respondent; other costs to abide final result.

CORFMAN, C. J., and GIDEON and FRICK, JJ., concur.

THURMAN, J., being disqualified, did not participate in the disposition of this cause.

(60 Utah, 153)

JEREMY FUEL & GRAIN CO. v. DENVER & R. G. R. CO. (No. 3672.)

(Supreme Court of Utah. May 3, 1922.
Rehearing Denied May 25, 1922.)

1. Pleading \S 8(3)—Complaint alleging rate charged and that it is unreasonable or extortionate states ultimate fact.

In an action against a carrier for excessive freight charges, a statement in the complaint that an overcharge has been collected is one of ultimate fact, and not simply a legal conclusion, and a complaint alleging the rate charged, and that it is unreasonable or extortionate, is not subject to demurrer.¹

2. Railroads \S 5½, New, vol. 6A Key-No. Series—Period of federal control excluded from period of limitation of state statute.

Since the Transportation Act provides that the period of federal control shall not be computed as a part of the period of limitation in actions against carriers for causes of action arising prior to federal control, the period from the date the government took control of and operated a railroad must be excluded from the computation of the period of limitation of the state statute.

3. Carriers \S 199—Shipper at common law could recover for discrimination in rates.

A shipper at common law could recover for discrimination in rates; the carrier being bound to carry at an equal rate for all customers for substantially similar service and under substantially similar conditions.

4. Carriers \S 200—Limitation of actions \S 28(1)—Common-law remedy to recover overcharges not abrogated by statute; shipper's suit to recover overcharges not governed by limitations as to statutory liabilities or penalties.

A shipper's right at common law to sue the carrier to recover excessive and discriminatory freight charges collected from the shipper by

¹ Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646, 131 Am. St. Rep. 827; Francis v. Gleason, 30 Utah, 67, 83 Pac. 571; Chesney v. Chesney, 33 Utah, 503, 94 Pac. 989; Rasmussen v. Sevier, etc., 40 Utah, 371, 121 Pac. 741.

the carrier is not abrogated by Comp. Laws 1907, §§ 434, 454, 455, requiring reasonable rates, and authorizing an overcharged shipper to recover double the charges paid; hence a suit to recover excessive freight charges collected is not governed by Comp. Laws 1917, § 6468, subd. 1, as to action for liability created by statute, or by section 6470, subd. 1, as to action for statutory penalty, but by the four-year statute.

5. Appeal and error ⇐1170(7)—Error in admission of evidence not affecting parties' substantial rights does not require reversal.

The introduction of incompetent and immaterial evidence will not warrant a reversal where there was substantial and competent evidence supporting the complaint, and an examination of the record convinces the Supreme Court that the jury's verdict for plaintiff was right; for the letter and spirit of Comp. Laws Utah 1917, § 6622, requires courts to disregard any error or defect in pleadings or proceedings not affecting the parties' substantial rights.²

Appeal from District Court, Salt Lake County; John F. Tobin, Judge.

Action by the Jeremy Fuel & Grain Company against the Denver & Rio Grande Railroad Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 203 Pac. 863.

Van Cott, Riter & Farnsworth, of Salt Lake City, and J. G. McMurry, of Denver, Colo., for appellant.

Baldwin Robertson and Ball, Musser & Robertson, all of Salt Lake City, for respondent.

WEBER, J. In March, 1919, plaintiff, on its own behalf, and as assignee of 14 other coal shippers, brought suit to recover excessive freight collected by defendant on coal shipped from different railroad stations in Carbon county, Utah, to Salt Lake City, Utah, by plaintiff and its assignors. The jury returned a verdict in favor of plaintiff in the sum of \$58,962.80, including interest. Defendant appeals.

Appellant assigns many errors. The most important relate to the pleadings.

The complaint in substance charges that, between November 20, 1914, and March 7, 1917, the defendant collected freight on coal shipped in carload lots by plaintiff and its assignors at the rate of \$1.60 per ton, and that between those dates, as contained in its printed tariff schedule for the transportation of coal, the legal rate was \$1.25 per ton; that the charges of \$1.60 per ton demanded and collected by appellant of respondent and its assignors were unjust, unreasonable, discriminatory, and unlawful to the extent that said charges exceeded the rates and charges as published in the tariff schedule, and the charges demanded and collected from re-

spondent and its assignors were unjust, unreasonable, discriminatory and unlawful to the extent that they exceeded \$1.25 per ton.

[1] The complaint was demurred to by appellant on the ground of uncertainty, in that from the averments that the rates exacted of the consignees "were unjust, unreasonable, discriminatory and unlawful to the extent that said charges exceeded the sum of \$1.25 per ton it is impossible to determine in what respect said rates are unjust, unreasonable, discriminatory or unlawful." A motion was also made to strike the parts of the complaint demurred to. It is argued that to say a rate is unreasonable is merely a conclusion, and not a statement of fact, and that appellant was entitled to be apprised in what respect the rates were claimed to be unreasonable. Attached thereto and made a part of the complaint are exhibits showing, among other things, the rates of freight charged, what the rate should have been, and the overcharge on each shipment. To say that an overcharge has been collected is stating an ultimate fact, not simply a legal conclusion. Certainly the appellant was given all the information that was necessary to fully apprise it of what respondent claimed. It has frequently been held that it is sufficient to allege in the complaint that plaintiff was charged a sum in excess of a reasonable rate. Thus it is said in *Goodridge v. U. P. R. R. (O. C.)* 35 Fed. 35, that—

"A simple allegation that the plaintiffs were charged a dollar a ton and that they had paid that amount, and that those charges were unreasonable and extortionate, states a good cause of action."

In 10 C. J. p. 454, § 717, the author says:

"At common law, where a carrier makes illegal charges to carry the goods, the consignee's expenses may be recovered back in an action for money had and received. As stated in *Cullen v. Seaboard Air Line R. R. Co.*, 63 Fla. 122, 58 South. 182, 'the gist of the action is that the defendant, upon the circumstances of the case, is obligated by the ties of natural justice to refund the money.'"

Appellant cites *Herndon v. Salt Lake City*, 34 Utah, 65, 95 Pac. 646, 131 Am. St. Rep. 827; *Francis v. Gishorn*, 30 Utah, 67, 83 Pac. 571; *Chesney v. Chesney*, 33 Utah, 503, 94 Pac. 989; *Rasmussen v. Sevier*, etc., 40 Utah, 371, 121 Pac. 741—as supporting its proposition that the averments in respondent's complaint as to the unreasonableness of the freight charges are mere conclusions. In *Herndon v. Salt Lake City*, supra, it is held that an allegation in the complaint that the city is charged with a duty of maintaining its streets in a safe condition for public travel is a mere conclusion, and that, while correct as an abstract proposition of law, such a statement in an instruction was inapplicable to the facts developed in that particular case.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

² *Baird v. D. & R. G.*, 49 Utah, 53, 163 Pac. 79.

The other three Utah cases cited are also far from being authorities in support of appellant's proposition in the instant case.

The motion to strike was properly overruled, and it was not error to overrule the demurrer to the complaint as pleading a conclusion of law instead of the facts.

[2] Another attack made by demurrer upon the complaint is that each cause of action, in so far as it is predicated upon the exaction of higher freight rates from the parties than from other shippers, is barred by subdivision 1, of section 6468, Comp. Laws Utah 1917, or, if not barred by that section, is barred by subdivision 1, of section 6470 of the same compilation. Subdivision 1, of section 6468, provides that an action for liability created by statute other than penalty or forfeiture under the laws of this state shall be begun within one year. Subdivision 1, § 6470, provides that an action upon the statute for a penalty or forfeiture where the action is given to an individual, except when the statute imposing it prescribes a different limitation, shall be begun within one year. This suit was instituted March 21, 1919. On December 21, 1917, the government took control of and operated the Denver & Rio Grande Railroad Company. By the Transportation Act (41 Stat. 456), providing for government control and operation of railroads, it is provided that the period of federal control shall not be computed as a part of the period of limitation in actions against carriers for causes of action arising prior to federal control. Therefore the period from December 31, 1917, must be excluded from the computation of the period of limitation of the state statute. *Standley v. U. S. Railroad Administration* (D. C.) 271 Fed. 794. Excluding the period of federal control, none of the claims for overcharge were barred by the four-year limitation. The trial court, however, permitted no proof of shipments prior to March 31, 1915.

[3] Counsel for appellant argue that at common law no recovery could be had for discrimination in rates, the only question being whether the rate charged was reasonable, and, if reasonable, it had to be paid even though another shipper was given a more favored rate. As supporting their proposition counsel cite 6 Cyc. 499; Penn., etc., v. *International, etc.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; *Parsons v. Railroad*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231; 5 Am. & Eng. Ency. of Law (2d Ed.) 179; *Fitchburg Ry. Co. v. Gage*, 12 Gray (Mass.) 399; *Menacho v. Ward* (C. C.) 27 Fed. 529, 23 Blatchf. 505. The great weight of American authority is not in accord with appellant's contention. 10 C. J. 471, § 746.

"Independently of any constitutional or statutory regulation on the subject, the carrier is bound to carry at an equal rate for all customers for substantially similar service and

under substantially similar conditions." 10 C. J. 489, § 775.

Referring to the doctrine that it has been held by some authorities that it is not necessary that the carrier shall serve all at the same rate of compensation, it is said in 4 R. C. L. § 85, p. 556:

"But although a number of courts have inclined toward this doctrine, there has been a marked tendency to give a more stringent interpretation to the rule, and it has been asserted that the duty of a common carrier toward the public contemplates fair treatment to all, and that therefore the carrier cannot discriminate unjustly between its patrons, and so cannot properly carry for one at an unreasonably low price, or gratis, when by so doing it would be acting unjustly toward another, even if it is ready to carry for such other at a reasonable charge. The duty which the common carrier owes to all cannot be discharged if it is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right, and the common-law rule should therefore be construed as meaning not only that all persons are entitled to carriage upon reasonable terms, but upon equal terms as well. It may safely be said that the tendency and weight of authority are in favor of the doctrine that a common carrier is charged with the quasi public duty of transporting on equal terms for all persons, where the carrying for some at a lower price than for others would injure those less favored. It is therefore not permissible for a common carrier to demand a different hire from different persons for an identical kind of service under identical conditions."

[4] It is contended by appellant that, even if the common law allowed recovery for unjust discrimination, section 454, Comp. Laws Utah 1907, excluded the common law from all subjects thereby regulated. By section 434 of the statutes mentioned railroads are authorized to receive such compensation for transportation of freight "as shall be reasonable and conformable to law." By section 454 they are required to "fix and publish their rates of charges for freight and fares from one station to another on their various lines in this state." By section 455 they are prohibited from charging any one a greater sum than another "for like service, from the same place, under like conditions, under similar circumstances, and for the same period of time. For every transgression of the provisions of this section such common carrier shall be liable to the party suffering thereby double the entire amount so charged to such party." Referring to this statute counsel say:

"It will thus be seen that the statute does not prescribe the particular rates to be charged. But it does provide that the rates charged shall be no greater than are charged to another under like circumstances, etc. If, therefore, one person is charged more than another, this section is violated, and the injured party is entitled to recover double the charges paid."

It is contended that this statute gives a complete remedy to a shipper who has been overcharged, and, being in force when plaintiff's cause of action accrued, the shipper has no remedy at common law. *Winsor v. C. & A. R. R. (C. C.)* 52 Fed. 716, and *Beadle v. Railroad*, 51 Kan. 248, 32 Pac. 910, squarely support the proposition advanced by appellant. The same rule is laid down in 1 *Rorer on Railroads*, p. 570. There is, however, a contrariety of opinion upon this subject. In 2 *Elliott on Railroads*, § 711, the rule is asserted to be that—

"Unless the common-law right of action is thereby taken away in express terms or by necessary implication, the penalty imposed by a penal statute is cumulative only, and the common-law right of action continues to exist unimpaired."

In 10 C. J. p. 451, § 709, it is said:

"The common-law remedy for excessive freight charges is not abrogated by a statute authorizing recovery of the charges collected in excess of the rates properly chargeable under a railroad commission law."

See, also, 4 R. C. L. 654, § 131.

In *Helserman v. B., C. R. & N. R. R.*, 63 Iowa, 732, 18 N. W. 903, it is held that:

"The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. * * * The injured party may waive the tort created by statute, and sue upon the implied contract raised by the law, whereby the carrier is obliged to repay the consignee or consignor of the property all sums exacted in excess of reasonable compensation."

See, also, *Fletcher Paper Co. v. D. & M. R. R.*, 198 Mich. 469, 164 N. W. 528; *Smith v. C. & N. W. Co.*, 49 Wis. 443, 5 N. W. 240; *Goodridge v. U. P. R. R. Co. (C. C.)* 35 Fed. 35; *La Floridienne v. A. C. L. R. R.*, 63 Fla. 208, 212, 58 South. 185; *Cullen v. S. B. A. L. R. R.*, 63 Fla. 122, 58 South. 182; *Sullivan v. Railroad*, 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612.

The statute of this state which was in force when plaintiff's cause of action accrued did not suspend other remedies and did not abrogate the common-law remedy. As plaintiff's cause of action was not based upon the statute, the court committed no error in overruling appellant's demurrer which raised the question of the statute of limitations.

[5] Among appellant's assignments of error are many regarding the admission and exclusion of evidence. The trial was prolonged. Every possible technicality was invoked by appellant's counsel. Over objections some

incompetent and some immaterial evidence was admitted. Some of the court's instructions are doubtless subject to criticism. In *Baird v. D. & R. G.*, 49 Utah, 58, 162 Pac. 79, it is said:

"Where a case is tried to a jury and improper or incompetent evidence is admitted to establish a material fact, respecting which the evidence is in conflict, the admission of such evidence ordinarily constitutes reversible error. There are, however, conditions under which the admission of improper evidence, even where a case is tried to a jury, may not constitute prejudicial error. Such may be the case where there is abundant competent evidence to establish the fact which is also sought to be proved by improper evidence, and where there is no evidence to the contrary."

So here the defense introduced no evidence. Substantial competent evidence supporting the complaint was adduced by plaintiff. An examination of the record convinces us that the jury's verdict was right. In such a case it is our duty to be governed by the letter and spirit of the statute which provides that the court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and that no judgment shall be reversed or affected by reason of such error or defect. *Comp. Laws Utah 1917*, § 6622.

The judgment is affirmed, with costs.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ.

(104 Or. 281)

MENDELSON v. MENDELSON.

(Supreme Court of Oregon. May 31, 1922.)

1. Reformation of Instruments §45(18) — Evidence held to show mutual mistake in omitting exception from release.

Evidence that the parties to an agreement for division of the property after divorce made a subsequent agreement to settle a dispute as to the distribution of the household furniture, in which the husband agreed to deliver certain articles to the wife, and to pay a stated sum in cash, and that, on delivery and payment, the scrivener for the wife's attorney copied a form of release which included all demands against the husband, without excepting therefrom the claim against the husband for future installments of cash payments provided for by the original agreement, concerning which there was no dispute, held to show a mutual mistake entitling the wife to a reformation of the release by the insertion of the exception.

2. Contracts §154 — Law imputes intention corresponding to reasonable meaning of words and acts.

The law imputes to a party to an agreement the intention corresponding to the reasonable meaning of his words and acts.

3. Contracts §16—Every agreement springs from an offer and acceptance.

Every agreement springs from offer and acceptance, sometimes by words alone, sometimes by acts alone, and sometimes by both words and acts.

4. Reformation of Instruments §45(18)—Evidence held not to show inexcusable negligence barring relief from mistake.

Evidence that the scrivener for plaintiff copied a form for release, which plaintiff signed without intending to release a claim which was not in dispute between the parties, but which was not excepted from the terms of the release, held not to show inexcusable negligence which precludes plaintiff from correcting the mistake.

5. Equity §39(1)—Complete relief is administered by equity in case transferred because of equitable reply.

Where plaintiff in an action at law interposed a reply claiming equitable relief by reformation of a release, as permitted by Or. L. § 390, as amended in 1917, and the case was thereupon transferred from the law side to the equity side of the court, it was proper for equity to give complete relief, and it was not necessary, after reforming the release, to transfer the case back to the law side for further proceedings.

Department 1.

Appeal from Circuit Court, Marion County; Geo. G. Bingham, Judge.

Action by Carrie E. Mendelsohn against M. P. Mendelsohn, transferred to equity on the filing of a reply claiming equitable relief. Decree for plaintiff, and defendant appeals. Affirmed.

Thomas Brown, of Salem (Carson & Brown, of Salem, on the brief), for appellant.
John Bayne, of Salem, for respondent.

BEAN, J. The controversy arises out of substantially the following facts: The defendant and plaintiff were formerly husband and wife living in Salem, Or. In the fall of 1917 plaintiff instituted a suit for divorce against defendant. Shortly after the institution of the divorce suit an agreement was entered into between the parties wherein it was provided that, in the event of a divorce, the defendant should deliver to the plaintiff 1,000 shares of mining stock and 500 shares to her daughter Ruth; also deliver, to the plaintiff all cut glass, linen, and other miscellaneous articles in their house, together with the sum of \$500 in cash and the further sum of \$500 in question in monthly installments of \$50 each, to begin with the month of December, 1917; and also pay the plaintiff the value to be placed upon household goods then in his residence, excepting a certain victrola, gas range, leather couch, bedroom set complete, one large rug, two small rugs, bookcase, and all books not belonging to the plaintiff or her daughter Ruth.

Thereafter, on October 8, 1917, a decree of divorce was entered in the suit dissolving the bonds of matrimony existing between the parties. Defendant delivered the mining stock, cut glass, linen, and miscellaneous articles to the plaintiff, and paid her the \$500. An effort was made to adjust the matter of the household goods, for which the defendant was to pay the plaintiff. Plaintiff desired to obtain the victrola. On October 5, 1917, the matter was adjusted by the defendant agreeing to pay \$100 in cash and deliver to the plaintiff the victrola and one-half of the silverware, in lieu of paying her the value of the household goods, the plaintiff agreeing to accept the same and give the defendant a receipt in full of all claims and demands except the sum of \$500 to be paid in monthly payments. The \$100 was then paid, and the one-half of the silverware and the victrola delivered to the plaintiff, who, through Mr. A. A. Hall, delivered to the defendant the receipt which is set out in defendant's answer, releasing and discharging defendant "from all, and all manner of actions and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, variance, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or equity, which against the said M. P. Mendelsohn I ever had, or now have, or which I, or my heirs, executors, or administrators hereafter, can, shall or may have, for, upon, or by reason of any matter, cause or anything whatsoever, from the beginning of the world to the date of these presents."

Mr. Hall, the scrivener, in writing the receipt, by oversight, inadvertence, and mistake omitted to write the words excepting the said \$500 to be paid in monthly payments from the operation of the release. The plaintiff by oversight, inadvertence and mistake supposed she signed a receipt and release covering the value of the household goods only, and releasing the defendant from all claims and demands except the sum of \$500. The present suit was instituted to collect the \$500 due in monthly installments beginning with the month of December, 1917. The defendant contends that the subsequent agreement evidenced by the release completely exonerated him from any further liability under the original agreement.

The complaint is in the ordinary form employed in actions on contracts. The defendant answered the complaint, and set up two further and separate defenses, the one being the modification of the contract and its execution as modified, and the other being the release. Plaintiff replied to the further and separate defenses, pleading a mutual mistake in the preparation and execution of the release under section 390, Or. L., per-

mitting an equitable defense in an action at law to be raised by the answer or reply. The trial court proceeded to hear the issues raised by the answer and reply as an equity proceeding, and at the conclusion of the hearing found for the plaintiff and decreed a reformation of the release by the insertion of an excepting clause, and that plaintiff should have judgment as prayed for in her complaint.

[1] The alleged mistake is the chief question in controversy in this suit, although it is not the only matter urged by the defendant. A careful reading of the testimony convinces us that the contract which the receipt or release was intended by the parties to evidence was to the effect that the defendant should pay the plaintiff \$100 and deliver to her one-half of the silverware and the victrola in lieu of the value of the household goods agreed to be paid for by defendant. This was the only matter left unsettled by the original agreement. Plaintiff and defendant had two parties examine the furniture in order to place a value thereon. On account of the change in the agreement no record was made of the valuation, and it is not remembered by the witnesses. The defendant made the proposition to the plaintiff through her attorney, Mr. Hall, to pay the \$100 and give the plaintiff one-half the silverware and the victrola, and requested a receipt in full. It was in evidence that such receipt should be in full for the claim in regard to the household furniture and nothing more. In attempting to adjust the matter there had been difficulty as to several little things which were in dispute and were not mentioned in the agreement. During all of the negotiations in regard to making the change in the original agreement, which culminated in the plaintiff's accepting \$100, the victrola, and silverware, nothing was said in regard to the \$500 to be paid in installments which would become due thereafter. The \$500 was not in the minds of either party. This was no part of the subject-matter of the transaction. It was not intended by either party to include the \$500 in the receipt or release. The scrivener for some reason, as he states, followed a stereotyped form instead of indicating what was received and what it was for. The defendant accepted the receipt; the mistake was mutual. The value of the victrola according to the testimony was about \$100, and the silverware according to the plaintiff was worth about \$10, and according to the testimony of the defendant about \$30. It is stated by Mr. Hall in his cross-examination that these items just about covered the value of the household goods.

[2, 3] The law imputes to a person the intention corresponding to the reasonable meaning of his words and acts. Every agree-

ment springs from offer and acceptance, sometimes by words alone, sometimes by acts alone, and sometimes by both words and acts. 9 Cyc. 245, 247.

[4] It is claimed by the defendant that the plaintiff was guilty of negligence in the matter so as to preclude her from having the written instrument reformed. Considering all the circumstances as detailed by the testimony, we do not think that the plaintiff was guilty of inexcusable negligence so as to preclude her from having the mistake corrected. 2 Pomeroy, Equity Jurisprudence (3d Ed.) § 856; Howard v. Tettelbaum, 61 Or. 149, 120 Pac. 373.

[5] It is contended by defendant that after the trial court decreed a reformation of the written instrument the action at law should have proceeded accordingly. Where a case is transferred from the law side to the equity side of the court it is proper procedure for the equity court to proceed to administer complete relief. Haynes v. Whitsett, 18 Or. 454, 22 Pac. 1072; Livesley v. Johnston, 48 Or. 40, 84 Pac. 1044; Tokstad v. Daws, 68 Or. 86, 136 Pac. 844; Acton v. Lamberson (Or.) 202 Pac. 421.

In the case of Crossen v. Campbell, 202 Pac. 745, we discussed somewhat at length the effect of the amendment of 1917 to section 390, Or. L., to which for the sake of brevity we here refer. In Churchill v. Meade, 92 Or. 633, 182 Pac. 370, Mr. Justice Burnett said of this section as compared to the same before its amendment:

"It may be said by a figure of speech that the statute opens a new door into chancery through the law courts, whereas before, the entry must have been by a direct suit in that forum."

There is nothing in section 390 of the Code to change the procedure in equity from what it was prior to the amendment of 1917 other than to permit a litigant in a law action to go into equity through the law side of the court. On the contrary, the amended section provides:

"The parties shall have the same rights in such case as if an original bill embodying the defense or seeking the relief prayed for in such answer or reply had been filed."

After the written instrument was reformed and the mistake corrected there was nothing remaining to be tried in the law action. The issues all having been determined by the equity court, it was appropriate to enter a judgment accordingly.

The decree of the lower court should be affirmed.

It is so ordered.

BURNETT, C. J., and McBRIDE and RAND, JJ., concur.

(104 Or. 398)

**NORTHWEST AUTO CO. v. HURLBURT,
Sheriff.***

(Supreme Court of Oregon. May 23, 1922.)

1. Licenses — Automobile license fee is privilege tax which Legislature may require.

Since the main purpose of Laws 1919, p. 704, c. 399 (Or. L. §§ 4772-4814), regulating the use, registration, licensing, etc., of motor vehicles, is to require the owners thereof to make good the extra wear and tear on the highways, the license fee therein exacted is a privilege tax within the Legislature's power to require, though the sale of a licensed car carries the privilege with it.

2. Taxation — Registered automobile dealers not exempt from personal property tax on cars in their hands.

An automobile dealer, to whom is assigned, under Or. L. § 4775, on payment of a single fee, a general distinctive registration number for all his cars, which he uses only for demonstration purposes, is in a distinct class from individual owners, as indicated by sections 4775-4777, 4780, and not within the general mischief of extra wear and tear on the highways without compensation which the statute (Laws 1919, p. 704, c. 399 [Or. L. §§ 4772-4814]) regulating the use, licensing, etc., of motor vehicles was intended to prevent, and hence is not exempt, under section 4800, from personal property taxes levied under section 4381; the registration and license fees which the former section provides shall be in lieu of other taxes and licenses referring to those required of individual owners under sections 4797-4799.

3. Taxation — No discrimination if classification is reasonable.

So long as there is reasonable classification, there is no discrimination.

4. Taxation — Act under which automobile dealers' cars are subject to personal property tax held not discriminatory.

Or. L. § 4381, under which automobiles in the hands of dealers are subject to personal property taxes, despite the payment of the comparatively small registration fee, required by section 4775, for issuance of a general distinctive number covering all such cars, is not discriminatory in favor of individual owners, the license fees exacted from whom are, under section 4800, in lieu of other taxes; it being reasonable to place cars, by the frequent use of which the public highways are injured and deteriorated, in a distinct class from dealer's cars, which are not so used.

5. Taxation — Exemptions must clearly appear.

Exemptions from taxation must clearly appear in the statute and cannot be implied.

6. Taxation — Imposition of personal property tax on automobiles of licensed dealers held not double taxation.

Or. L. § 4381, under which cars in the hands of dealers are subject to personal property taxes, despite the payment of the registration fee required by section 4775, is not unconstitutional as constituting double taxation, though

the dealer might add the amount paid to the price of the car and sell it within the year to a resident of the state who might register it and pay the required fees within such time.

7. Constitutional law — Act authorizing summary collection before equalization held not unconstitutional.

Or. L. § 4381 authorizing the summary collection of taxes on unsecured personal property before equalization, is not unconstitutional as depriving the owner of an opportunity to go before the board of equalization; due process of law in tax matters not requiring any judicial procedure.

8. Taxation — Act authorizing summary collection before equalization held not discriminatory.

Or. L. § 4381, authorizing the summary collection of taxes on unsecured personal property before equalization, is not discriminatory as compelling payment thereof earlier than taxes in general, as the statute does not discriminate between property owners similarly circumstanced.

9. Taxation — Act authorizing assessor to summarily collect taxes on unsecured personal property held reasonable.

The authority given the assessor under Or. L. § 4381, to cause the summary collection of taxes on unsecured personal property liable to be removed from the county, is reasonable; the fair presumption being that he will do his duty and pursue the same course with respect to all property similarly situated.

In Banc.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Suit by the Northwest Auto Company to enjoin T. M. Hurlburt, as Sheriff of Multnomah County, from selling plaintiff's automobiles for payment of taxes. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

This is a suit brought by the plaintiff to enjoin the sheriff of Multnomah county from selling the plaintiff's automobiles for the personal property tax levied against them for the year 1921. The facts as shown by the complaint are substantially as follows: The plaintiff, a dealer in automobiles, on March 1, 1921, owned a number of automobiles which it held in Multnomah county for the purpose of sale, exchange, and trade.

Prior to that date, the plaintiff had procured a dealer's license for the year 1921, pursuant to section 4 of chapter 399, Laws of 1919.

Under the authority of section 4381, Or. L. (Olson's Comp.), the county assessor of Multnomah county during March, 1921, assessed plaintiff's said automobiles and levied a tax thereon at the rate of the 1920 tax levy and demanded from plaintiff payment of the resulting tax. Plaintiff refused payment on the ground that the automobiles were taxable only under chapter 399 of the

Laws of 1919 and not under the general laws for the taxation of personal property. Ten days after such refusal, the assessor certified this assessment and tax to the sheriff of Multnomah county, with instructions to collect the tax. The sheriff was proceeding to collect the tax until temporarily restrained therefrom in this suit.

A demurrer was interposed by the defendant on the ground that the complaint did not state facts sufficient to constitute a cause of suit. This was sustained by the circuit court and a decree was entered dismissing the complaint.

The appeal brings up for construction and interpretation chapter 399, Laws of 1919, the plaintiff contending that all matters pertaining to the regulation and taxation of automobiles are covered by the act of 1919 alone, while the defendant insists that automobiles may be taxed in some instances under that act alone, and in others may be taxed under the act and the general personal property taxation laws as well and that the circumstances stated in the complaint warrant a taxation under the general personal property taxation laws. The constitutionality of section 4381 Or. L., under which the assessor and sheriff were proceeding in assessing, levying, and collecting the tax in question, is also attacked in this controversy.

Dan J. Malarkey and E. B. Seabrook, both of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for appellant.

George Mowry, Deputy Dist. Atty., of Portland (Stanley Myers, of Portland, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). It would be idle to say that the questions presented on this appeal are easy of solution, or that any construction which we may give to the sections hereinafter considered will not in individual instances work some hardship. There never was, and perhaps never will be, any system of taxation devised that will work even and exact justice in every instance. The best result that the lawmaker may hope to attain is such an approximation to uniformity as will work out justice in the great majority of cases. The present litigation illustrates this proposition.

The plaintiff on March 1, 1921, when by operation of law all personal property not otherwise exempt became liable to taxation, was the owner of a large number of automobiles which it kept for sale, and upon which, if not exempt by the provisions of the motor vehicle act, there were taxes due Multnomah county to the amount of \$3,002.49. If these automobiles were exempt from taxation by reason of the payment of a \$30 dealer's license, a large amount of such property held for sale or exchange might practically escape the tax burden imposed by

law upon all other personal property; and, if unsold during the year or sold to parties residing outside the state, would not contribute anything to the revenues of the state either by license or otherwise. On the other hand, it is urged that the great weight of probability is that most of the vehicles so kept for sale or exchange will have been sold during the year to residents of the state who will necessarily be compelled to secure a license for the privilege of driving them upon the highways of the state, which license approximates in amount the personal property tax which would otherwise be due thereon; that in effect this would amount to double taxation; and that, as the amount paid by the dealer as personal property tax would naturally be added by him to the price of the car, the burden of this double taxation would eventually fall upon the purchaser. Such and similar difficulties which suggest themselves, and which must ensue in consequence of any construction of the law, added to the fact that the statute itself is not entirely free from ambiguity, render its interpretation a matter of much nicety when we attempt to ascertain that elusive thing called "the intent of the Legislature."

Those sections of the statute particularly relied upon by the plaintiff are sections 4775 and 4800, Or. L., and are as follows: the italicized portion of section 4775 being that particularly pertinent to the present discussion:

"Sec. 4775. Every owner of a motor vehicle, except as otherwise provided herein shall, after he becomes the owner thereof, and before he operates or drives the same upon the roads, streets or highways of this state, cause to be filed by mail, or otherwise in the office of the secretary of state, an application duly signed by such owner for registration on a blank or blanks to be furnished by the secretary of state for the purpose, containing (1) the name, residence and business address of the owner of such motor vehicle and the name of the county in which he resides; (2) a brief description of the motor vehicle to be registered, including the name of the manufacturer, style, type and engine number of such motor vehicle, the character of the power and the number and diameter of the cylinders, and if a motor truck, the rated maximum load carrying capacity expressed in tons and fractions thereof, and the width of the tires of the wheels expressed in inches; provided, that every person, firm, association or corporation manufacturing or dealing in motor vehicles for the purpose of sale or exchange, instead of registering each motor vehicle so manufactured or dealt in, may make an application upon a blank to be furnished by the secretary of state for a general distinctive number for all motor vehicles owned or controlled by such manufacturer or dealer for the purpose of sale or exchange, such application to contain (a) a brief description of each style or type of motor vehicle manufactured or dealt in by such manufacturer or dealer, including the character of the motor power, and (b) the name and business address, including the county, of

such manufacturer or dealer. Upon receipt of such application in due form and the payment of the registration fee of \$30, the secretary of state shall cause the same to be filed in his office in the manner provided in this act. There shall thereupon be assigned and issued to such manufacturer or dealer a general distinctive number, and delivered to such manufacturer or dealer, at a place within the state of Oregon, to be designated by him in his application, a certificate of registration in such form as the secretary of state shall prescribe, and one set consisting of two duplicate number plates with a number corresponding to the number of such certificate of registration. Such number plates shall be displayed in the manner provided in this section by every motor vehicle of such manufacturer or dealer when the same is operated or driven upon any road, street or highway of this state; provided that for any registration made on or after July first of any year but one-half of such registration fee shall be paid, and for any registration made on or after October 1st of any year but one-fourth of such registration fee shall be paid. Such manufacturer or dealer may obtain as many duplicate sets of number plates of such number so assigned to him hereunder as may be desired upon the filing of a formal application therefor with the secretary of state and the payment of \$5 for each additional duplicate set. No plate or sign shall be used other than those furnished by the secretary of state. Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or hire."

"Sec. 4800. The registration and license fees imposed by this act upon motor vehicles, motorcycles, motor bicycles, motor trucks, trailers and other road vehicles, shall be in lieu of all other taxes and licenses, except municipal license fees under regulatory ordinances, to which such vehicles may be subject, and such motor vehicles, when so registered and licensed shall not be entered on the county tax rolls for taxation as personal property; provided, that nothing herein shall be considered as relieving such vehicles from liability for the payment of any tax based or levied on an assessment thereof for the year 1919, or any prior year. This shall not be construed to include any such vehicles in process of manufacture or held in storage for commercial purposes, which are not registered and licensed as in this act required."

Section 4814, concluding the enactment, is important as indicating the legislative intent, and is as follows:

"The purpose, object and intent of this act is to provide a comprehensive system for the regulation of all motor and other vehicles in this state, except that nothing herein contained shall be deemed to apply to the registration and licensing of United States government owned motor vehicles and to traction engines, farm tractor, road rollers, fire wagons, fire engines, invalid chairs and baby buggies."

Sections 4776 and 4777 are evidently intended to refer only to applications for license to use individual cars to the exclusion of those covered by applications of dealers. They read as follows:

"Sec. 4776. Upon receipt of an application for registration of a motor vehicle the secretary

of state shall file such application in his office and register such motor vehicle and the facts stated in such application in a record book and index to be kept for the purpose under the distinctive number assigned to such motor vehicle by the secretary of state, which record book and index shall be a public record and open to inspection by the public during reasonable office hours."

"Sec. 4777. Upon the filing of an application for registration under this act and the payment of the license fee herein provided for, the secretary of state shall assign to the motor vehicle a distinctive number and, without expense to the applicant, issue and deliver to the owner two number plates bearing the same number. He shall also issue a certificate of registration of such motor vehicle, which certificate shall include the name of the registrant of the motor vehicle, trade name of the motor vehicle, motor number and license number assigned and also a space for the counter signature of the registrant for identification purposes. The number plates assigned as herein provided shall be and remain with the motor vehicle for the period of registration mentioned in the application therefor; provided, however, that in the event of the loss, mutilation or destruction of a number plate or plates the owner of a registered vehicle may obtain from the secretary of state a duplicate or duplicates thereof upon filing in the office of the secretary of state on forms prepared by him an affidavit showing the fact and the payment of a fee of \$1."

It is significant that the term "license" is only used in these sections in connection with applications for registration of individual cars. So far as the dealer is concerned, the secretary of state is required to issue a certificate of registration in such form as shall be prescribed and furnish him identification plates; whereas, when an individual owner applies, the secretary of state is required to give to the particular vehicle registered a distinctive number and deliver to the owner two number plates bearing the same number, which plates by a subsequent section the owner is required under penalty to keep upon his car. The certificate of registration in this instance must contain the trade name of the automobile (as, for example, Ford, Buick, Dodge, etc.), the motor number, etc., of the vehicle registered; in short, everything necessary for the identification of the particular vehicle, a requirement not exacted in the registration of a dealer.

Another important distinction between the license or tax upon a dealer and the license to the owner of an individual car is found in the provision that in a sense attaches the license to the individual car to the vehicle itself, as shown in section 4780, which provided that—

"Upon the purchase of a motor vehicle registered in accordance with this act, the title to the number plates shall vest in the vendee," etc.

To say that the title to the plates furnished under the act included the plates furnished the dealer would be absurd. The words

"registered in accordance with this act" evidently refer to vehicles registered by individual owners. These words furnish a key to the intent of the Legislature; and, unless a contrary intent is clearly implied, these words whenever they appear should be taken to refer to vehicles which are the property of individual owners.

[1] The main purpose of the act is well indicated by the preamble, which is as follows:

"Providing for regulating the use, registration, licensing, taxing, identification, conduct and operation of vehicles operated upon the public roads, streets and highways of the state of Oregon; the registration and licensing of persons operating the same; providing for the punishment of violations of this act; prohibiting the unauthorized use or possession of a vehicle; limiting the authority of cities and towns on subjects concerned with said vehicles; providing for the disposition of the funds derived from the operation of said act, repealing all acts or parts of acts in conflict herewith, and declaring an emergency."

That purpose, in a nutshell, was to require the owners of motor vehicles to make good to the state the extra damage and wear and tear caused by the use of the vehicles upon its highways. The use of motor vehicles upon the roads was comparatively an innovation, having grown to its then proportions in the space of a few years. For such use better and more permanent roads and roadbeds were required than for the comparatively light vehicles theretofore employed. Their weight and swiftness were calculated to work serious injury to the roadbeds prepared for lighter and slower vehicles, and necessitated highways more permanently constructed and more frequent repairs to those already in use.

As a police measure, it was nothing more than fair that the agencies causing and requiring this extra expense should be required to pay for it. Accordingly, we held in *Briedwell v. Henderson*, 99 Or. 506, 195 Pac. 575, that the license exacted of persons as a prerequisite to using their motor vehicles upon the public highways of the state was a privilege tax within the power of the Legislature to require. That this privilege is subject to transfer and sale, or rather that the sale of the car carries with it and vests in the purchaser the right and privilege to use the car upon the public highways, can make no difference in the character of the right.

The courts in speaking of financial exactions of the character herein discussed have sometimes called them "licenses," and sometimes "privilege taxes." Again, they are sometimes spoken of as "license fees" or "license taxes"; but, by whatever name they may be called, they partake of the nature of a tax in many respects, and the designation

given in the statute is immaterial, the courts being interested in the substance rather than in the name. In *Briedwell v. Henderson*, supra, we held it to be properly called a privilege tax, the result of this tax being substantially a license, a certificate that the person paying the sum required was permitted to use a particular car upon the highway for the whole or what time might remain of the current year.

[2] The dealer in motor vehicles is in a distinct class from the individual owner. Except for the purposes of demonstrating the qualities of his machine, he makes no use of the public highways. He is not within the general mischief which it was the intent of the statute to prevent, nor is he personally greatly benefited by the expenditure of the fund derived from the licensing of individual owners of cars. The \$30 fee exacted from him would probably amount to about the average annual license of a single car; and, since it is not probable that he would in demonstrating so use the cars on hand for sale as to render them secondhand or impair their quality of newness, \$30 would doubtless cover the damage which the use of his cars would inflict on the highways. In fact, the dealer has not under this act a single regulated and licensed car, but a roving commission to use any one of many cars for the purposes of demonstration.

A careful study of the whole act satisfies us that the registration and license fees mentioned in section 4800 have reference to those expressly designated as such in sections 4797 and 4798, and not to the fee paid by dealers, which is not mentioned or alluded to in either of the two last mentioned sections. At the risk of taking more space than is absolutely necessary and of repeating what has already been quoted, we give the three preceding sections entire as they stand in the statute, so that their logical relation to the exemption section may appear:

"Sec. 4797. *Registration or License Fees for Motor Vehicles.*—The following annual license fees shall be paid to the secretary of state upon the registration or re-registration of a motor vehicle in accordance with the provisions of this act; provided, that for any registration made on or after July 1st of any year, but one-half of said fees shall be paid; and for any registration made on or after October 1st of any year, but one-fourth of said fees shall be paid:

Motor bicycles.....	\$ 3 00
Motorcycles	6 00
Electric pleasure vehicles.....	18 00
Electric service vehicles under 1 ton capacity	25 00
All steam, gasoline and hydrocarbon operated vehicles (except motor trucks having a rated maximum load carrying capacity of 1 ton and over), up to and including 23 h. p.....	
In excess of 23 h. p. and inclusive of 26 h. p.	22 00
In excess of 26 h. p. and inclusive of 30 h. p.	28 00
In excess of 30 h. p. and inclusive of 36 h. p.	36 00
In excess of 36 h. p. and inclusive of 40 h. p.	48 00
In excess of 40 h. p.....	56 00

"All horse-power ratings herein specified for the purpose of determining the registration fees herein enumerated shall be based upon Haskell's horse-power formula for steam vehicles and upon the formula of the Associated Licensed Automobile Manufacturers for gasoline vehicles. And in case of doubt, where the secretary of state is unable from either of said formulas to determine the actual rated horse-power of any such motor vehicles, it shall take the rate of the next class of motor vehicles to which its horse-power approximates, that it may pay a fair and uniform registration fee of all such other vehicles upon its horse-power.

"Sec. 4798. *Registration or License Fees for Motor Trucks and Trailers.*—The annual license fees in the schedule following shall be paid to the secretary of state upon the registration or re-registration of all motor trucks and trailers as defined in this act, except such motor trucks having a carrying capacity of less than one ton; provided, that for motor trucks and trailers registered on or after July 1st of any year, only one-half of said fees shall be paid; and for motor trucks and trailers registered on or after October 1st of any year, only one-fourth of said fees shall be paid:

One ton and not over 1½ tons.....	\$ 32 00
Over 1½ tons and not over 2 tons.....	48 00
Over 2 tons and not over 2½ tons.....	60 00
Over 2½ tons and not over 3 tons.....	72 00
Over 3 tons and not over 3½ tons.....	84 00
Over 3½ tons and not over 4 tons.....	96 00
Over 4 tons and not over 4½ tons.....	108 00
Over 4½ tons and not over 5 tons.....	120 00

"On all trailers as defined in this act an annual license fee equal to one-half of the license fee charged for motor trucks of like rated carrying capacity shall be paid to the secretary of state at the same time and in the same manner as herein provided for motor trucks; provided, trailers of less than one ton rated carrying capacity shall be exempt from the payment of the license fee herein imposed.

"Sec. 4799. *Weight of Motor Trucks—How Determined.*—The manufacturer's rated maximum load carrying capacity shall be the basis on which the above registration and license fee upon trucks and trailers shall be determined and charged; provided, that in no case shall the rated load carrying capacity be determined to be in excess of six hundred pounds per inch of tire width of wheels. When the manufacturer's load carrying capacity is not obtainable it shall be estimated on the basis of six hundred pounds per inch width of tire."

Thereafter follows the exemption section, which would seem clearly to refer to the sections quoted above and to be limited in its application to those sections.

[3-5] So long as there is reasonable classification there is no discrimination, and it appears entirely reasonable to place cars used upon the public highways and accommodated by them, as injured and deteriorated by such use, in a distinct class from those cars not so used, and that is what the Legislature attempted here. It is a well-known rule that exemptions from taxation must clearly appear in the statute and cannot be

implied. 26 R. C. L. § 266, p. 302; Wallace v. Board of Equalization, 47 Or. 584, 86 Pac. 365.

[6] It is plausibly contended that the position of a personal property tax upon automobiles kept for sale will constitute double taxation, but this does not necessarily follow. So to hold as a matter of law, we should have to assume (1) that the dealer would add the amount paid for taxes to the price of the car when sold; (2) that he would sell it within the year; (3) that he would sell it to a resident of this state; and (4) that such resident would have it registered and would pay the required fees within the year. The county of Multnomah is not required to gamble upon these probabilities or possibilities.

[7] It is also urged that section 4381, Or. L., authorizing the summary collection of taxes upon unsecured personal property before equalization and upon certificate of the assessor, is unconstitutional and void. This is not an uncommon statute, and we are cited to no case in which it has been held unconstitutional. On the contrary, such a statute has been held constitutional by the Supreme Court of our sister state of California in the case of Rode v. Siebe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342.

[8, 9] The fact that the plaintiff was deprived of an opportunity to go before the board of equalization can have no importance here, in the sense of his being deprived of a hearing before some judicial or quasi judicial body, for the reason that "due process of law" in tax matters does not require regular or indeed any judicial procedure. Judson on Taxation, § 340. In fact, counsel for plaintiff hardly put their argument upon that ground, but rather upon the theory that the statute is discriminatory in that it compels plaintiff to pay its taxes several months earlier than the general run of tax payers are required to pay theirs. The argument is unsound, in this, that the statute does not discriminate between plaintiff and other property owners similarly circumstanced. The authority given the assessor to cause the summary collection of taxes upon personal property liable to be removed from the county is reasonable, if the county is to have any assurance that its taxes are to be collected. The fair presumption is that the assessor will do his duty and pursue the same course with respect to all property similarly situated. If his action is arbitrary and unwarranted by the facts, the plaintiff perhaps has his remedy by injunction; but such is not the case made here, where one of the points suggested in the argument of counsel is that the cars in question will probably soon be sold and in private ownership.

After a careful examination of the authorities cited, we are of the opinion that the demurrer was properly sustained, and

the decree of the circuit court is therefore affirmed.

BROWN, J., took no part in the hearing or decision of this case.

(104 Or. 414)

COVEY et al. v. HURLBURT, Sheriff.*

(Supreme Court of Oregon. May 31, 1922.)

1. Taxation \S 47(1) — No inconsistency or double taxation in requiring both ad valorem tax and license fee from motor vehicle owners.

There is no inconsistency or double taxation per se in requiring payment of an ad valorem tax on a motor vehicle and an additional license exaction for the privilege of operating it on the public highways.

2. Taxation \S 79—Automobile dealers liable for personal taxes on cars owned by them on March 1st, irrespective of subsequent sales.

Under Or. L. \S 4268, making the owner of property on March 1st liable for the taxes thereon, dealers in motor vehicles are liable for personal property taxes on cars owned by them on March 1st, though subsequent thereto and before the taxes were equalized they were sold to private owners who secured the individual licenses required by law; section 4800, exempting registered and licensed motor vehicles from taxation as personal property, applying only to cars registered and licensed prior to March 1st.

In Banc.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Suit by H. M. Covey and another, partners doing business as the Covey Motor Car Company, to enjoin T. M. Hurlburt, as Sheriff of Multnomah County, from collecting a tax on plaintiffs' automobiles. Decree for defendant, and plaintiffs appeal. Affirmed.

This is in most respects a companion case to Northwest Auto Co. v. Hurlburt, 207 Pac. 161, decided May 23, 1922, and not yet [officially] reported. The distinction is that in this case the property mentioned has not been levied upon specially under the provision of section 4381, Or. L. (Olson's Comp.), but had been assessed and the sheriff threatens to collect the tax upon the same under the general provisions of the law providing for the collection of delinquent taxes. The plaintiffs were the owners of the cars on March 1, 1920, and at that date had paid the dealers' license tax of \$30 required by the statute, and the secretary of state had issued to them a distinctive number and the dealers' license tags bearing said number, required by section 4775, Or. L.

The complaint alleges that—

"Subsequent to March 1, 1920, and prior to September 1, 1920, plaintiffs sold and delivered to various and sundry persons all of the said automobiles and motor vehicles which they so had on hand and in stock for sale and trade on March 1, 1920, and which were so assessed, as aforesaid, and at the time of the sale of each of said automobiles and motor vehicles there was paid to the secretary of state of the state of Oregon the individual license fee for the year 1920 required to be paid by sections 28 and 27 of chapter 899 of the General Laws of Oregon for the year 1919, and said secretary issued and delivered to the purchaser of each of said automobiles and motor vehicles license tags for said year 1920, which were duly affixed to each of said automobiles and motor vehicles.

"Notwithstanding said payment by and for each and every one of said automobiles and motor vehicles of the whole of said license fees for the entire year of 1920, a tax levy at the rate of 44.8 mills per dollar has been made upon said assessment of \$13,840, and a tax amounting to \$620.04 thereon has been entered in the tax roll of said county for said year of 1920, and said tax roll has been placed in the hands of the defendant as sheriff of said county with a warrant attached commanding him to collect said tax."

Dan J. Malarkey and E. B. Seabrook, both of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for appellants.

George Mowry, Deputy Dist. Atty., of Portland (Stanley Myers, Dist. Atty., of Portland, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). We have here, as well as the questions passed upon in Northwest Auto Co. v. Hurlburt, a state of facts indicating that subsequent to March 1, 1920, and before the taxes had been equalized, the vehicles in question had been sold into private ownership and the individual licenses required by law had been secured by the purchasers. It is claimed that such payment releases the dealers from the obligation to pay the personal property tax assessed against the dealers on March 1, 1920. With this contention we are unable to agree.

Section 4268, Or. L., has the effect to make the person who is the owner of the property on March 1 of any year liable to pay the taxes thereon. The law imposes the tax and the assessor's duty is confined to ascertaining what property was owned by a particular person at that date, and fixing a valuation on it. The fact that it may have been sold before the valuation is made and entered upon the assessment roll can make no difference. If the property is owned by a party on March 1 and is sold to another person before the value is ascertained and entered upon the assessment roll, the purchaser is not made liable to pay the tax upon it. That liability is still upon the person who owned it on March 1. It follows that there is nothing in

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied July 18, 1922.

the fact of a sale of the property after March 1 that in itself releases the vendor from the liability to pay the tax. If there is any release from such liability, it must be sought in the statute of 1919. Section 4800, Or. L., is the statute relied upon to create such exemption. It reads as follows:

"The registration and license fees imposed by this act upon motor vehicles, motorcycles, motor bicycles, motor trucks, trailers and other road vehicles, shall be in lieu of all other taxes and licenses, except municipal license fees under regulatory ordinances, to which such vehicles may be subject, and such motor vehicles, when so registered and licensed shall not be entered on the county tax rolls for taxation as personal property; provided, that nothing herein shall be considered as relieving such vehicles from liability for the payment of any tax based or levied on an assessment thereof for the year 1919, or any prior year. This shall not be construed to include any such vehicles in process of manufacture or held in storage for commercial purposes, which are not registered and licensed as in this act required."

[1,2] As shown in *Northwest Auto Company v. Hurlburt*, supra, motor vehicles kept for sale or exchange and the property of the dealer on March 1 of each year were subject to general taxation as personal property. The property in question was so assessed. There is no inconsistency or double taxation per se in requiring a person owning a motor vehicle to pay an ad valorem tax on such vehicle and an additional license exaction for the privilege of operating it upon the public highways. The enormous damage to the highways and the necessity for more substantial roads for such vehicles might well justify the imposition of both; but, in order to secure the prompt payment of the license, it is enacted that payment thereof shall exempt the owner from further personal property taxation on the particular motor vehicle so taxed. He has from January 1 to March 1 to pay his privilege tax or license, and, if he does this, he is able to show the evidence of it to the assessor and escape further taxation. If he neglects this, it is but fair that he should pay both the personal property tax and the license fee. This applies to both dealers and individual owners. It was never the intent of the law that the assessor should keep a daybook account with dealers in automobiles and reduce the amount of their assessments every time a car was sold to a resident of the state who thereupon took out an individual license and registration.

Construing this section of the statute in connection with section 4268, Or. L., we are constrained to hold that the section relied upon by counsel for plaintiffs applies only to motor vehicles which were registered and licensed prior to March 1.

The decree of the circuit court is affirmed.

STEVENS v. HURLBURT, Sheriff.

(Supreme Court of Oregon. May 31, 1922.)

Taxation \Leftrightarrow 219 — Dealers' automobiles, on which license fees are paid before July 1st, not subject to ad valorem tax.

Under Laws 1921, p. 729, § 26, motor vehicles in the hands of dealers who have paid the license fees imposed by Or. L. § 4775, prior to July 1st, are not subject to an additional ad valorem tax under section 4381.

In Banc.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Suit by A. C. Stevens to restrain T. M. Hurlburt, as Sheriff of Multnomah County, from collecting a tax on plaintiff's automobiles. Decree for defendant, and plaintiff appeals. Reversed and remanded.

This case is in many respects similar to that of *Northwest Auto Co. v. Hurlburt*, 207 Pac. 161, decided by this court May 23, 1922, and not yet [officially] reported.

On March 1, 1921, plaintiff was the owner of and a dealer in motor vehicles of the value of \$3,300 and had the dealer's license prescribed by section 4775, Or. L. On January 5, 1922, the assessor of Multnomah county demanded payment of taxes upon plaintiff's motor vehicles, assuming to act under section 4381, Or. L. On the plaintiff's refusal to pay the same, the sheriff, under the same procedure set forth in *Northwest Auto Company v. Hurlburt*, attempted summary collection, and this suit was brought to restrain him from proceeding further.

The complaint alleges, among other matters, that prior to July 1, 1921, the license fees imposed by the statute of 1919 had all been paid upon said vehicles, and invokes the benefit of section 26 of chapter 371, Laws of 1921, which reads as follows:

"The registration and license fees imposed by this act upon motor vehicles, motorcycles, motor bicycles, motor trucks, trailers, semitrailers and other road vehicles in this act described and upon the owners thereof by reason of such ownership, shall be in lieu of all other taxes and licenses, except municipal license fees under regulatory ordinances, to which such vehicles or the owners thereof by reason of such ownership may be subject; provided, that this section shall not be construed to exempt from ad valorem taxes any such vehicles in process of manufacture or held in storage and not for sale or exchange, unless the owners thereof register and license such vehicles under the provisions of this act, prior to July first of the year for which any such ad valorem tax shall have been assessable by law."

Dan J. Malarkey and E. B. Seabrook, both of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for appellant.

George Mowry, Deputy Dist. Atty., of Portland (Stanley Myers, Dist. Atty., of Portland, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). We are of the opinion that this section is applicable here and distinguishes this case from *Covey Motor Car Co. v. Hurlburt* (Or.) 207 Pac. 166, and *Northwest Auto Co. v. Hurlburt* (Or.) 207 Pac. 161, and that the demurrer to the complaint should have been overruled.

The decree is reversed, and the cause is remanded to the circuit court for further proceedings.

(104 Or. 236)

GREENFIELD v. CENTRAL LABOR COUNCIL OF PORTLAND AND VICINITY et al.

(Supreme Court of Oregon. May 31, 1922.)

1. Injunction §14—Never issued except to prevent irreparable injury.

Independently of, as well as under, Laws 1919, p. 614, § 2, injunction is never issued except to prevent irreparable injury.

2. Injunction §101(1)—Issuance in labor dispute inhibited only where means of persuasion are peaceful and lawful.

Laws 1919, p. 614, § 3, inhibiting injunction against soliciting others "by peaceful or lawful means" to cease patronizing a party to a dispute concerning terms or conditions of employment, is by its plain terms applicable only where the means are peaceful and lawful.

3. Constitutional law §48—Statute to be so construed as to be constitutional.

When possible a statute is to be so construed as to make it square with state and federal Constitutions.

4. Constitutional law §328—Courts open to all on like terms.

It is fundamental that courts are open to all on like terms.

5. Injunction §101(1)—Picketing held unlawful.

For pickets to take their stand at store entrances, or to patrol in front thereof, so as to cause the entrances to be somewhat obstructed, and during all business hours to call out in loud tones, denouncing the proprietor, advising all not to buy from him, thus causing annoyance and substantial loss, is unlawful, and none the less because of the existence of a strike, so that injunction properly issues notwithstanding Laws 1919, p. 614, § 3.

6. Injunction §55—Right to follow lawful business without illegal interference protected.

It is as much the duty of a court of equity to protect a man's right to follow his lawful business without illegal interference as to grant injunctive relief to prevent destruction of his physical property.

In Banc.

Appeal from Circuit Court, Multnomah County; John McCourt, Judge.

On rehearing. Decree affirmed.

Former opinion (192 Pac. 783) modified.

This is a suit in equity, involving a controversy with union labor. The plaintiff, Geo. L. Greenfield, sought, and was decreed, protection by injunction. The plaintiff is a merchant of Portland, conducting two retail stores for the sale of boots, shoes, and other footwear, his places of business being located at the northeast corner of Fourth and Alder streets and the northwest corner of Fourth and Morrison streets respectively.

The defendant Local Union No. 1257 of the Retail Clerks' International Protective Association is a trade union. Defendant John Doe Preston is the business agent of this union. Defendants L. O. Novak and J. D. Myall are its secretary and president respectively. Defendant Central Labor Council of Portland and Vicinity is a body of delegates appointed by, and representing, numerous labor unions and organizations, including the defendant Local Union No. 1257, and has authority conferred upon it by the several unions to aid, assist, promote, counsel, and advise such labor unions, including the defendant Local Union No. 1257, in respect to the conduct and acts set forth in the pleadings.

The facts offered and received in evidence in the trial of the cause were brought before the court by the pleadings, stipulations of counsel, and affidavits. From the evidence adduced upon the trial the court made its findings of fact, from which it deduced, as a conclusion of law, that the plaintiff was entitled to relief by the extraordinary process of injunction. Based thereon, the court made and entered the following decree:

"That said defendants, and each of them, their servants, agents, officers, employees, members, and attorneys, be, and they are hereby, enjoined and prohibited from in any wise interfering with or harassing or annoying or obstructing plaintiff in the conduct of his business, to wit, his retail shoe stores known as 'Greenfield's,' situated at the northwest corner of Fourth and Morrison streets, and 'Wright's Sample Shoe Shop,' situated at the northeast corner of Fourth and Alder streets, both in the city of Portland, Or., and from in any wise molesting, interfering with, intimidating, threatening, or harassing any employee or employees of plaintiff in said business, and from intimidating, harassing, annoying, interfering with, or obstructing any customer or customers, patron or patrons of plaintiff from entering into or departing from plaintiff's said places of business, and by any kind of violence, threats, or intimidation, inducing or seeking to induce any customer or customers, patron or patrons, or intending customers or patrons, to withhold or withdraw their patronage from plaintiff, or to refrain from entering

into plaintiff's said places of business, and further said defendants, and each of them, their agents, servants, employees, members and officers, are hereby prohibited and enjoined from in any wise or manner picketing the said places of business of plaintiff, save and except that it shall be lawful, and the defendants are hereby permitted to employ two pickets during the business hours of each day, and to station one of said pickets in front of each of plaintiff's said stores, and said pickets may be permitted to wear upon their person a sash inscribed with the words, 'Unfair to organized labor, Local Union 1257,' and said pickets are permitted to walk upon the outer edge of the sidewalk in front of plaintiff's said places of business, but said pickets are prohibited and enjoined from making any declaration or statements whatsoever concerning plaintiff or his said places of business, and said pickets are enjoined and prohibited from engaging in any argument or conversation of any kind with any person concerning the strike or boycott declared against plaintiff, or concerning the merits thereof, and said pickets are further enjoined and prohibited from making any demonstration of any kind whatsoever, or from taking any poses or making any gestures calculated or intended to divert or turn patrons or prospective customers from plaintiff's said places of business. * * *

The plaintiff appeals from that part of the decree reading:

"Save and except that it shall be lawful, and the defendants are hereby permitted to employ two pickets during the business hours of each day, and to station one of said pickets in front of each of plaintiff's said stores, and said pickets may be permitted to wear upon their persons a sash inscribed with the words, 'Unfair to organized labor, Local Union 1257,' and said pickets are permitted to walk upon the outer edge of the sidewalk in front of plaintiff's said places of business"

—and asserts that all picketing is an unlawful invasion of a property right and constitutes a continuous trespass; second, that all picketing, whether peaceful or otherwise, is a means employed by men acting in concert and in furtherance of a conspiracy to do an unlawful act.

The defendants appeal, assigning error in finding of fact No. 7, wherein the court found:

"That the defendants had formed a plan or carried out by concert of action, or otherwise, a plan or purpose of intimidating and annoying the plaintiff or his employees, or to intimidate or annoy the customers about to enter into plaintiff's said places of business, or any of said customers, by means of pickets or otherwise.

"And, further, the court erred in * * * finding that many of plaintiff's customers were * * * prevented and intimidated from patronizing plaintiff's stores during * * * the time of said picketing, and that thereby the trade of plaintiff in his retail business was materially reduced, to his * * * irreparable loss and damage; and that said picketing as

thus conducted by defendants obstructed the entrances to plaintiff's said places of business, and obstructed and interfered with the free and open access to plaintiff's said places of business by his patrons. * * *

"That the court erred in its conclusions of law that the picketing as conducted by defendants is unlawful * * * and in all that portion of the decree, except only wherein the court enjoined the defendants, and each of them, from, 'by any kind of violence, threats or intimidations, inducing, or seeking to induce, any customer or customers, patron or patrons, or intending customers or patrons, to withhold or withdraw their patronage from plaintiff, or to refrain from entering into plaintiff's said places of business.'"

John W. Kaste, of Portland (Bauer, Greene & McCurtain, of Portland, on the brief), for plaintiff.

W. S. U'Ren, of Portland (A. M. Crawford and W. C. Campbell, both of Portland, on the brief), for defendants.

BROWN, J. (after stating the facts as above). There is no serious conflict in the evidence concerning the material facts relating to the strike. There is, however, a dispute as to the manner in which the pickets addressed plaintiff's customers and others.

After careful consideration of the record, we adopt the findings of fact made by the trial court and set forth below as supported by the evidence. The facts so found and adopted are as follows:

In conducting his business as a retail dealer in boots and shoes, the plaintiff employed a number of clerks, all of whom were members of Local Union No. 1257 excepting four. About January 15, 1920, the defendants demanded that Greenfield, the plaintiff, require the four nonunion men in his employ to join Local Union No. 1257, and insisted that, if they should fail or refuse to become members of the Union, plaintiff should discharge them. This the plaintiff refused to do. Thereupon the defendants, for the purpose of coercing plaintiff to discharge his nonunion clerks, threatened him with a strike, including the picketing of his stores.

The plaintiff and defendant Local Union had previously entered into a contract set forth in defendant's further and separate answer which was violated by the plaintiff when he refused to compel his nonunion employees to join the union, or to discharge them from his employ. There was also a dispute between plaintiff and some of his employees concerning the payment of overtime provided for in that contract.

In carrying out their threats, the defendants entered into an agreement to be executed by concert of action, having for its purpose the injuring of the business of the plaintiff by preventing his customers from dealing with him. In order to influence persons from trading with plaintiff, it was agreed to

annoy him, his clerks, as well as customers and prospective patrons, by means of pickets, who were to parade along the outer edge of the sidewalk in front of the entrances to his stores. This agreement was carried out. The pickets, wearing about their shoulders scarfs, with the words, "Unfair to organized labor, Local Union No. 1257," inscribed thereon in large letters, patrolled the sidewalk in front of plaintiff's stores, or took their stand in front of such stores, and, in a loud tone of voice, declared to the customers who were about to enter, or who did enter and depart from the stores:

"This place is unfair to organized labor; please do not patronize it; friends of union labor and all workmen will not patronize this place; all others should not."

While parading to and fro on the sidewalk in front of the plaintiff's stores, and while standing on the walk in front thereof, the pickets urged would-be customers to go elsewhere to purchase footwear, asserting that they could purchase such goods cheaper at union stores than at plaintiff's. To patrons departing from plaintiff's stores, the pickets would say:

"That's all right. Go in and bother them all you want, just so you don't buy anything."

The court found that the picketing obstructed the free and open access to the stores of plaintiff; that many of the plaintiff's customers were prevented and intimidated from trading with him during the time of the picketing, and the amount of his sales materially reduced, to his great and irreparable loss and damage; that the defendants inflicted direct and intentional injury upon plaintiff's business, and that such injury was not the incidental result of defendants' lawful efforts to benefit themselves or their friends.

The court further found that defendants would continue so to picket plaintiff's places of business unless restrained; that the defendants were insolvent, and that "plaintiff has no plain, speedy or adequate remedy at law."

The defendants not only put the plaintiff upon his proof, but also invoke in their defense the provisions of chapter 346, General Laws of Oregon 1919 (sections 6814-6819, Or. L.). The main point in the case lies in the construction to be placed upon this statute. Defendants admit that they were picketing plaintiff's stores, but assert, in effect, that all that they did, or caused to be done, was authorized by the terms of this act, and that, if any damage resulted therefrom to plaintiff, such injury was only incidental to the lawful conduct of defendants legalized by the act.

Sections 2 and 3 of this chapter are practically the same as section 1464 of the Revised

Statutes of Arizona (Civ. Code) 1913, and section 20 of the Clayton Act (October 15, 1914) 38 Stat. 738, c. 323 (Comp. Stat. § 1243d; 6 Fed. Stat. Anno. [2d Ed.] p. 141). Section 1 of chapter 346, General Laws of Oregon 1919, provides that workmen may organize themselves into, or carry on, labor unions for the purpose of lessening the hours of labor, or increasing the wages, or bettering their conditions. This is but a declaration of the law as it existed in this commonwealth prior to the enactment of the statute.

[1] Section 2 of the act prohibits the granting of an order of injunction in any case between an employer and an employee, or between persons employed and persons seeking employment involving or growing out of disputes concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law. That is another declaration of the law as it existed long prior to the enactment of the statute in question.

Great care should always be exercised by the court in issuing a writ of injunction in a controversy of this character. It is an elementary principle of equity that an injunction is never issued except to prevent irreparable injury. This court, in the case of Longshore Printing Co. v. Howell, 26 Or. 527, 554, 555, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640, approved the following statement of the law by Baldwin, J., in *Bona-parte v. Camden*, Baldw. 205, Fed. Cas. No. 1617:

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; * * * it will be refused till the court is satisfied that the case before them is of a right about to be destroyed, irreparably injured, or that great and lasting injury is about to be done by an illegal act. In such case the court owes it to its own suitors and its own principles to administer the only remedy which the law allows to prevent the commission of such act."

[2-4] That portion of section 3 of the act material to this case provides:

That "no restraining order or injunction shall prohibit any person * * * from ceasing to patronize any party to such dispute; or from recommending, advising or persuading others by peaceful or lawful means so to do."

This provision of the statute enacts no new legal principle. If the defendants have

adopted peaceful and lawful means in the persuasion of others not to patronize Greenfield, an injunction does not lie. It was the fact that the acts of the defendants were not deemed peaceful and lawful that led the court to issue its restraining order.

The language of the statute is plain. The words are to be given their ordinary meaning. It was the intention of the lawmaking body to pass a valid and constitutional act. It is our duty, whenever possible, so to construe a statute as to make it square with the state and federal Constitutions. This statute, however, could not be held valid, if intended and construed as a shield of protection for persons unlawfully engaged in the destruction of plaintiff's property rights. It is a fundamental principle of law that courts are open to all on like terms.

In *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831, the question of the constitutionality of a law prohibiting the issuance of injunctions in labor disputes was before the court. The first section of St. Mass. 1914, c. 778, is like the second section of chapter 346, General Laws of Oregon 1919. The other sections are, in substance, similar to the Oregon law. In that case the court held that the right to labor was a property right, notwithstanding the legislative act, and was under the protection of the Fourteenth Amendment to the Constitution of the United States. The court said:

"That a man cannot resort to equity respecting his property right to work in the ordinary case simply because he is a laboring man, and that he cannot have the benefit of an injunction when such remedies are open freely to owners of other kinds of property, need scarcely more than a statement to demonstrate that such man is not guarded in his property rights under the law to the same extent as others."

And, further:

"It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No obstacles can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law [citing numerous authorities]."

We have hereinbefore alluded to the fact that the Oregon statute under consideration is almost a duplicate of section 20 of the Clayton Act.

Concerning the meaning of section 20 of the Clayton Act, the court said, in the case of *Stephens v. Ohio State Telephone Co.* (D. C.) 240 Fed. 759, 770, 773, 774:

"The second paragraph of section 20 we quote in full as the important one. It has

sometimes been called 'Labor's Bill of Rights.' We may as well call it an 'Employer's Bill of Rights,' and also, when there is a labor controversy involving a public utility, as here, the 'Public's Bill of Rights.' The 'rights' guaranteed by it to the employees, 'in any case between employer and employees,' are to be set up against and limited by the certain 'rights' of the employer therein written. He has just as much right, under this section, that his employees shall not exceed the limits of their rights under it as they have to enjoy them. The rights of the employer begin where those of the employees stop. The granting of a 'right' by statute always involves an obligation upon the favored one not to exceed its limitations. The act says: 'And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'

"It is well to note, and not to lose sight of, the fact that the words 'lawfully,' 'peacefully,' 'lawful,' 'peaceful,' dominate the thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was 'unlawful' or 'provocative of a disturbed peace.' * * *

"Each case presents its own peculiar questions. An act may be lawful and peaceful, or just the opposite, according to its setting. It is easier, and far more practicable, therefore, to deal in prohibitions than in affirmations. Broad generalizations, however, are easily framed, because, if we just keep in mind the prevalence in the statute of the qualifying idea of 'peaceful' and 'lawful' action, we cannot be misled. * * *

"Again, the right of an employer to have access to and from his place of business, and his right to have the streets and public highways in front of his place of business kept clear of crowds, bystanders, and curiosity seekers, is as strong as the right to picket, and no picketing which is conducted in a manner to

attract and retain the presence of crowds can be said to be peaceful or within the law.

"It is a safe and proper generalization that any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act, of speech, of gesture, or of conduct, which 'any fair-minded man' may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable; such must be the verdict of 'any fair-minded man'; nothing can be said in justification."

The Supreme Court of the United States, in *Truax v. Corrigan*, 257 U. S. —, 42 Sup. Ct. 124, 66 L. Ed. 132 (decided December 19, 1921), in an opinion by Mr. Chief Justice Taft, held the Arizona statute to be unconstitutional as construed by the Supreme Court of Arizona in that case. The opinion lays down the well-established principle, applicable here, that the plaintiff's business is a property right; it sets forth the settled law that free access for employees, owners, and customers to the place of business is incident to such right. The Chief Justice wrote that—

"Intentional injury caused to either right or both by a conspiracy, is a tort. Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful."

Actual loss in that case was proved by the evidence. A question in the cause related to the legality or illegality of the means used. Alleged libelous attacks, abusive epithets, insistent and loud appeals by picketers, threats of injury to future customers, "all linked together in a campaign were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiff's place of business." The complaint alleged:

"The defendants conspired to injure and destroy plaintiffs' business by inducing his theretofore willing patrons and his would-be patrons not to patronize him, and they influenced them to withdraw or withhold their patronage:

"(1) By having the agents of the union walk forward and back constantly during all the business hours in front of plaintiffs' restaurant, and within five feet thereof, displaying a banner announcing in large letters that the restaurant was unfair to cooks and waiters and their union.

"(2) By having agents attend at or near the entrance of the restaurant during all business hours and continuously announce in a loud voice, audible for a great distance, that the restaurant was unfair to the labor union.

"(3) By characterizing the employees of the plaintiffs as scab Mexican labor, and using opprobrious epithets concerning them in hand-

bills continuously distributed in front of the restaurant to would-be customers.

"(4) By applying in such handbills abusive epithets to Truax, the senior member of plaintiffs' firm, and making libelous charges against him, to the effect that he was tyrannical with his help, and chased them down the street with a butcher knife; that he broke his contract and repudiated his pledged word; that he had made attempts to force cooks and waiters to return to work by attacks on men and women; that a friend of Truax assaulted a woman and pleaded guilty; that plaintiff was known by his friends, and that Truax's treatment of his employees was explained by his friend's assault; that he was a 'bad actor.'

"(5) By seeking to disparage plaintiffs' restaurant, charging that the prices were higher and the food worse than in any other restaurant, and that assaults and slugging were a regular part of the bill of fare, with police indifferent.

"(6) By attacking the character of those who did patronize, saying that their mental caliber and moral fibre fell far below the American average, and inquiring of the would-be patrons—Can you patronize such a place and look the world in the face?

"(7) By threats of similar injury to the would-be patrons—by such expressions as 'All ye who enter here leave all hope behind;' 'Don't be a traitor to humanity;' by offering a reward for any of the ex-members of the union caught eating in the restaurant; by saying in the handbills: 'We are also aware that handbills and banners in front of a business house on the main street give the town a bad name, but they are permanent institutions until William Truax agrees to the eight-hour day.'

"(8) By warning any person wishing to purchase the business from the Truax firm that a donation would be necessary, amount to be fixed by the District Trades Assembly, before the picketing and boycotting would be given up."

The Court said:

"The result of this campaign was to reduce the business of the plaintiffs from more than \$55,000 a year to one of \$12,000.

"Plaintiffs' business is a property right (*Duplex Printing Press Co. v. Deering*, U. S. Adv. Ops. 1920-21, p. 176, 254 U. S. 443, 465)

* * * and free access for employees, owner, and customers to his place of business, is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful. *Pettibone v. United States*, 148 U. S. 197, 203; * * * *Duplex Printing Press Co. v. Deering*, supra. Intention to inflict the loss and the actual loss caused are clear. The real question is: Were the means used illegal? The above recital of what the defendants did can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them, were palpable wrongs. They were uttered in aid of the plan to induce plaintiffs' customers and would-be customers to refrain from patronizing the plaintiffs. The patrolling of defendants immediately in front of the restaurant on the main

street and within five feet of plaintiffs' premises continuously during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs, and customers, and the threats of injurious consequences to future customers, all linked together in a campaign were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. * * * Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy [citing numerous authorities].

"A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment. * * *

"It is argued that, while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence. * * *

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * *

"Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be. To hold it not to be would be, to use the expression of Mr. Justice Brewer in *Gulf C. & S. F. R. Co. v. Ellis*, 185 U. S. 150, 154, 41 L. Ed. 666, 667, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause 'a rope of sand.' * * *

"Our conclusion, that plaintiffs are denied the equal protection of the laws, is sustained by the decisions in this court [citing many authorities].

"It is urged that, in holding paragraph 1464

invalid, we are in effect holding invalid section 20 of the Clayton Act. * * * Of course, we are not doing so. * * *

"We held that these clauses were merely declaratory of what had always been the law and the best practice in equity, and we thus applied them. The construction put upon the same words by the Arizona Supreme Court makes these clauses of paragraph 1464 as far from those of section 20 of the Clayton Act in meaning as if they were in wholly different language."

On December 5, 1921, the Supreme Court of the United States decided the case of *American Steel Foundries v. Tri-City Central Trades Council*, 237 U. S. —, 42 Sup. Ct. 72, 66 L. Ed. —. The opinion of the court, delivered by Mr. Chief Justice Taft, contains a construction of section 20 of the Clayton Act, together with a full discussion on the subject of picketing. The plaintiff was a New Jersey corporation, engaged in the manufacture of steel products in the state of Illinois. When in full operation, in November, 1918, it had in its employ 1,600 men. It resumed operations in April following, with about 350 regular men. A trade dispute arose as to the amount of wages. The Trades Council appointed a committee to secure a reinstatement of the previous wages. The committee was informed that the plant was run as an open shop, and they refused to deal with the committee, but were ready to entertain complaints made by employees. On April 22d a strike was declared. A picket was established about the plant. Picketing was carried on for about four weeks without cessation by three or four groups of picketers, each group consisting of 4 to 12 persons. The plaintiff company applied for relief, and an injunction was issued by the District Court for the Southern District of Illinois in May, 1914, restraining the Trades Council and certain individual defendants from "the use of persuasion, threats, or personal injury, intimidation, suggestion of danger, or threats of violence of any kind," thus preventing them from hindering or obstructing employees of the plaintiff in connection with its business. Picketing at or near the premises of the plaintiff was likewise forbidden. The defendants appealed to the Circuit Court of Appeals, where the injunction was modified by striking out the word "persuasion" and inserting after the words "restraining picketing" the words "in a threatening or intimidating manner." See *Tri-City Central Trades Council v. American Steel Foundries* (C. C. A.) 238 Fed. 728. Mr. Chief Justice Taft, in rendering the opinion of the court, after quoting section 20 of the Clayton Act, among other things said:

"It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of section 20, includes injury to the business of an employer,

and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment, between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and persons who are neither employees nor seeking employment. * * *

"The prohibitions of section 20, material here, are those which forbid an injunction against, first, recommending, advising or persuading others by peaceful means to cease employment and labor; second, attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working; third, peaceably assembling in a lawful manner and for lawful purposes. This court has already called attention in the Duplex Case to the emphasis upon the words 'peaceable' and 'lawful' in this section. 245 U. S. 443, 473. It is clear that Congress wished to forbid the use by the federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Congress thought it wise to stabilize this rule of action and render it uniform.

"The object and problem of Congress in section 20, and indeed, of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. If in their attempts at persuasion or communication with those whom they would enlist with them, those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court's duty, which the terms of section 20 do not modify, so to limit what the propagandists do as to time, manner and place as shall prevent infractions of the law and violations of the right of the employees, and of the employer for whom they wish to work. * * *

"How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is

likely soon to savor of intimidation. From all of this, the person sought to be influenced has a right to be free, and his employer has a right to have him free.

"The nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer. Attempted discussion and argument of this kind in such a proximity is certain to attract attention and congregation of the curious, or, it may be, interested bystanders, and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes. * * * All information tendered, all arguments advanced, and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. * * *

[5] We have quoted largely from the foregoing decisions because they are illuminating and authoritative. The case of *Truax v. Corrigan*, supra, is the most important case involving trade disputes that has been determined in years. Under that opinion construing the Fourteenth Amendment, no state can pass a law legalizing such picketing as took place in the *Truax* Case. The opinion by Mr. Chief Justice Taft in the case of *American Steel Foundries v. Tri-City Central Trades Council*, supra, contains a more thorough discussion of the subject of picketing than was made by that court prior to its rendition. The others cases quoted from are valuable precedents in determining the validity of our statute.

In view of the teaching of the authorities, we could not hold chapter 846, Laws 1919, valid if construed to be a justification of the manner and method of picketing in the case at issue. The patrolling was not done for the purpose of obtaining information, nor yet in order peacefully to persuade the employees to quit work. It is a case of boycotting. Had no strike existed, would it have been lawful for the pickets employed in this case to take their stand at the entrances to plaintiff's places of business, or to patrol the sidewalks in front thereof, so as to cause the entrances to such stores to be obstructed to some extent, and during all the business hours of the day, week after week, to call out in loud tones, denouncing plaintiff to his customers and others, advising them not to purchase anything from him, but to go elsewhere if they would buy, thus causing annoyance and substantial loss in business? We think not. If such conduct is not lawful in the absence of a strike, it is not legalized by a strike. A man has a right to pursue his vocation in a peaceful manner.

[8] From the authorities we deduce the doctrine that it is as much the duty of a court of equity to protect a man's right to follow

his lawful business without illegal interference as to grant injunctive relief to prevent the destruction of his physical property. The first duty of the state is so to administer its laws as to enforce order. Intimidation and good order cannot coexist in front of the entrances to plaintiff's stores.

This case is affirmed.

McCOURT, J., took no part in the consideration of this case.

(105 Or. 531)

In re RIGGS et al.

(Supreme Court of Oregon. June 6, 1922.)

1. Appeal and error \S 396, 619—Service and filing of notice of appeal and filing of transcript are necessary jurisdictional steps.

The service and filing of a notice of appeal and filing of a transcript of appeal are necessary successive jurisdictional steps, without which an appellate court cannot hear and determine an appeal.

2. Time \S 10(9)—Transcript held filed within 30 days from perfecting of appeal.

Under Or. L. \S 531, providing that the time within which an act should be done shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, etc., where an undertaking on appeal was duly served and filed April 7th, which in the absence of objections to the sureties thereon, under section 550, became perfected five days thereafter or on April 13th, a transcript of appeal filed on May 15th was filed within the 30 days allowed by section 554; the appellant being entitled to an extra day, since May 14th fell on Sunday.

In banc.

In the matter of the application of J. Alvin Riggs and others, the Board of Directors of Central Oregon Irrigation District, for a judicial examination and judgment as to the regularity and legality of proceedings in connection with organizing the district, the proceedings and acts of the Board of Directors of the district subsequent to its organization, and the acts authorizing the issue and sale of certain bonds. On motion to dismiss an appeal from the decision of the circuit court. Motion denied.

Harrison Allen and John R. Latourette, both of Portland, and H. H. DeArmond, of Bend, for the motion.

Paul C. King and R. S. Hamilton, both of Bend, opposed.

BROWN, J. This is a motion to dismiss an appeal in the matter of the application of J. Alvin Riggs, C. H. Hardy, and J. G. McGuffie, the board of directors of Central Oregon Irrigation District, a municipal corpora-

tion, for the validation of certain proceedings and acts of the directors and district. The motion is grounded upon the alleged failure of the appellant to file his transcript within the time required by statute.

[1] It is elementary that the service and filing of the notice of appeal, and the filing of the transcript on appeal, are necessary successive jurisdictional steps. Unless taken, this court cannot proceed to hear and determine the suit.

[2] From the record, it appears that on March 29, 1922, notice of appeal was served upon respondents and filed in the circuit court of Deschutes county, Or. On April 7, 1922, the undertaking on appeal was duly served and filed, and the transcript on appeal on May 15th. No exception was taken to the sufficiency of the sureties on the appeal bond, hence the appeal became perfected five days thereafter. Section 550, Or. L.

Our statute provides that—

"The time within which an act is to be done, as provided in this Code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded." Section 531, Or. L.

On grounds of stare decisis, we follow the construction of the foregoing section of the Code in so far as it applies to appeals, given in a per curiam opinion where it was said:

"The method of computing time within which a notice of appeal should be served and filed may be said to have been in a state of uncertainty until the case of U. S. Nat. Bank v. Shefler, 77 Or. 579, 143 Pac. 51, 152 Pac. 234, in which case it was held by this court, though not without dissent, that the day following the entry of a judgment was to be excluded in the computation of time. This rule, having been generally accepted by the profession, will be adhered to, although there are authorities holding a contrary doctrine." In re Anderson's Estate, De Golia v. Andersen, decided March 9, 1920 (Or.) 188 Pac. 164.

To like effect is Vincent v. First Nat. Bank, 76 Or. 579, 143 Pac. 1100, 149 Pac. 938.

Excluding the 7th day of April, 1922, the date of service and filing of the undertaking, and the first day of the period of five days following, the time in which the adverse parties had a right to except to the sufficiency of the sureties expired on April 13th. Hence the appeal in this cause became complete at the end of that day.

Within 30 days after an appeal has been perfected, the appellant must file with the clerk of the appellate court his transcript, and, if not so filed, the appeal shall be deemed abandoned, unless "the trial court or the judge thereof, or the Supreme Court or a justice thereof," extend the time for filing such transcript. Section 554, Or. L.

April 14th was the first day on which the appellants could lawfully have filed their transcript on appeal. Under the rule laid down by our statute for computing the time in which an act may be done, as construed by the decisions cited, we must exclude April 14th. By computation we find that the period of 30 days expired on Sunday, May 14th, and for that reason the appellants were entitled to an additional day in which to file their transcript.

How time shall be computed is a matter which has been litigated since the existence of the common law. In the computation of the period of time, the contest has generally been: Which day shall be included and which excluded? It would be difficult, however, to extract any uniform rule from the diverse holdings of the courts on this question. *Hahn v. Dierkes*, 37 Mo. 574. It is not really important which rule is adopted, but it is of great interest to the profession in the practice of the law that uncertainty on this subject should be avoided. *Blake v. Crowninshield*, 9 N. H. 304-307. We are familiar with all the holdings of our court upon this subject. But in the case at bar the appellant had a right to rely upon the latest expression of this court relating to the computation of time in the matter of appeals.

It has been written that:

"Parties should not be encouraged to seek re-examination of determined principles and to speculate on a fluctuation of the law with every change in the expounders of it. As to many matters of frequent occurrence, the establishment of some certain guide is of more significance than the precise form of the rule, and substantial justice may often be better promoted by adhering to an erroneous decision than by overthrowing a rule once established." 7 R. C. L. 1000, 1001.

The motion is denied.

(105 Or. 642)

DEGIDIO v. STATE INDUSTRIAL ACC. COMMISSION.

(Supreme Court of Oregon. May 31, 1922.)

1. Master and servant §416—Commission's final decision on application for compensation conclusive in absence of appeal.

All questions arising out of the facts, circumstances, and conditions surrounding an injury for which a claim for compensation is made under Workmen's Compensation Law (Or. L. §§ 6616, 6626) existing and known at the time of the decision on the original application provided for by section 6632 are concluded by the final decision of the Industrial Accident Commission on the application unless an appeal is taken to the circuit court under section 6637, as amended by Laws 1921, p. 564, and a different result obtained.

2. Master and servant §418—Final decision on application for increase of compensation prerequisite to appeal.

To authorize a rearrangement of compensation provided for by the Workmen's Compensation Law (Or. L. § 6616, and section 6626, subd. [f]) in the form of an increase thereof, the workman must comply with section 6632, subd. (c), by filing an application showing a change of circumstances warranting such increase, and that the aggravation of disability for which the increase is claimed has taken place or been discovered after the rate of compensation was originally established; and a final decision upon such an application by the Industrial Accident Commission in the exercise of the powers given by section 6611 is a prerequisite to the right to appeal to the circuit court under section 6637, as amended by Laws 1921, p. 564.

3. Master and servant §419—Letters held not an "application" for increase of compensation or a "decision" authorizing appeal.

Letters addressed by an injured workman to the State Industrial Accident Commission asking an increase or rearrangement of compensation and a report of the medical examiner of the Commission and letters of the Commission in reply held not to constitute an application under Workmen's Compensation Law (Or. L. 6632, subd. [c]), for increase or rearrangement of compensation, nor a final decision from which an appeal under section 6637 was authorized.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Application; Decision.]

In Banc.

Appeal from Circuit Court, Multnomah County; H. H. Belt, Judge.

Application by Antonio Degidio for compensation under the Workmen's Compensation Law, opposed by the American Export Lumber Company, employer. The State Industrial Accident Commission made a final award, and subsequently the plaintiff applied to the Commission for an additional award, and requested and was given a medical examination, and subsequently served notice of appeal. Findings and judgment in the circuit court referring the claim to the Commission and directing it to fix compensation in accordance with the findings, and the Commission appeals. Judgment of circuit court reversed, and cause remanded, with direction to grant the Commission's motion to dismiss the appeal.

James West, Asst. Atty. Gen. (I. H. Van Winkle, Atty. Gen., on the brief), for appellant.

Walter T. McGuirk, of Portland (McGuirk & Schneider, of Portland, on the brief), for respondent.

McCOURT, J. This appeal is prosecuted by the State Industrial Accident Commission

from a judgment of the circuit court for Multnomah county in favor of plaintiff.

On January 23, 1920, plaintiff filed with the Commission a claim for compensation for an injury to his arm and shoulder sustained by him on January 1, 1920, while he was employed by the American Export Lumber Company at Rainier, Or. Plaintiff at the time was subject to the Oregon Workmen's Compensation Law (Laws 1913, p. 188), and the injury sustained by him resulted from an accident arising out of and in the course of his employment.

Final action was taken by the Commission on plaintiff's application for compensation on September 22, 1920, of which plaintiff was forthwith notified. In its decision the Commission found that plaintiff was disabled for five months, and that he was permanently partially disabled to the extent of the loss of 5 per cent. function of his right arm. Based upon the injury thus found, the Commission awarded plaintiff the sum of \$590.85, in accordance with the provisions of the Workmen's Compensation Law, in full settlement of any and all claims arising out of his injury. The sum so awarded was paid to plaintiff and accepted by him. The last payment was made on October 25, 1920.

Plaintiff did not appeal from the decision or the findings of the Commission above mentioned. Plaintiff on November 21, 1920, and again on February 21, 1921, wrote to the Commission, complaining that his arm still hurt him, that he was unable to work sometimes when it was very bad, finding it hard to keep his job, and requested the Commission to advise him whether he was entitled to more compensation. The Commission in each instance promptly replied to plaintiff's letter, advising him that the award of compensation in his favor made on September 22, 1920, was final and in full settlement of his claim, and that he was not entitled to further compensation.

On August 12, 1921, plaintiff presented himself at the Portland office of the Commission, and requested a medical examination. A medical examiner for the Commission thereupon examined the plaintiff, and found his arm freely movable in all directions, and discovered no objective disability, and advised plaintiff that there was no reason for changing the award previously made.

On August 15, 1921, the plaintiff directed the following letter to the Commission:

"I am writing you in reference to an accident which I received compensation for and thought that I was all right. But same injuries are present bothering me to the extent that I am unable to work and my doctor states that an operation may be necessary right away, so I am writing to you through his reference in hopes that I may be entitled to further compensation. My doctor is Dr. Akin, Corbett

Bldg., Portland, Oregon. And case in question is 82435.

"Hoping that I or Dr. Akin might receive a reply from your office, I remain. * * *

On behalf of the Commission, one of its claim agents, on August 19, 1921, replied to the above letter as follows:

"Replying to your letter of August 15, wish to say that you were advised when you were in our Portland office August 12 that the Commission would not be responsible for your doctor bills. You have already received the entire amount of compensation to which you are entitled under the provisions of the law, and accordingly there is no further action for the Commission to take in your case. Yours truly, State Industrial Accident Commission, Claim Agent."

On August 21, 1921, plaintiff addressed another letter to the Commission, as follows:

"Recd. your letter of the 20th inst., and will reply will say I was to Dr. Akin and he took an X-ray of my shoulder and discovered that it is bad shape. He has an idea that there is a piece of bone that causes the shoulder to pain me, and to get it in shape again Dr. Akin says that I must undergo an operation to get it shape again. And when I do have to have this done and in the hospital who is to care for my family, as this trouble I am having with my shoulder and unable to work is caused from this fall. So I am writing to ask you to do the right thing, and if you do not then I will have to take other measures. Hoping to get a satisfactory answer from you, I remain. * * *

To the last above letter the Commission, through a claim agent, replied on August 23, 1921, as follows:

"This acknowledges receipt of your letter of August 21, and in reply we desire to refer you to ours of August 19. You were informed at that time that the Commission would take no further action on your case. The findings and final action of this Commission dated September 22, 1920, covers the final award in your claim. Yours truly, State Ind. Accident Commission, Claim Agent."

On August 26, 1921, plaintiff filed a notice of appeal in the circuit court, in which he gave notice that he appealed "from the final decision of the State Industrial Accident Commission of Oregon, dated August 12, August 19, and August 23, 1921." The action of the Commission at which plaintiff's notice of appeal was directed was the report of the medical examiner to the Commission of the physical examination of plaintiff had August 12, and the letters of August 19 and August 23, 1921, directed to plaintiff, which are above set out.

The Commission interposed a motion to dismiss plaintiff's said appeal, alleging as a reason for granting its motion to dismiss:

"* * * that the defendant has not since September 22, 1920, made any decision relative

to the claim of Antonio Degidio for compensation under chapter 1 of title 37 of Oregon Laws, and that the time in which plaintiff is entitled to appeal has long since expired."

The circuit court on September 13, 1921, denied and overruled the motion of the Commission to dismiss the appeal, and proceeded to try the matter to a jury. The jury by its verdict found that there was an aggravation of plaintiff's injury subsequent to the award made by the Commission of a loss of 25 per cent. function of his right arm. Upon this verdict the court made findings and rendered a judgment, referring the claim back to the Commission, with an order directing it to fix the compensation in accordance with the findings made by the court.

The first question presented by this appeal arises upon an assignment of error predicated upon the action of the circuit court in overruling defendant's motion to dismiss plaintiff's appeal to that court.

The Workmen's Compensation Law designates those workmen engaged in hazardous occupations who may be entitled to compensation under its provisions (section 6616, Or. L.), describes the personal injuries for which compensation shall be awarded, and fixes the amount that shall be paid an injured workman for each of numerous personal injuries that may result to a workman when any of such injuries result in disability to an extent defined by the statute, and also fixes the length of time that the payments to the injured workman for such disability may continue (section 6626, Or. L.).

The State Industrial Accident Commission is charged with the administration of the provisions of the Workmen's Compensation Law (section 6611, Or. L.), and is given full power and authority to hear and determine all questions within its jurisdiction (section 6637, Or. L., as amended by Act Feb. 26, 1921 [Laws 1921, c. 311]).

The power and jurisdiction thus vested in the Commission is continuing, and by virtue thereof the Commission may from time to time modify or change former findings or orders where the circumstances of the case justify such modification or change. Section 6632, subd.(e), Or. L.

In order to obtain the compensation provided by the statute, the workman or his beneficiary must file with the Commission an application for such compensation on blanks furnished by the Commission. Section 6632, subd.(a), Or. L. In such application the claimant must furnish and state such pertinent facts relating to the injury and the employment of the workman as are called for by the blanks, to the end that the Commission may intelligently pass upon the claim, and determine with reasonable certainty the presence or absence, as the case may be, of facts and circumstances author-

izing compensation under the statute. The above-mentioned requirement of filing a formal claim upon blanks furnished by the Commission governs applications for increase or rearrangement of compensation due to aggravation of an injury, upon which the rate of compensation shall have been established by a prior final decision of the commission. Section 6632, subd.(c), Or. L.

[1] All questions arising out of the facts, circumstances, and conditions surrounding an injury for which claim for compensation is made, existing and known at the time of the decision upon the original application, are concluded by the final decision upon that application, unless an appeal is taken to the circuit court, and a different result obtained upon such appeal. Section 6637, Or. L., as amended by Act Feb. 26, 1921 (Laws 1921, c. 311); *Iwanicki v. State Ind. Acc. Com.* (Or.) 205 Pac. 990; *Enneberg v. State Ind. Acc. Com.*, 88 Or. 436, 167 Pac. 310, 171 Pac. 765; *Grant v. State Ind. Acc. Com.* (Or.) 201 Pac. 438.

[2] To authorize a rearrangement of compensation, in the form of an increase of such compensation, the application therefor must show a change of circumstances that warrants such increase or rearrangement (section 6632, subd. [c], Or. L.), and that the aggravation of disability for which the increase of compensation is claimed has taken place or has been discovered after the rate of compensation was originally established (section 6626, subd.[1], Or. L.) A final decision upon such an application is a prerequisite to the right to appeal to the circuit court.

[3] The letters of August 15th and August 21st addressed by plaintiff to the Commission did not constitute an application for an increase or rearrangement of compensation in compliance with the statute. They amounted to no more than notice that plaintiff contemplated making such an application. Taken singly or together, the report of the medical examiner for the Commission, made August 12, 1921, and the letters of the Commission written in reply to plaintiff's letters, and dated respectively August 19th and August 23d, did not constitute a decision from which an appeal is authorized. *Enneberg v. State Ind. Acc. Com.*, 88 Or. 436, 167 Pac. 310, 171 Pac. 765; *Iwanicki v. State Ind. Acc. Com.* (Or.) 205 Pac. 990. The letters to plaintiff merely referred to the final decision of the Commission upon plaintiff's claim, dated September 22, 1920, and expressed the view of the writer (not the Commission) that the action of the Commission then taken closed the case.

The record of the appeal to the circuit court in the recent case of *Iwanicki v. State Ind. Acc. Com.* (Or.) 205 Pac. 990, did not differ in any material particular from the record upon appeal to the circuit court in

this case. There it was held that the letters written by the Commission to the claimant did not constitute a decision from which an appeal would lie. Mr. Chief Justice Burnett, speaking for the court in the Iwanicki Case said:

"In order, therefore, for the claimant to obtain an increase or rearrangement of compensation, he must make an application and show some change of circumstance which would warrant the desired increase.

"It is not contemplated by the statute that a new trial shall be granted and the case reopened before the Commission on the old application. * * *

"The letter of July 11, being merely narrative of past occurrences happening before the Commission, was not a decision within the meaning of the Enneberg Case."

The circuit court was in error in not dismissing the appeal. In view of the conclusion expressed concerning plaintiff's appeal, it is unnecessary to examine the other questions arising upon the record.

The judgment of the circuit court is reversed, and the case remanded to the circuit court, with directions to grant defendant's motion to dismiss the appeal.

BURNETT, C. J., took no part in the consideration of this case.

(106 Or. 12)

STRONG et al. v. MOORE et al.*

(Supreme Court of Oregon. June 6, 1922.)

1. Vendor and purchaser ⇨18(1)—Option agreement held to constitute contract between vendor and purchaser.

Though an option given plaintiffs by defendants did not mention the disposal of insurance money in case of a fire before a deed was executed, in view of the fact that it was examined and approved by attorney for plaintiffs and acknowledged before a notary by one of the defendants, it constituted a complete statement of the agreement of defendants.

2. Vendor and purchaser ⇨18(½)—"Option" imposes no obligation to buy.

An "option" is a contract by which an owner agrees that another shall have the privilege of buying property at a fixed price and within the time expressly or impliedly prescribed by the writing, and is a continuing offer, and though it gives the optionee the right to buy if he chooses, it does not impose an obligation to buy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Option.]

3. Vendor and purchaser ⇨18(½)—Optionee has no interest in land until he accepts option.

An optionee has nothing except the right to elect to buy and has no interest in land un-

til by his acceptance of the option he transforms the option into a contract of sale and changes his character to that of a vendee, and then his interest dates from the acceptance of the option.

4. Vendor and purchaser ⇨18(4)—Option given without consideration may be withdrawn before acceptance, but not if given for consideration.

An option given without consideration may be withdrawn before acceptance, but if given for consideration it cannot be withdrawn before the expiration of the prescribed time, without the consent of the optionees.

5. Vendor and purchaser ⇨18(3)—Acceptance of option creates contract of sale.

The acceptance of an option by an optionee creates a contract of sale, and his interest in the land dates from his acceptance of the option.

6. Vendor and purchaser ⇨18(3)—To be capable of specific performance, acceptance of option must conform to terms of offer.

In order to effect a contract of sale capable of specific performance, the acceptance of an option must conform with the terms of the offer, and ordinarily must be unequivocal, absolute, and unconditional.

7. Contracts ⇨309(2)—Destruction of large part of subject-matter terminates contract.

Where from the nature of a contract the parties must have contemplated the continued existence of its subject-matter, in the absence of agreement that the subject-matter shall exist, the contract is subject to an implied condition that, if the subject-matter or a large or important part of it has ceased to exist at the time of performance, each party is discharged from the contract.

8. Vendor and purchaser ⇨57—Optionee held not entitled to insurance money on loss of buildings by fire.

Where during the continuance of an option to purchase land a building insured for \$34,000 was destroyed by fire, the optionees were not entitled to accept contract and to require the optionors to account for the insurance money.

In Banc.

Appeal from Circuit Court, Multnomah County; John McCourt, Judge.

Suit by Margaret H. Strong and another against B. H. Moore and another. From decree that plaintiffs should pay the clerk of court certain amount of money, and that defendants should convey certain property to plaintiffs, plaintiffs appeal, and defendants file a cross-appeal. Suit dismissed.

This is a suit brought by Margaret H. Strong and Kate R. Henderson against Ben H. Moore and Mabel E. Moore to enforce an alleged contract for the sale of land claimed to have been created by the asserted acceptance of an option. In some respects the evidence is contradictory. It will not be neces-

sary to give a detailed account of the testimony of the various witnesses, because after a careful examination of the record of the evidence we are satisfied with the findings of fact made by the trial judge who had the advantage of seeing and hearing the witnesses; and so it is sufficient to say, without further discussion, that we approve the findings of fact made by the trial court.

George W. Brown, Fannie B. Brown, and Melville W. Brown owned the west 55 feet of lot 5 and the west 55 feet of the south 8 feet of lot 6 in block 251 in the city of Portland, on which was standing an apartment house known as Elton court. Emma G. Robinson was authorized by plaintiffs to act "for them in connection with realty transactions." While acting as such agent, Emma G. Robinson on June 8, 1920, took in her own name, but for the benefit of the plaintiffs, an option from the Browns. Emma G. Robinson paid the Browns \$1,000 for the option. The premises were described in the option thus:

"The following described real property to wit: The west 55 feet of lot 5 and the west 55 feet of the south 8 feet of lot 6, in block 251 in the city of Portland, Multnomah county, Oregon."

The purchase price was fixed at \$36,000. "to be paid as follows: \$1,000.00 cash this day paid as above set out, \$10,000.00 cash on delivery of deed, \$25,000.00 in the form of a promissory note, to be secured by first mortgage upon the above-described property, said note and mortgage to be executed and delivered at the time of delivery of deed, and to be dated at that time and to be payable on or before five years after date and to bear interest at the rate of 6 per cent. per annum, payable quarter yearly."

The owners agreed to furnish an abstract showing the title free from incumbrance except the second half of taxes for the year 1919. It was provided that—

If the title "proves valid and marketable, and the purchaser fails to consummate the purchase within thirty days from date of the approval of title, the \$1,000.00 deposit paid as above set out shall become forfeited and be retained by the said owners."

An abstract was furnished on June 14, 1920, showing the required title. After receiving the abstract, Emma G. Robinson—

"took up with defendants herein named the matter of securing a loan upon said property sufficient to complete said purchase." "Said defendants did not procure the loan for the plaintiffs in time to complete the taking up of said option, and defendants were unwilling to make said loan, and upon the 14th day of July, 1920, plaintiffs, acting through said Emma G. Robinson, their agent, agreed to sell, assign and transfer to defendants all rights conferred upon plaintiffs by said option, in consideration of the agreement made by the defendants to complete said option by complying with all of the terms thereof, (2) the repayment to plain-

tiffs the sum of one thousand dollars, paid to secure said option, and (3) the execution and delivery to plaintiffs of a written option to purchase said real property from defendants on or before January 15, 1921, at a price of \$38,500, payable \$13,500 cash at the time plaintiffs should elect to purchase the property under the option, and the balance to be paid by assuming a mortgage upon the property for \$25,000, due five years after date, bearing interest at six per cent. payable semiannually, which mortgage was to be given by defendants upon completing said option as aforesaid."

The option held by Emma G. Robinson was transferred to the defendants. The Browns agreed to extend this option one day. On July 15, 1920, the Moores exercised the right conferred by the option and paid \$10,000 to the Browns, gave their note to the Browns for \$25,000, together with a mortgage on the real property to secure the note, received a deed from the Browns, and "contemporaneously with said transaction the defendants paid to said Emma G. Robinson the sum of \$1,000, the amount which she had paid to" the Browns.

"As a part of the entire transaction, defendants on July 15, 1920, after the defendants had acquired title to said real property" executed and delivered to the plaintiffs an option by the terms of which the plaintiffs were given the "exclusive right to purchase or sell the following described real property, to wit: The west 55 feet of lot 5 and the west 55 feet of the south 8 feet of lot 6 in block 251, in the city of Portland, Multnomah county, state of Oregon, for a period of six months from this date, and for the following amounts of money, to wit: \$13,500.00 cash and assuming and agreeing to pay a note and mortgage this date executed for the sum of \$25,000.00, bearing interest at the rate of 6 per cent. per annum."

The Moores agreed to furnish an abstract showing title free from incumbrances except the mortgage for \$25,000, and they also agreed:

"Upon the payment of the sum of \$13,500 as hereinbefore provided, that we will execute a full warranty deed to the above-described real property in favor of" the plaintiffs.

The Browns were carrying insurance on the building amounting to \$34,000 when on June 8, 1920, they gave the option to Emma G. Robinson, and they continued to carry this insurance until they conveyed to the Moores. The mortgage given by the Moores required "that the property should be insured against loss by fire to the amount of at least \$25,000.00, and that the indemnity provided by the insurance policies should be made payable to the mortgagee as his interest might appear," and on July 15, 1920, when the Moores purchased the property they paid to the Browns \$230.89, the amount of the unearned premiums on the insurance policies, and the policies were thereupon assigned to

the Moores with the loss made payable to the mortgagees as their interest might appear.

On August 7, 1920, "a fire totally destroyed the roof and interior of said building and partially destroyed the walls thereof," and afterwards the insurers "paid to the defendants and said mortgagees as provided by the terms of the several insurance policies and said mortgage the sum of \$34,000.00 and thereby discharged said mortgage of \$25,000.00 upon said premises given by defendants as aforesaid on or about July 15, 1920."

On December 18, 1920, the plaintiffs served upon defendants a writing notifying the defendants that the plaintiffs elected to exercise the right given by the option of July 15, 1920, and stating:

"We, the undersigned, hereby tender to you \$13,500.00 in cash, we to receive from you the following": An abstract, a warranty deed, containing covenants of warranty "except as to the first mortgage of \$25,000," and "said B. H. Moore and Mabel E. Moore to furnish and transfer all their right, title and interest in and to insurance policies covering the improvements on the above-described real estate upon which there has been an adjudicated loss found payable of \$34,000.00, we to take said insurance free and clear from all claims against the same except as to the rights of said first mortgage hereinabove set forth. * * *

"The buildings upon said property having been materially damaged by fire during the life of said option we hereby demand that the sums of money due or to become due under said policies of insurance and the rights thereunder be assigned to us in lieu of the damaged building, demanding this as our rights under said option and making this as a formal tender in writing of complete performance of all the duties and obligations devolving upon the undersigned under the terms of said option."

On December 24, 1920, the plaintiffs notified the defendants that—

On December 27, they would meet the defendants at the place "where B. H. Moore makes his headquarters," to complete "the taking up of said option;" and, accordingly on December 27, "the plaintiffs, by and through their attorney, tendered to said defendants \$13,500, provided the defendants here would convey said real property to plaintiffs subject to said mortgage of \$25,000, and pay to the said plaintiffs the sum of \$34,000 received from insurance upon the building upon said property, and that the defendants refused said offer, and said defendants tendered in lieu thereof a deed to the plaintiffs and a mortgage to be executed by said plaintiffs, payable to said defendants in the sum of \$25,000."

In their complaint the plaintiffs allege that—

They "offer to pay to said defendants or to the order of this court, the sum of \$13,500, legal tender according to the laws of the state of Oregon, upon the execution and delivery by the defendants of a deed, * * * together with an accounting for the insurance policies

covering said property, or a right to said policies held by said defendants, and full payment to plaintiffs of the moneys received by defendants in said insurance policies."

The decree of the circuit court directed the plaintiffs to pay to the clerk of the court the sum of \$13,500 within 10 days, and that the defendants should convey the property to the plaintiffs by a warranty deed free from incumbrances.

The plaintiffs appealed, and the defendants filed a cross-appeal.

Appellants, pro se.

Joseph, Haney & Littlefield, of Portland, for respondents.

HARRIS, J. (after stating the facts as above). [1] Reduced to brief terms, the situation presented by the record is one where Emma G. Robinson by the payment of \$1,000 acquired from the Browns an option whereby she could purchase the real property owned by the Browns by paying within a prescribed time the additional sum of \$10,000 and giving a note for \$25,000 secured by a mortgage on the premises; and, being unable to borrow the funds with which to make the necessary additional payment, she transferred her option to the Moores in consideration of the payment to her of \$1,000, the exercise by the Moores of the right to purchase the property from the Browns, and the giving of an option by the Moores to the plaintiffs entitling the latter within six months to purchase the property by paying \$13,500 and assuming the payment of the mortgage of \$25,000. Neither the option of June 8th nor the one of July 15th speaks of insurance. Both options are silent upon that subject. It is true that there was testimony in behalf of plaintiffs, contradicted, however, by the defendants, indirectly if not directly charging that the Moores agreed to carry insurance for the benefit of the plaintiffs, and that the alleged agreement concerning insurance should have been expressed in the option of July 15th; but it is also true that the uncontradicted evidence is that the option of July 15th was submitted to Wilson T. Hume, the attorney for the plaintiffs, for examination, and was approved by him; and, furthermore, this option was acknowledged by Ben H. Moore before Wilson T. Hume as notary public. Furthermore, the complaint does not ask for a reformation of the option. The writing of July 15th must therefore be accepted as a complete statement of the agreement of the Moores. The building was insured for \$34,000. The cost of the insurance was paid by the Moores. The land, after the destruction of the building, was valued at \$20,000. The policies required the payment of the insurance to the mortgagees as their interest might appear, and the remainder, if any, to the Moores. The building was totally destroyed by fire on August 7, 1920. The in-

surers paid \$34,000, the full amount of the insurance; the Browns receiving the amount of their mortgage and the Moores receiving the balance of the insurance money. The plaintiffs did not accept or attempt to accept the option of July 15th until after the fire. The tender of \$13,500 made by the plaintiffs was on each occasion upon the condition that the defendants account for the moneys paid by the insurance companies.

The defendants contend that the tenders made in December, although made within the time allowed by the option, were conditional and not in conformity with the offer contained in the option, and that therefore the plaintiffs are not entitled to any relief whatever. The plaintiffs insist that the insurance money in equity represents the building, and must be paid to the plaintiffs in lieu of the building which has been destroyed.

[2] The rights and obligations arising out of an option to purchase are to be contrasted rather than merely to be compared with the rights and obligations arising out of a contract of sale. An option is simply a contract by which an owner agrees that another shall have the privilege of buying his property at a fixed price and within the time expressly or impliedly prescribed by the writing. The optionee is not obliged to buy, although he may, if he chooses, elect to buy. A contract of sale imposes upon the vendee an obligation to buy. An option confers a privilege or right to elect to buy, but it does not impose any obligation to buy. *Fargo v. Wade*, 72 Or. 477, 479, 142 Pac. 830, L. R. A. 1915A, 271; *Hanscom v. Blanchard*, 117 Me. 501, 105 Atl. 291, 3 A. L. R. 545; *Stelson v. Haigler*, 63 Colo. 200, 165 Pac. 265, 3 A. L. R. 550; 27 R. O. L. 334, 336.

[3] An option does not pass to the optionee any interest in the land; but a contract of sale does transfer to the vendee an interest in the land; and therefore a person appearing in the character of an optionee possesses nothing except the right to elect to buy, and he has no interest in the land until by his acceptance of the option he transforms the option into a contract of sale and changes his character from that of an optionee to that of a vendee. *Kingsley v. Kressly*, 60 Or. 167, 172, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746; *Gamble v. Garlock*, 116 Minn. 59, 133 N. W. 175, Ann. Cas. 1913A, 1294.

[4] An option is a continuing offer. If the option is without consideration it may be withdrawn before acceptance; but if it was given for a consideration it cannot be withdrawn before the expiration of the prescribed time without the consent of the optionee. *Sprague v. Schotte*, 48 Or. 609, 87 Pac. 1046; *Mossie v. Cyrus*, 61 Or. 17, 19, 119 Pac. 485, 624; note in 3 A. L. R. 580.

[5] If the optionee accepts the option, the acceptance produces a contract of sale with mutual obligations and remedies. *Sprague*

v. Schotte, 48 Or. 609, 87 Pac. 1046; *House v. Jackson*, 24 Or. 89, 95, 32 Pac. 1027. So long as a person stands in the position of an optionee, his rights are those of an optionee, and his rights as a vendee do not come into existence until he occupies the position of a vendee. When by accepting an option a person changes his position from that of an optionee to that of a purchaser, the interest in the land created by the contract of sale dates, in this jurisdiction, from the date of the contract of sale, and is not by force of a fiction deemed to date from the date of the option. *Sprague v. Schotte*, 48 Or. 609, 87 Pac. 1046. See, also, *Caldwell v. Frazier*, 65 Kan. 24, 68 Pac. 1076; *Gilbert v. Port*, 28 Ohio St. 276.

[6] In order to effect a contract of sale capable of specific performance, the acceptance of an option must conform with the terms of the offer, and ordinarily must be unequivocal, absolute, and unconditional. *Friendly v. Elwert*, 57 Or. 599, 610, 105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann. Cas. 1913A, 357; *Wetherby v. Griswold*, 75 Or. 468, 474, 147 Pac. 388; *Leadbetter v. Price* (Or.) 202 Pac. 104, 108; *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401.

Whether or not the tenders relied upon by the plaintiffs constitute such an acceptance as is required by the law depends upon whether the plaintiffs are entitled to an accounting of the insurance money. When the fire occurred the plaintiffs were mere optionees, and possessed nothing except a bald right to elect to buy, and did not have any legal or equitable interest in the land. However, if for the purposes of discussion it be supposed that a binding contract of sale was in existence when the fire occurred, it will be found that some courts follow one rule and other courts adhere to a different rule, the difference in the rules resulting from the difference in views as to whether, in the absence of an agreement concerning the matter, the loss in case of fire falls upon the vendor or upon the vendee.

A majority of the courts take the view that by a contract of sale the vendee becomes in equity the owner of the land with the vendor, holding the legal title as security for the purchase price, with the result that, in the absence of a stipulation upon the subject-matter, loss of a building by fire or otherwise without fault on the part of either party falls upon the vendee. *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863, 18 Ann. Cas. 795; 27 R. C. L. 556; note in 9 Ann. Cas. 1053. In jurisdictions where the loss of a building caused by accident falls upon the vendee the courts necessarily, in order to be consistent, hold that if the vendor receives insurance money the vendee is entitled in equity as between himself and the vendor to demand that the insurance money be applied

on the purchase price or to the restoration of the property. 27 R. C. L. 559.

[7] Thirty-seven years ago Oregon adopted and has lately reaffirmed the view that where from the nature of the contract it appears, as it does here, that the parties must from the beginning have contemplated the continued existence of the subject-matter of the contract, then, in the absence of an agreement that the subject-matter shall exist, the contract is to be construed as subject to an implied condition that, if the subject-matter or a large or important part of it has ceased to exist when the time for performance arrives, each party is discharged from the contract, the vendor from his obligation to convey and the vendee from his obligation to pay; and the vendor can neither recover nor retain any part of the purchase price. In the instant case the premises were to be conveyed for an entire price, and since the building was insured for \$34,000 and the land is valued at \$20,000, it is manifest that the building was a very large part of the subject-matter. *Powell v. Dayton & Sheridan G. R. R. Co.*, 12 Or. 488, 8 Pac. 544; *Elmore v. Stephens-Russell Co.*, 88 Or. 509, 171 Pac. 763; 27 R. C. L. 557. In jurisdictions where this rule discharging both parties prevails we should naturally expect to find the law to be that the vendor, who has paid the insurance premium, is entitled to collect and hold the insurance money without liability to account to the vendee. 27 R. C. L. 560. It is appropriate to state that we are aware of the conclusion reached in *Waller v. City of New York Ins. Co.*, 84 Or. 284, 164 Pac. 959, Ann. Cas. 1918C, 139; nor have we overlooked any statement made in the opinion rendered in that case, but the governing facts there were radically different from the controlling facts here.

The general rule observed in most jurisdictions is that, if a building is accidentally destroyed while the relation of optionor and optionee exists, the loss falls upon the optionor, for the reason that the optionee has no interest, neither legal nor equitable, in the land, and consequently moneys received on an insurance policy held and paid for by the optionor are the absolute property of the optionor, and he is not required to account for them to the optionee. *Gamble v. Garlock*, 116 Minn. 59, 133 N. W. 175, Ann. Cas. 1913A, 1294; *Caldwell v. Frazier*, 65 Kan. 24, 68 Pac. 1076; *Gilbert v. Port*, 28 Ohio St. 276; *Clark v. Burr*, 85 Wis. 649, 55 N. W. 401. *James on Option Contracts*, § 512. Where there is a contract of sale and the relation of vendor and vendee exists, the courts adhering to the rule that the loss falls upon the vendee, and that he may demand that the insurance moneys be applied on the purchase price or to a restoration of the property, do so on the theory that in equity the vendee is the owner of the real property; but when the contract is only an

option, the reason upon which such rule is based does not exist, and consequently the rule, being without any foundation upon which to stand, cannot be applied even in those jurisdictions which apply such rule to contracts of sale. There are a few adjudications like *People's St. Ry. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113, 36 Am. St. Rep. 22, and *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150, where, because of peculiar and unusual circumstances and notwithstanding the fact that an acceptance of the option did not occur until after the loss, the doctrine of relation was applied so as to make the date of the contract of sale relate back to the date of the option, and thus with the aid of a legal fiction enable it to be said that the vendee was in equity the owner at the time of the loss, and on that account entitled to require the vendor to account for the proceeds.

[8] In the instant case, however, the loss occurred at a time when the parties stood in the position of optionor and optionee, unaffected by any unusual or peculiar circumstances. The writing of July 15, 1920, was a pure option; and, even though it be assumed that the tenders relied upon by the plaintiffs constituted such an acceptance as was required to effect a contract of sale, nevertheless such assumed contract of sale would date from the time of such supposed acceptance, and could not relate back to the date of the option. *Sprague v. Schotte*, 48 Or. 609, 611, 87 Pac. 1046. Since therefore only the relation of optionor and optionee existed at the time of the fire, the plaintiffs are not entitled to require the defendants to account for the insurance money, even though it be supposed that the defendants would be obliged to account for such money if the relation of vendor and vendee existed. But, as already pointed out, under the established rule in this jurisdiction the destruction of the building discharged the parties from their respective obligations even though it be assumed that they occupied the relation of vendor and vendee. A different question would of course be presented if notwithstanding the loss the plaintiffs had not demanded an accounting of the insurance money and had offered fully to perform. The plaintiffs, however, tendered a conditional performance, and for that reason the option was not transformed into a contract of sale. Whether the plaintiffs occupied the position of a mere optionee or that of a vendee, in either event they must fail. The plaintiffs permitted the time fixed in the option to expire without tendering an unqualified performance, and for that reason they are not entitled to specific performance. The decree of the circuit court gave to the plaintiffs more than they are entitled to receive. The circuit court refused to allow costs to either side, and we think that a like order should be made in this court; and so the suit is

dismissed, without costs to any party in either court.

Mr. Justice McCourt took no part in the consideration of this case.

(111 Kan. 206)

MIDDLEKAUFF v. BELL et al.*
(No. 23479.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

Mortgages § 154(4)—**Judgment awarding subsequent mortgages first lien held erroneous.**

In October, 1910, a mortgagor gave a real estate mortgage to secure a negotiable promissory note for \$2,000, due in six months, and the mortgage was duly recorded. In November, 1911, the note was indorsed and delivered, and the mortgage was assigned by written assignment, duly acknowledged, to the plaintiff. In 1914, the mortgagor offered the land to an investment company as security for a loan. An abstract of title disclosed the mortgage of 1910. The investment company inquired of the mortgagee, and was told the debt had been paid and a release would be executed. No release was executed, and the investment company closed the loan, taking as security a mortgage for \$4,300. In an action to foreclose the plaintiff's mortgage, the investment company was awarded a first lien. *Held*, the judgment was erroneous.

Appeal from District Court, Johnson County.

Action by Nellie Middlekauff against S. B. Bell, Jr., and others to foreclose a recorded real estate mortgage. Judgment that a subsequent mortgage taken before the assignment of the prior mortgage to plaintiff was recorded, was a superior lien, and plaintiff appeals. Reversed and remanded, with directions to award plaintiff first lien, and dispose of case accordingly.

Forest D. Siefkin and Long, Cowan & Depew, all of Wichita, and W. D. Morrison and S. D. Scott, both of Olathe, for appellant.

James F. Getty, of Kansas City, for appellees.

BURCH, J. The action was one by the assignee of a recorded real estate mortgage to foreclose the mortgage. The judgment was that a subsequent mortgage, taken before the assignment was recorded, was a superior lien. The plaintiff appeals.

In October, 1910, Bell gave the Commercial State Bank a real estate mortgage to secure a negotiable promissory note for \$2,000, due in six months. The mortgage was recorded on October 29. On November 24, 1911, the note was indorsed and delivered, and the

mortgage was assigned by written assignment, duly acknowledged, to the plaintiff. Bell had given a mortgage to Palmer on other property to secure an indebtedness of \$3,000. In September, 1914, this indebtedness was renewed, delinquent interest and commissions were added, and Bell gave Palmer a mortgage on both tracts, to secure payment of the total sum of \$4,300. An abstract of title disclosed the mortgage to the bank. Before taking his mortgage, Palmer made inquiry of the bank, and was told the mortgage was paid and would be released, but no release was executed. In 1916, Palmer's mortgage was foreclosed, in an action to which neither the bank nor the plaintiff was a party. The land was sold to Palmer, who assigned the certificate of purchase to the Hughes-Palmer Investment Company, and in December, 1917, a sheriff's deed was issued to the investment company. The evidence indicates that Palmer and the investment company represented a single interest. On January 3, 1918, the bank executed a release of the plaintiff's mortgage, which did not reach the record until February 28, 1918. On January 5, 1918, the plaintiff filed her assignment for record.

The general recording act provides for recording instruments affecting real estate, and provides that no instrument eligible to record shall be valid except as between the parties, and except as to those who have actual notice, until deposited for record. Gen. Stat. 1915, §§ 2068, 2070. In support of the judgment, of the district court, it is contended these sections exclude from consideration the assignment from the bank to the plaintiff, and determine the controversy in favor of the investment company. An assignment of a mortgage is merely a formal transfer of title to the instrument, and the assignment from the bank to the plaintiff was admittedly good for that purpose. The plaintiff, however, did not need the assignment in order to invest her with ownership of the mortgage. She acquired full title by purchase of the note which it secured, and the assignment may be excluded from consideration without prejudice to her lien. The mortgage was recorded, was unreleased, and was notice of lien, no matter who owned it; Palmer did not take his mortgage on faith in the record, but in opposition to the record; and instead of the sections referred to determining the controversy in favor of the investment company, another section of the general recording act, providing that recorded instruments, entitled to record, impart notice to subsequent mortgages (Gen. Stat. 1915, § 2069), determines the controversy in favor of the plaintiff.

The recording of assignments has always been a matter of special legislative consideration, in connection with the general subject of real estate mortgages. The chapter of the

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied June 16, 1922.

General Statutes of 1868 relating to mortgages contained the following provision:

"The recording of the assignment of a mortgage shall not be deemed, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee." Chapter 68, art. 1, § 3.

This provision was interpreted in the case of *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274. The opinion reads:

"From the conclusions of law stated, the court must have decided that where a negotiable note is secured by mortgage on real estate, and both are assigned by indorsement thereon before maturity to a bona fide purchaser, the mortgage is taken subject to all payments made by the mortgagor to the mortgagee at any time before actual notice to the mortgagor of such assignment. Counsel for defendants claim this to be the law, and have cited many respectable authorities in support thereof. We think the doctrine thus announced not sustained by reason or sound policy, and if adopted it would be an unfortunate obstacle to commercial transactions so common in this state as the sale and transfer of negotiable paper secured by real estate mortgages, and that such a doctrine is not in accord with the previous decisions of this court controlling the principles of law applicable to negotiable paper secured by such mortgages. In this state, the common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories concerning such mortgages demolished. The mortgage is a mere security, creating a lien upon the property, but vesting no title. The debt secured by the mortgage is the principal thing, and the mortgage the mere incident following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. Here, the negotiable notes are the principal evidence of the debt, and the mortgage is merely ancillary; the mortgage follows the notes; whoever owns the notes, owns the mortgage. * * *

"Section 3 speaks of the recording of the assignment of the mortgage, and does not by its terms refer to negotiable paper, and it seems to us a strained interpretation to hold its provisions applicable, where a debt is evidenced by a negotiable note, secured by mortgage upon real estate, when such mortgage is merely ancillary thereto, and follows the note wherever it goes, deriving its character from such instrument. A better interpretation, and one clearly more in accord with the law of mortgages in this state, is, that such section has reference only to a mortgage standing alone, or one securing debts and notes of a non-negotiable character." 25 Kan. 629-631, 37 Am. Rep. 274.

In the *Burhans* Case the mortgagor had attempted to release the mortgage. In the case of *Lewis v. Kirk*, 28 Kan. 497, 42 Am. Rep. 173, the question was one of priority between the assignee of a mortgage whose assignment was not recorded and a purchaser who took title relying on a release by the original mortgagee. It was held the innocent purchaser

should be protected. In the opinion, which distinguished the *Burhans* Case, it was said:

"If a mortgage has been executed by the owner of the property to secure the payment of a negotiable promissory note, and the mortgage has never been recorded, then we think a person who has no knowledge of the mortgage may purchase the property from the mortgagor freed from all liens or equities created by the mortgage. Or, if the mortgage has been recorded and then has been regularly released on the margin of the record thereof by the mortgagee, then we think that any person, if he does it in good faith, may purchase the property in like manner freed from all liens and equities existing in favor of the holder of the mortgage; or in other words, and to state the proposition more succinctly, a purchaser in good faith of real estate may always rely upon the public records, subject only to the equities of persons in open, visible and exclusive possession of the property." Page 505.

In the case of *Insurance Co. v. Huntington*, 57 Kan. 744, 48 Pac. 19, the mortgagee released the mortgage after he had assigned it. The syllabus reads:

"The assignment and delivery of a negotiable promissory note before maturity operates as an assignment of a mortgage given as security for the payment of the note. After such transfer the original mortgagee has no power to release or discharge the lien of the mortgage, and a release made by him without authority will not affect the rights of the assignee." Paragraph 1.

In the opinion it was said:

"No obligation rested upon *Huntington* to record his assignment in order to protect himself against the subsequent mortgages. As the mortgage was given to secure a negotiable note, it could be assigned by the mere indorsement or delivery of the note, and there was in fact no assignment to record. It has been expressly held that the bona fide holder of negotiable paper, transferred to him by indorsement thereon before maturity and secured by a real estate mortgage, need not record the assignment of the mortgage. *Burhans v. Hutcheson*, 25 Kan. 625.

"After assigning the note and mortgage, the mortgagees had no interest therein, and no power to release or discharge the lien of the mortgage; and, being wholly without authority, the release executed by them cannot affect the rights of the assignee. When the plaintiffs in error found upon the record a mortgage securing a negotiable note, it was their duty to inquire whether the release was executed before or after the assignment and by persons having authority to do so." 57 Kan. 747, 48 Pac. 20.

The *Huntington* Case was decided in 1897, and in that year the Legislature passed an act, the pertinent provisions of which may be summarized as follows: All assignments of real estate mortgages thereafter made should be recorded within 90 days; no assignment of a mortgage should be received in evidence against the mortgagor unless recorded; no transfer of note or mortgage should

be received in evidence against the mortgagor, unless the mortgage had been assigned and the assignment recorded; a release by the last assignee of record should fully discharge the mortgage and cancel the debt as to the mortgagor. Laws 1897, c. 160.

In the case of *Burt v. Moore*, 62 Kan. 536, 540, 64 Pac. 57, 58, the statute was interpreted as follows:

"The only penalty prescribed in the act is that if an assignment is not acknowledged and recorded as therein provided, it shall not be received in evidence in any court of the state. It was not within the constitutional power of the Legislature, nor did it attempt, to annul the mortgage or to destroy the mortgage lien. The mortgage continues in existence and remains enforceable notwithstanding the statute; and the lien and right to enforce the same may be established by any competent proof; * * * The failure to have the assignment acknowledged and recorded effectually bars its use as evidence, but when a case can be made out or is established without such evidence a judgment of foreclosure should be given."

At the next regular session of the Legislature, the act of 1897 was repealed, and the present law was enacted. It contains the following section:

"In cases where assignments of real estate mortgages are made after the passage of this act, if such assignments are not recorded, the mortgagor, his heirs, personal representatives, or assigns, may pay all matured interest or the principal debt itself prior to the recording of such assignment to the mortgagee, or if an assignment of such mortgage has been made that duly appears of record, then such payment may be made to the last assignee whose assignment is recorded in accordance with the provisions of this act, and such payment shall be effectual to extinguish all claims against such mortgagor, his heirs, personal representatives, and assigns, for or on account of such interest or such principal indebtedness; and no transfer of any note, bond or other evidence of indebtedness, by indorsement or otherwise, where such indebtedness is secured by mortgage on real estate within this state, shall prevent or operate to defeat the defense of payment of such interest or principal by the mortgagor, his heirs, personal representatives, or assigns, where such payment has been made to the mortgagee or to the assignee whose assignment appears last of record under the provisions of this act; provided, however, that in all such cases the assignee who may hold such unrecorded assignment shall have a right of action against his assignor to recover the amount of any such payment of interest or principal made to such assignor as upon an account for money had and received for the use of such assignee." Laws 1899, c. 168, § 3, Gen. Stat. 1915, § 6485.

This statute was interpreted in the case of *Anthony v. Brennan*, 74 Kan. 707, 87 Pac. 1136. The syllabus reads:

"The act relating to the recording of assignments of mortgages (Laws 1899, c. 168) does

not restrict the methods by which a negotiable note and a mortgage securing it may be transferred, nor prevent a transfer of the ownership of such paper by mere delivery."

In the opinion it was said:

"That act does not undertake to limit the methods by which real estate mortgages may be transferred, and it does not provide that the failure to make a record of an assignment of a mortgage shall invalidate the security of the transfer. It was intended as a protection to mortgagors, and the only penalty prescribed for not recording the transfer is that all payments made by the mortgagor to the mortgagee or to any one who appeared to be the owner shall be credited to the mortgagor, although the assignee never received such payments. This was the view taken of the statute in earlier cases." 74 Kan. 709, 87 Pac. 1136.

In the case of *Mayse v. Williams*, 77 Kan. 813, 91 Pac. 795, Brewer appeared on the record as assignee of a mortgage. Mayse procured from Brewer a release for which he paid \$25. After procuring the release, Mayse obtained a quitclaim deed from the owner of the land. Brewer advised Mayse she could not find the note and mortgage, and she did not comply with his request to make an affidavit of ownership. In fact, Brewer had assigned to Williams, who had not recorded his assignment. In an action by Williams to foreclose the mortgage, the district court allowed Mayse \$25, and entered the decree of foreclosure prayed for. Mayse appealed. In affirming the judgment the court said:

"Under chapter 160 of the Laws of 1897, requiring all such assignments to be recorded within 90 days after the transfer, and providing in express terms that a release executed to the last recorded assignee should discharge the mortgage, the release, relied upon here would have been a complete defense to the action. But in 1899 that law was repealed and a new act, chapter 168 of the Laws of 1899 (Gen. Stat. 1901, §§ 4234-4239), enacted in its place. In the latter the provision that a release by the last assignee of record shall be effectual fully to discharge the mortgage is omitted. * * * Whatever the purpose of the Legislature may have been, whether, as suggested, it believed the former provision hindered and impaired the usefulness of mortgage notes as security, it is clear that the provision was eliminated from the act of 1899, and nothing of the kind left in its place.

"Mayse was not a purchaser of the land in this transaction; he was attempting to secure a release and satisfaction of a mortgage from a person whom the evidence shows he had some reason to believe might not be the owner, with the expectation of afterward acquiring the title to the land free from the mortgage." 77 Kan. 814, 91 Pac. 795.

Why the district court compelled the rightful holder of the mortgage to reimburse an outsider, who did not own the land or owe the debt, for his outlay in procuring an unauthorized release from a person who, he had

reason to believe, did not own the mortgage, is not disclosed. The reference to the subject in the cases of *Mayse v. Williams*, supra, and *Bullock v. Kendall*, 80 Kan. 791, 104 Pac. 568, are not to be taken as adjudications by this court.

The statutes of 1897 and 1899 were enacted at the ebbing of a tidal wave of farm mortgages which swept Kansas, and were not enacted for the benefit of subsequent purchasers or mortgagees; the intention was to benefit mortgagors only. Even the Savage statute of 1897 did not declare that failure to record an assignment of a recorded mortgage should give priority to a subsequent purchaser or mortgagee. Two years later the Legislature again considered what penalty should be assessed against an assignee who omitted to record his assignment. It stopped with the provision that payments made by the mortgagor to the holder of record should be credited to the mortgagor, and there is no other penalty. One who acquires a negotiable note secured by recorded mortgage is not, as to subsequent purchasers or mortgagees, the possessor of a mere "secret equity," if no assignment of the mortgage be placed on record. Record of the mortgage is notice of its existence, and the holder is not obliged to disclose his ownership by recording his assignment in order to preserve priority of lien.

The result of the foregoing is that we must turn to *Lewis v. Kirk*, 28 Kan. 497, 42 Am. Rep. 173, and *Insurance Company v. Huntington*, 57 Pac. 744, 48 Pac. 19, already referred to, for principles on which to base a decision.

Taken literally, the language of the syllabus and opinion in the case of *Insurance Company v. Huntington* would place the decision in conflict with that of *Lewis v. Kirk*, which was not referred to, would place the decision out of harmony with the great weight of authority, and would tend to embarrass rather than to facilitate commercial uses of negotiable mortgage securities. The difficulties encountered in securing conclusive proof that all releases by mortgagees had been made with authority, would be practically insuperable, but no new mortgage could safely be taken without such proof. Under the facts of the case, however, the decision was sound. The mortgage covered a number of city lots. The record disclosed that the mortgage was assignable by negotiation of the note it secured. Before the mortgagee released the lots in controversy, *Huntington*, as assignee, had made five releases on the margin of the record. Under these circumstances, it was properly held a purchaser should have inquired if the release of his lots "was executed before or after the assignment, and by persons having authority to do so."

In *Lewis v. Kirk*, the question was, Who should suffer from the fraud of the mortgagee in releasing the mortgage after he had sold the note which it secured—the innocent as-

signee of the note and mortgage, or the innocent purchaser of the land? The decision was, The purchaser might rely on the record showing the release; but the decision was equally emphatic that the record of the mortgage protected the assignee until the mortgage was paid, or was released by some one having authority to do so.

"But when the mortgage is recorded, its negotiable character is then extended even to bona fide purchasers of the property, and it retains such character contemporaneously with the existence of the note to which it is an incident until the note is satisfied, or until the mortgage is released of record by the mortgagee, or his attorney, assignee, or personal representative. * * *" 28 Kan. 506, 42 Am. Rep. 173.

These rules, equally just to holders of negotiable real estate securities and to purchasers of real estate, are settled rules of property in this state.

It is argued that the plaintiff, by omitting to record her assignment, placed it within the power of the bank to mislead the investment company, to its injury, and that, as a consequence, it would be inequitable for the plaintiff to prevail. The note to the bank was payable to its order, was copied in the mortgage, and the record of the mortgage warned the investment company that the paper was negotiable and might be the property of an assignee. There was no occasion for the investment company to depend on a report of payment based on an interpretation of the bank records. All it needed to do was to refrain from closing the loan until a release from the bank appeared on the public records, which constitute the standard source of information in such cases. Having been put on guard, the investment company elected to pursue an unsafe course instead of a safe one, and it has no standing in equity to charge the consequences of its conduct to the plaintiff.

In this instance, the note was transferred and the mortgage was assigned after maturity. The fact made the paper subject to any defense the maker might have against the payee of the note, but as long as a negotiable mortgage, duly recorded and not released, remains valid security for all or any part of the debt evidenced by the note, a subsequent purchaser or mortgagee takes subject to the assignee's lien. There was some evidence the assignment to the plaintiff was withheld from record for temporary accommodation of the bank. That fact is of no importance to one who purchased in the face of a record showing an unreleased mortgage.

The judgment of the district court is reversed, and the cause is remanded, with direction to award the plaintiff a first lien, and to dispose of the case accordingly.

All the Justices concurring.

(111 Kan. 291)

HARRIS v. HARDESTY. (No. 23724.)*

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Intoxicating liquors \S 299—Civil damage statute a remedy only against person who by selling intoxicating liquors caused the intoxication.

The civil damage statute, giving to a child injured in means of support in consequence of intoxication of its parent a right of action against the person who caused the intoxication (Gen. St. 1915, \S 5507), affords remedy against none but a person who, by "selling, bartering, or giving intoxicating liquors," caused the intoxication.

2. Intoxicating liquors \S 285—"Giving intoxicating liquor" within statute held applicable only to giving of liquor as a subterfuge to evade provisions of law.

The giving of intoxicating liquor, referred to in the statute, means giving as a subterfuge or device to evade the provisions of the prohibitory law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Giving Away.]

3. Intoxicating liquors \S 297, 306 — Infant child's petition against defendant who caused habitual intoxication of child's mother held not to state cause of action; child injured in means of support by parent's intoxication has no right of action against person who caused intoxication at common law.

The plaintiff is a minor. The petition alleged the defendant induced her mother to drink intoxicating liquor, procured, bought, and furnished intoxicating liquor, and gave it to her mother to drink, which liquor her mother did drink, to such extent she became habitually intoxicated. As a consequence of such intoxication the plaintiff was injured in means of support. *Held*, the petition failed to state a cause of action under the civil damage statute; and under the common law the plaintiff was without remedy.

Appeal from District Court, Shawnee County.

Action by Helen Maud Harris, a minor, by Sarah C. Klehl, her next friend, against Frank Hardesty. Demurrer to petition sustained, and plaintiff appeals. Affirmed.

Addington & Doster and Waters & Waters, all of Topeka, for appellant.

A. E. Crane, of Topeka, and C. A. Smart, of Lawrence, for appellee.

BURCH, J. The action was one by a minor for damages resulting from loss of support occasioned by drunkenness of her mother, caused by the defendant. A demurrer to the petition was sustained, and the plaintiff appeals.

The petition alleged the plaintiff's parents had separated, her father had gone from the

state of Kansas, and she was dependent on her mother for support. The defendant induced her mother to drink intoxicating liquor, procured, bought, and furnished intoxicating liquor and gave it to her mother to drink, which liquor her mother did drink, to such an extent she became habitually intoxicated. As a consequence of such intoxication the plaintiff was injured in means of support. The petition contained allegations of malice on the part of the defendant, and of anguish, humiliation, and disgrace on the part of the plaintiff, and prayed for both actual and punitive damages.

The remedy afforded by civil damage laws was unknown to the common law, and without a statute the plaintiff could not recover. Besides that, at common law an infant could not enforce parental obligation to support, and had no remedy against a third person for deprivation of parental support.

The statute under which the action was commenced reads as follows:

"Every wife, child, parent, guardian or employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person, such wife, child, parent or guardian shall have a right of action, in his or her own name, against any person who shall, by selling, bartering or giving intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained, as well as for exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered, the same as if unmarried; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parents, guardian, or next friend, as the court shall direct; and all suits for damages under this act shall be by civil action in any of the courts of this state having jurisdiction thereof." Gen. Stat. 1915, \S 5507.

This section is part of the Prohibitory Law of 1881, and is a continuation of a section of the Dramshop Act of 1868. *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625. The title of the Dramshop Act is as follows:

"An act to restrain dramshops and taverns, and to regulate the sale of intoxicating liquors." Gen. Stat. 1868, c. 85.

The title of the Prohibitory Law of 1881 is as follows:

"An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." Laws 1881, c. 128.

It was necessary, under the Constitution, which requires a bill to contain but one subject, which shall be clearly expressed in the title (article 2, \S 16), that the civil damage provision be germane to the declared purposes of the two statutes. In the case of

Werner v. Edmiston, 24 Kan. 147, the court considered the relation of the civil damage section to the dramshop act. The opinion reads:

"It is insisted that said sections 9 and 10 are unconstitutional, because they contain matter foreign to that in the other sections of the act, and not expressed in the title to the act. The title of the act is, 'To restrain dramshops and taverns, and to regulate the sale of intoxicating liquors.' The other sections contain provisions as to licenses, penalties for sales without license, prohibitions of sales upon certain days and to certain persons. Section 9 provides that any one who causes the intoxication of another shall be compelled to pay for his care while so intoxicated; and § 10, that every person who is injured in his property or means of support by any intoxicated person, or in consequence of intoxication, may recover therefor of the person causing such intoxication.

"Now it seems to us that these matters come fairly within the scope of the title. They name certain conditions upon which one may sell liquor. The act in substance says to a party that you must not sell without a license; that when licensed you must not sell on certain days or to certain persons; and that if you sell, you will be held liable for the injury the liquor causes. Is not all this the regulation of the sale of intoxicating liquors?" 24 Kan. 151.

In the case of Durein v. Pontious, 34 Kan. 353, 8 Pac. 428, the court considered the relation of the civil damage section to the Prohibitory Law of 1881. The opinion reads:

"It is first contended that said section 15 is unconstitutional, for the reason that the title of the act is not broad enough to cover it. The title of the act is, 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.' This court has passed upon this question in the case of Werner v. Edmiston, 24 Kan. 147. That action was under § 10 of the act of 1868, entitled 'An act to restrain dramshops and taverns, and to regulate the sale of intoxicating liquors.' Section 15 of the statute of 1881 was bodily transferred from the Dramshop Act of 1868. The Prohibitory Liquor Law of 1881 not only provides for prohibition, but also for the regulation of the sale of intoxicating liquors. The title of the act of 1881 is as broad as the title of the act of 1868, so far as embracing therein the provisions of said § 15; and the case of Werner v. Edmiston, supra, is therefore controlling." 34 Kan. 359, 8 Pac. 432.

Very soon after the enactment of the prohibitory law, the court had occasion to consider fully the relation of provisions of the act to its title. The law contained a section making it unlawful for any person to become intoxicated. In the case of State v. Barrett, 27 Kan. 213, it was held the section was not within the scope of the title, and in the opinion it was said:

"All that it seems to have had in contemplation was the prohibition of the manufacture and

sale of intoxicating liquors in certain cases, and the regulation of the manufacture and sale of intoxicating liquor in certain other cases. With regard to what should be done with the liquors, independently of their manufacture and sale, it was silent. The title to the act does not, in the slightest or most remote degree, refer to the use of the liquor in the abstract. So far as the title of the act is concerned, after the liquor has been manufactured and sold, any person in the lawful and bona fide possession of it may use it as he sees fit; he may drink it, or burn it, or give it away, or he may use it in any other manner or for any other purpose to which his inclinations may lead him. The title to the act is wholly silent with reference to these matters. When the liquor is manufactured and sold, if manufactured and sold and purchased in good faith and according to law, the title to the act has then spent its force; it has then no further room for operation; its mission is then ended. When the sale is completed, it can have no further application to any transaction. * * *

"Of course we know that the indirect and remote object of the title to the act, as well as of the act itself, is to prevent drunkenness, to prevent intoxication, and to prevent the use of intoxicating liquors as a beverage; and we shall construe both the title to the act and the act itself with reference to such object; but we cannot under such a title, consider drunkenness or intoxication or the use of intoxicating liquors, aside from the manufacture and sale of such intoxicating liquors, for they have no existence in the title to the act independent of the manufacture and sale of intoxicating liquors, and are indissolubly and inseparably connected with them. We cannot consider drunkenness, or intoxication, or the use of intoxicating liquors as a beverage, in the abstract, but can consider them only where they are incidents or concomitants to the manufacture and sale of intoxicating liquors. When construing a provision of the act affecting the manufacture or sale of intoxicating liquors, we shall keep in view the fact that the act was intended to prevent the use of intoxicating liquors as a beverage, and shall construe the provision accordingly, and try to give it that construction which will best promote its object; but if we find a provision in the act that has no relation to the manufacture or sale of intoxicating liquors (whether it has any relation to drunkenness or not, or to intoxication or not, or to the use of intoxicating liquors as a beverage or not), we must say that the provision is outside of the title of the act; that it is not included in the title, and that it is therefore unconstitutional and void." 27 Kan. 219, 220.

[1] No statute has been enacted since 1881 which has placed the civil damage section under broader title, and that section stands to-day as a remedy for nothing except injuries in consequence of intoxication caused by "selling, bartering, or giving intoxicating liquors." In the case of Zibold v. Reneer, 73 Kan. 312, 317, 85 Pac. 290, 292, the court said:

"It was known to the Legislature, as it is to all other persons, that the use of intoxicating liquors as a beverage makes drunkards; that

an intoxicated person is incapable of caring for himself, is always in danger of being injured, and is likely to inflict injury upon others, at the cost of his liberty—possibly his life; that he habitually neglects his business and family; that the harm resulting from the excessive use of intoxicating liquors always falls most pitilessly upon the dependents of the user, not infrequently pauperizing himself and family. The idea naturally suggested itself to the Legislature that if the sellers of intoxicants were made liable to those who should sustain injury to person or property or means of support by an intoxicated person, or in consequence of intoxication, the hazard would be so great that fewer persons would engage in the business, and those who should engage in it would exercise more caution. The Legislature, therefore, gave a cause of action and created a liability for these injuries where none existed at common law."

The Dramshop Act contained the following provision:

"The giving away of intoxicating liquors, or other shifts or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling within the provisions of this act." Gen. Stat. 1868, c. 35, § 11.

This section was continued in the prohibitory law in the following form:

"The giving away of intoxicating liquor, or any shifts or device to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act." Laws 1881, c. 128, § 17.

In numerous sections of the prohibitory law other than the civil damage section, giving intoxicating liquor was coupled with selling and bartering, and in due time it became necessary to reach a conclusion respecting the meaning of the words "give," "giving away," "giving," and "gift." The conclusion was that section 17 was inserted in the law to circumvent the ingenuity of those who might seek to effect sales without transgressing the letter of the law. *State v. Nickerson*, 30 Kan. 545, 549, 2 Pac. 654. In the case of *State v. Standish*, 37 Kan. 643, 16 Pac. 66, the syllabus reads:

"A person in the lawful and bona fide possession of intoxicating liquor may use it as he sees fit; he may drink it himself or give it away, but he cannot by any shift or device in selling or giving away lawfully evade the provisions of the statute prohibiting the manufacture and sale of intoxicating liquors.

"A person cannot be convicted under § 16 of the Prohibitory Act of 1881 for keeping in his house, store, or in a warehouse thereof, intoxicating liquor for his own use, or for giving the same way, providing the giving away is done honestly and in good faith, and not as a shift or device to evade the provisions of said act."

Paragraphs 1, 2.

In the opinion it was said:

"The limitation is that a person in giving away intoxicating liquor shall not do so to evade the provisions of the prohibitory act; in other words, any shift or device adopted in selling or giving away such liquors, to evade the provisions of that act, is prohibited." 37 Kan. 647, 16 Pac. 67.

In the opinion in the case of *State v. Mulker*, 43 Kan. 237, 241, 22 Pac. 1020, 1022 (7 L. R. A. 183), the court said:

"A person may purchase and bring liquor into the state for his own use without violating the statute; and one so lawfully obtaining possession of intoxicating liquors may use it as he sees fit, by drinking it himself or giving it to another, provided it is done in good faith, and not as a shift or device to evade the provisions of the prohibitory act."

[2, 3] The result is that under the various provisions of the Prohibitory Law of 1881, including the civil damage section, the giving of intoxicating liquor means giving as a subterfuge for sale. The petition discloses nothing but simple gifts of intoxicating liquor, not made by way of pretense to accomplish sales, and consequently the petition does not state a cause of action under the civil damage statute.

The plaintiff contends the court should expand the meaning of the civil damage statute to bring it in harmony with the increased reprobation of intoxicating liquors disclosed by recent legislation. The contention is met by the fact that, while the Legislature has dealt more and more severely with intoxicating liquors, it has not seen fit to change the civil damage statute, although it has had under consideration the extension of civil liability. In 1915 two additional civil damage acts were passed. One of them made owners of property where intoxicating liquors are sold liable for damages caused by intoxication, and the other made cities similarly liable. Laws 1915, cc. 233, 234. The original civil damage act, however, was not amended, and the court cannot amend it by now giving it an interpretation different from that which it has borne continuously for substantially 40 years.

The plaintiff contends she should be allowed to recover for damages accruing since passage of the Bone Dry Law (Laws 1917, c. 215), inasmuch as that statute makes it unlawful to give intoxicating liquors to another. The contention is met by the fact that the civil damage law gives no cause of action for damages accruing from intoxication caused by gift of liquor, and the Bone Dry Law did not amend the civil damage law.

The judgment of the district court is affirmed.

All the Justices concurring.

(111 Kan. 283)

SOLOMON NAT. BANK v. BIRCH et al.*
(No. 23701.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Bills and notes \S 342—Note on which internal revenue stamp was placed at its transfer held regular on its face on acquisition by transferee.

The fact that previous to the transfer of a negotiable note it did not bear an internal revenue stamp, and that one was at that time placed upon it by the person negotiating the transfer in behalf of the holder, does not prevent it from being complete and regular on its face at the time of its acquisition by the transferee, nor prevent his becoming a holder in due course.

2. Bills and notes \S 539—Finding that plaintiff purchased note in good faith held to make defenses of fraud and illegality in inception not available.

In an action upon a negotiable note complete and regular on its face, where the plaintiff claims to be a holder in due course, and proves by records obviously made at the purported time of the transaction that he became the owner before maturity and for value, unless the steps taken by him were merely colorable, a finding that he did not purchase it in bad faith renders defenses of fraud and illegality in the inception of the note unavailable against him.

Appeal from District Court, Mitchell County.

Suit by the Solomon National Bank, a corporation, against Lester Birch and Dallas U. Birch, doing business under the firm name and style of Birch Bros., and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Kagey & Smith, of Beloit, and David Ritchie, of Salina, for appellant.

Turner & Stanley, of Mankato, and Lutz & Jordan, of Beloit, for appellees.

MASON, J. The Solomon National Bank sued Lester Birch and Dallas U. Birch upon two negotiable notes executed by them to their own order, and indorsed by them and by Felix Broeker. The defendants answered setting up that the notes were executed by them for stock in the Okla Queen Oil Company, and were procured from them by fraudulent representations as to its value; and also that the transaction was illegal because the same was made in violation of the "blue sky law." Gen. Stat. 1915, §§ 9458-9475. Both issues were submitted to the jury, together with the question whether the plaintiff was a holder of the notes in due course. A general verdict was returned in favor of the defendants, on which judgment was rendered. The plaintiff appeals.

The plaintiff contends that it was entitled to a judgment by virtue of special findings of the jury to the effect that the plaintiff did not have actual notice or knowledge that the notes in question were obtained by fraud, and did not purchase them in bad faith. These findings obviously acquit the plaintiff of either actual or constructive notice of any fraudulent representations having been made. The defendants correctly assert, however, that, in order to constitute the plaintiff a holder in due course so far even as concerns the question of fraud, it was necessary not only that it should have acquired the notes without actual notice of the fraud, and without bad faith, but that also (1) the notes should have been complete and regular on their face; (2) the plaintiff should have become the holder before maturity; and (3) taken them in good faith and for value. Gen. Stat. 1915, § 6579; Uniform Negotiable Instruments Act, § 52.

[1] 1. When the notes were first brought to the plaintiff they bore no revenue stamps, but these were affixed at the time of the transfer by the person who negotiated the deal in behalf of the former holder. The defendants argue that because of this fact the notes when acquired by the plaintiff were not "complete and regular on their face." This contention is supported by Lutton v. Baker, 187 Iowa, 753, 174 N. W. 599, which is annotated in 6 A. L. R. 1701. The note cites cases of a contrary tendency, and suggests that the decision appears possibly to have been influenced by an earlier view of that court, since abandoned, that the omission of a stamp invalidated the instrument. We do not think the circumstance that a note was not stamped when it was executed, where a sufficient stamp is attached and canceled at the time of its transfer, prevents it from being then complete and regular on its face, or precludes the transferee from becoming a holder in due course. We regard the terms "complete" and "regular" as referring to the condition of the note itself, with regard to its contents, execution (of which the affixing of a stamp is no part), and indorsement. The stamp is merely evidence of the payment of a tax. Provisions of an act of Congress that an instrument shall not be received in evidence without the required stamp are held by most of the courts which have considered the question (not including that of Iowa, however) to relate to federal and not to state procedure. When the omission to stamp an instrument was not fraudulent it does not invalidate the instrument, and may be remedied at any time, even after an action has been brought. 3 R. O. L. 923, 924; 8 C. J. 112, 113. It is not suggested that the failure to attach stamps to the notes at the time of their execution was due to a purpose to defraud the government.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied June 16, 1922.

Such suggestion could hardly be made in behalf of the defendants, since the primary duty in that respect rested upon them. No question on this or any other phase of the stamp matter was submitted to the jury, nor does it appear that the attention of the trial court was in any way directed to it.

[2] 2. That the notes as a physical fact came into the hands of the plaintiff on November 1 and 10, 1917, and that a certificate of deposit, a cashier's check, and a draft which were returned to the bank as paid were then issued in exchange for them, does not admit of substantial doubt. The records of the bank demonstrate that at least the forms of a purchase for value were gone through with at that time. If the plaintiff were not a purchaser before maturity in good faith and for value, this could only have been because the steps taken were only colorable—were a mere sham, although regular on their face—and this hypothesis we regard as negated by the finding that the plaintiff did not purchase the notes in bad faith. If the plaintiff caused records to be made showing it to have been a purchaser before maturity and for value, when the fact was otherwise—if for instance it was merely acting in behalf of the Traders' State Bank of Salina, from which it acquired them, receiving them to hold for the benefit of that bank—it necessarily had knowledge of such facts that its action in taking the notes amounted to bad faith as the term is used in the statute. Gen. Stat. 1915, § 6583; Uniform Negotiable Instruments Act, § 56.

Whether the special findings require the conclusion that the plaintiff was a holder of the notes in due course with respect also to the defense of illegality in the violation of the blue sky law is more debatable, because it might be argued that, while the jury were of the opinion that the plaintiff did not have actual notice or knowledge that the notes were obtained by fraud, they may have thought it did have actual notice or knowledge of the violation of the blue sky statute. This seems hardly possible as a practical matter, and we think it irreconcilable with the finding that the bank did not purchase the notes in bad faith. Fraud or illegality in the inception of a note makes the payee's title defective (Gen. Stat. 1915, § 6582; Uniform Negotiable Instruments Act, § 55), and throws upon the holder the burden of proving its acquisition in due course (Gen. Stat. 1915, § 6586; Uniform Negotiable Instruments Act, § 59). This the plaintiff could meet in the present case by showing both that it had no actual knowledge of an infirmity in the instrument or defect in the title, and that it had no knowledge of such facts that its action in taking it amounted to bad faith. Gen. Stat. 1915, § 6583; Uniform Negotiable Instruments Act, § 56. One is not a holder in due course if

he takes the note (1) with actual knowledge of facts constituting a defense, or (2) with knowledge of such facts that his taking it was in bad faith. The absence of bad faith implies a want of knowledge of even such suspicious circumstances as would charge him with constructive notice of the existence of a defense, and as the greater includes the less it must also and more strongly imply a want of that fuller information which is characterized as actual knowledge. We conclude that the jury's finding that the plaintiff did not purchase the notes in bad faith, in view of the matters already suggested, amounts to a decision that it was a holder in due course, and therefore neither the fraud nor illegality in the inception of the notes constituted a defense against it.

The judgment is reversed, and the cause is remanded, with directions to render judgment for the plaintiff.

All the Justices concurring.

(111 Kan. 350)

STATE v. RAY. (No. 23907.)*

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Criminal law §997—Parties present when confession was prepared and signed, or when plea of guilty was entered, held competent to negative statements in affidavit for writ of coram nobis.

In a proceeding coram nobis brought by one who had been sentenced to imprisonment for life on the charge of murder in the first degree, it was claimed that he had been induced to sign a written confession and enter a plea of guilty by reason of beatings administered to him at the hands of police officers and by threats inducing him to fear mob violence. Held, that the testimony of the district judge or of any person who was present at the time the confession was prepared and signed or when the plea of guilty was entered was competent to negative the statements in the affidavit for the writ.

2. Criminal law §997—On application for writ of coram nobis, it is not error to admit petitioner's statement at time of arrest, where inconsistent with his affidavit.

It was not error to admit in evidence statements made by the petitioner at the time of his arrest, which were inconsistent with statements made in his affidavit for the writ.

3. Criminal law §997—Instruction that burden was on petitioner for writ coram nobis, and that if jury found plea of guilty was voluntarily made there was no error in conviction, held proper.

Instructions charging that the evidence regarding the question of his guilt or innocence of the crime charged had been admitted only in so far as it related to the issues in this proceeding, and could not be considered by

the jury for any other purpose, that the burden of proof was upon the petitioner, and that if the jury found from the evidence that the plea of guilty was freely and voluntarily made because of the fact of appellant's guilt, and not because of undue influence, duress, assaults, or threats, then the proceeding before the district court at the time the petitioner was sentenced was correct and orderly, are *held* proper instructions.

4. Criminal law §997—Instruction that burden of proof rested upon petitioner for writ of error coram nobis held proper.

Instructions to the effect that on the face of the record the proceedings were regular, and that the burden of proof rested upon the petitioner, *held* proper.

5. Criminal law §997—On petition for coram nobis after conviction of murder, instruction that petitioner was a competent witness, but jury might consider his interest, held not prejudicial.

An instruction that the appellant was a competent witness and the jury must consider his testimony, but could take into consideration, as affecting his credibility, his interest in the result of the proceeding, is *held* not to have been prejudicial.

Appeal from District Court, Sedgwick County.

Oral A. Ray pleaded guilty to murder and was sentenced to the penitentiary for life, and, after having been confined for three years, he filed in the District Court a motion for writ of coram nobis which is in the nature of a civil action, alleging that his confession was extorted by beatings administered to him at the hands of the officers. The jury's verdict was against the defendant, and in favor of the State, his motion for new trial overruled, and he appeals. Affirmed.

Walter L. Bullock, of Dodge City, and Geo. Jeffery and Chas. B. Hudson, both of Wichita, for appellant.

Richard J. Hopkins, Atty. Gen., and I. N. Williams, J. A. Conly, and S. L. Foulston, all of Wichita, for the State.

PORTER, J. The proceeding is brought under the writ of coram nobis which is in the nature of a civil action.

The appellant, on the 23d day of May, 1918, pleaded guilty in the district court of Sedgwick county to the murder of Clarence Le Clerc, and was sentenced to imprisonment in the state penitentiary for life.

On May 18th, the body of Clarence Le Clerc, with three bullet holes in it, was found in an orchard a few miles from Wichita. The automobile which he had been driving was gone, and the next day the appellant was found at Pratt in possession of the car, which had been repainted. The appellant was brought to Wichita, and on the 21st of

May signed a confession, in substance as follows: He came to Wichita May 17th, from Oklahoma on his way to his home at Ford, Kan. He stayed in Wichita that night, and the next morning went to the garage of the Herman Motor Car Company and asked if they had any used cars for sale; talked to a man who took him in an automobile and demonstrated it; finally began to talk about a Jackson "8" which was painted blue. The man said, "Get in, and we will take a ride." After driving around, they came back to the garage, and appellant said he could not buy such a car, but might trade some oil stock on it, and the salesman said, "Get in, and let us ride some more, and we can talk about it." When they reached the Thomas orchard, appellant pointed a revolver at Le Clerc, told him to stop the car and to get out; held the gun on him all the time. When they got into the orchard, appellant shot him three times, twice in the back and once in the head. Before the shooting, Le Clerc told him if he wanted the car to take it and go with it, but not to kill him. After killing Le Clerc, he got into the car and drove back to Wichita, got gasoline, bought a quart of green paint and a brush, drove out into the country, painted the automobile, then drove west, and later was arrested at Pratt. The confession was signed and sworn to before a notary public. After having been confined in the state penitentiary for three years, he filed in the district court a motion for the writ of coram nobis, supported by an affidavit alleging that he made the confession and entered the plea of guilty by reason of beatings administered to him at the hands of officers and through fear of mob violence.

The issue raised by the writ was tried by a jury, resulting in a verdict against the appellant and in favor of the state. His motion for a new trial was overruled, and he has brought the case here for review, alleging errors in the admission of testimony and in the instructions to the jury.

On the trial of this proceeding the appellant testified that, after he had been placed in jail, the chief of police asked him to confess. His Bertillon measurement was taken, and he was photographed and then taken to the undertaker's room where the body of Le Clerc was. While viewing it the chief said: "You are a brute. You are not human." He was taken to the Thomas orchard with two carloads of officers. An officer swore at him, and said, "You know you done this, and I ought to knock your brains out right here." He was taken back to the city jail. On Monday night two men came in; they wanted a confession; they said to him, "You just as well confess to this, and save trouble." He told them he had nothing to

confess, and they "cussed" him and said if he did not they would beat his brains out, and they struck him with a black-jack and knocked him back on the bed. "Afterwards they came back. This big fellow, he says, 'You have got to confess to this,' and mashed me over the head and knocked me to the floor, put his heel on my neck; slipped down off my skull on my neck, mashed my face into the gravel, skinned my face up; also cut a place on each side of my neck with his heel and hit me in the sides when I hollered." After they had kicked him to keep him from "hollering," they picked him up and laid him on the bed, and told him if he would confess and come right down there they would see he got out in a few minutes. He thought they were telling the truth, and that was the reason he made the confession. After promising to sign a confession, he was not further molested. The next morning he was taken before the chief, who said to him:

"Now I am going to give you all the chance in the world, but," he says, "You know you done this." I told him that I didn't know that I had done it; positive that I didn't do it, but I said: "I have got to confess, I guess, you people are going to kill me if I don't."

His father-in-law testified that on the 23d day of May he came to Wichita with his daughter, wife of the appellant, and witness said to the chief of police:

"You have not treated us people right in this case, you never let us know anything of this case." He says: "I even treated you better than right; if I had not got this confession out of Ray, he would have been killed. There was a mob."

When witness saw the appellant, he could hardly recognize him; his face was swollen; he could not talk; there was a blow on his head, a cut place; the back of his head was swollen. The witness did not learn when the trial would be held. About one week later he learned that the appellant had been sentenced.

The wife and her brother testified that appellant's eyes were swollen, that he had a dent on the right side of his head back of the ear, and that "he was almost beaten to death." Appellant's wife further testified that the chief of police told her she was lucky to have a husband alive and that if they had not made him confess they would have sent him home in a box; that a mob threatened to hang and kill him. She also said that the reason she did not employ a lawyer at that time was because the appellant feared to have her do that.

The judge of the district court testified that, when the appellant was arraigned and asked what plea he wished to enter, he said that he wanted to plead guilty. The judge asked him if he desired an attorney, and he replied something to this effect, "What is

the use of having an attorney?" Mr. Foulston, who was city attorney at the time, testified that he dictated the statement as made to him by the appellant to a stenographer who transcribed it on the typewriter.

The chief of police denied that he had ever said to Mrs. Ray or the defendant that a mob was being formed or that Ray had better plead guilty; that he did not threaten the family of the defendant and did not inflict any punishment on the defendant and had no knowledge of its being done.

One of the police officers in charge of the jail testified that, on Sunday afternoon the officers were attracted to the jail below by noise and pounding; that he went down to find out what it was, and found Ray beating his head against his bed and against the bars of his cell.

The appellant on his cross-examination was asked if it was not true that, when the chief of police first inquired about the killing, he told the chief he did not know anything about it. His answer was:

"Yes.

"Q. You did know about it, didn't you? A. No."

His attention was then directed to his affidavit in this case, and the following questions were asked:

"Q. You did know about it, didn't you? A. I did.

"Q. And you told him you didn't know anything about it? A. I told him I didn't."

The following portion of his affidavit was then read to him:

"On the 17th day of May, 1918, I came from Arkansas City to Wichita, Kan. On the train, coming into Wichita, I met a man who I afterwards learned was R. C. Miller. The next morning I went to a garage where secondhand automobiles were kept for sale and was taken out in a Jackson car by a salesman named C. Le Clerc. As we were driving away from the garage, this man Miller stepped up and got in and rode. We drove across the river over to the Hoover orchard, where Miller told Le Clerc to get out of the car, and they walked back a few feet in the orchard where Miller shot Le Clerc. I started to drive away, but Miller stopped me and said: 'I don't want to hurt you. I will give you a chance to make some money. I have wanted this fellow for some time, and, if you do not do as I bid you, I will do the same to you.'

"Q. Was that true? A. Yes, sir."

The main contention is that the court permitted the original charge of murder to be investigated and tried out before the jury to the prejudice of the appellant. On the other hand, the state contends that only so much of the facts were investigated as tended to show that the appellant had told different stories under oath concerning his knowledge of the crime and his participation

in it. In his affidavit in this case he had sworn that he had seen a man named Miller shoot Le Clerc. The affidavit was part of the application for the writ, and it was competent to introduce it in evidence and to cross-examine the appellant for the purpose of showing his inconsistent statements.

[1, 2] The testimony of the district judge before whom appellant entered his plea of guilty was competent, as was that of the city attorney who dictated to the stenographer the confession from statements made by the appellant. The testimony of any person who was present at the time the confession was prepared and signed or when the plea was entered was competent to negative the statements in appellant's affidavit. The same thing is true of the testimony of the officers who arrested appellant at Pratt. The appellant states in his affidavit that he took the car from Wichita and drove to Pratt under compulsion of another man, who, he says, committed the murder. It was proper to show that when he was arrested he stated that he bought the car at another place and had not been in Wichita for several months.

Complaint is made because the state was permitted to show the regularity of the proceedings in the district court at the time Ray was sentenced, and it is insisted that an issue was thus raised which should have been left to the jury because it was a question of fact. There was no claim in the affidavit for the writ that anything occurred in the courtroom at the time the plea of guilty was entered which was irregular.

[3] We find nothing substantial in the objections to the testimony of Le Clerc's employer and of other witnesses who told of the number of persons they saw in the car when Le Clerc drove away with it or when near the Thomas orchard. In any event, none of this testimony can be said to have been prejudicial. The court carefully protected appellant's rights and instructed that evidence regarding the question of his guilt or innocence had been permitted only in so far as it related to the issues in this proceeding, and could not be considered by the jury for any other purpose, and that the only purpose of the writ was to restore to appellant his rights which existed prior to the plea of guilty, and that in the event this relief should be granted him he would then be placed on trial upon the charge of murder. The instructions, after stating what the records of the court show, properly charged that if the jury found from the evidence that the plea of guilty was freely and voluntarily

made because of the fact of appellant's guilt and not because of undue influence, duress, assaults, or threats, then the proceeding before the district court on May 23, 1918, was correct and orderly, and the defendant was not deprived of any of his rights by the court.

[4] It is complained that it was error to instruct that, upon appellant's announcement of his desire to plead guilty, the district court was not compelled to cause a trial to be had; nor was it necessary that counsel be appointed to defend him. This was no more than an instruction that on the face of the record the proceedings were regular, and the court properly instructed that the burden of proof rested upon the appellant to establish that his confession and plea of guilty had been obtained by threats of bodily harm and under duress as charged in his affidavit.

Complaint is made of the following part of instruction No. 1:

"It is needless to say that the judgment of a court cannot be lightly set aside and that until they are lawfully set aside they are in full force and effect and binding upon all parties thereto. No appeal was taken by the defendant from the judgment of said court, and the defendant is bound by said judgment of said court and must abide thereby, unless under the proceedings had in this action which is now on trial it be determined by the jury that said plea of guilty was entered under such circumstances as to cause the same to be null and void and of no force and effect as further explained in these instructions.

"In other words, the state relies to a certain extent upon the judgment of this court, and the burden of setting aside said judgment and holding the same for naught, in this proceeding, is upon the said Oral Ray."

This is civil proceeding, and we think the instruction correctly states the law.

We discover nothing in instruction No. 4 which contradicts instruction No. 3, or which would, in our opinion, tend to confuse the jury as to the real issues.

[5] The instructions charged that the appellant was a competent witness, and the jury must consider his testimony, but that they could take into consideration, as affecting his credibility, his interest in the result of the proceeding. In view of the character of the proceeding, we do not think it can be said that this was prejudicial, although it did direct particular attention to the testimony of the appellant.

Finding no error in the proceedings, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 338)

BROWN v. UNION PAC. R. CO. (No. 23716.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Master and servant §302(3) — Section foreman's assault on boy on right of way held not actionable.

Plaintiff, a boy 16 years of age, was on defendant's right of way at the invitation of and for the purpose of running an errand for the switch tender when the section foreman called him vile names. At some remark of plaintiff's in reply the foreman became angry, ran after plaintiff, caught him, tried to choke him, and struck him with a broom handle. The switch tender interfered, and the section foreman returned to his hand car. Plaintiff said he was going home, and started to leave, when the foreman got off his car, chased the plaintiff through the right of way fence into a field, through a barbed wire fence a half block away, caught up with him, and assaulted him again. In an action to recover damages from the railroad company, *held*, that plaintiff was not a trespasser on the right of way, but was a licensee, and on the facts stated, *held*, further, that a demurrer was properly sustained to plaintiff's evidence because it is obvious that a candid mind acting normally could not reasonably infer that the foreman, in making the assault and in following up the plaintiff for a half block after he had left the right of way and again assaulting him, supposed he was engaged in an attempt to discharge any duties devolving upon him, or reasonably infer that he was in fact acting within the scope of his employment. *Kemp v. Railway Co.*, 91 Kan. 477, 138 Pac. 621, and cases cited in that opinion.

2. Pleading §126—Answer held to contain negative pregnant, but not one implying that foreman in making attack was acting within scope of his employment.

The petition alleged that one — Larson, whose first name was unknown, the section foreman and an agent and employee of defendant in charge of its tracks and right of way, ordered plaintiff to leave the right of way and struck and beat him, and that while plaintiff was leaving the place and tracks the said Larson, "acting as the agent, servant and employee of defendant, followed after plaintiff, again willfully, wantonly, maliciously, wrongfully and violently struck, cursed, abused and beat plaintiff," etc. The part of the answer, verified under section 110, Civ. Code (Gen. St. 1915, § 7002), denied that defendant "had in its service at the place mentioned * * * any man named Larson, employed as section foreman, agent, servant, or employee." *Held*, a negative pregnant implying an affirmative statement that defendant did have in its employ a section foreman at the time and place mentioned who was in charge of defendant's tracks and right of way, but *held*, further, that it cannot be taken as an affirmative implication that the section foreman, while following up and assaulting plaintiff, was acting within the scope of his employment as such agent.

(Additional Syllabus by Editorial Staff.)

3. Pleading §126—"Negative pregnant" defined.

A "negative pregnant" involves and admits of an affirmative implication, or at least an implication of some kind favorable to the adverse party (citing Words and Phrases, vol. 5, p. 4739).

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Negative pregnant.]

Appeal from District Court, Wyandotte County.

Action by Lee Brown, a minor, by his mother as next friend, against the Union Pacific Railroad Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

J. H. Brady, T. F. Rallsback, and Wm. H. McHale, Jr., all of Kansas City, for appellant.

A. L. Berger, of Kansas City, and R. W. Blair, T. M. Lillard, and O. B. Eldson, all of Topeka, for appellee.

PORTER, J. The appeal is from a judgment sustaining a demurrer to plaintiff's evidence. The petition alleged that the plaintiff who was 16 years of age, was assaulted by a section foreman by the name of Larson, an agent and employee of defendant in charge of its tracks and right of way near Twenty-Second street in Kansas City; that the section foreman ordered plaintiff to leave the right of way and struck, cursed and abused him because he did not immediately comply, and, when he started to leave, followed and assaulted him a second time.

The answer consisted of a general denial, a defense that plaintiff was a trespasser, and that only such force as was reasonably necessary to put him off the right of way was used. As a further defense it was denied under oath that defendant had in its service at the time mentioned any man named Larson, employed as a section foreman, agent, servant, or employee.

Plaintiff testified that he lived with his parents a short distance from where the assault occurred; that Johnson, the switch tender, called him to come over there to do an errand for him; he had often run errands for the employees of the defendant. On this occasion he was standing near the switch shanty when a section crew came up on a hand car under Larson, the foreman. He had known Larson about two years and had seen him giving orders about the repair work. Larson engaged in a conversation with the switch tender, but spoke of the plaintiff, calling him vile and unspeakable names. Plaintiff replied:

"I am no more of those names than you are. You don't look any better than the rest of them along here."

This caused the foreman to "fly up in the air," and plaintiff ran away; the foreman followed him, caught him, and tried to choke him. Plaintiff ran and picked up a broom handle and tried to strike the foreman with it, but the latter took it and hit him across the back and shoulder. Plaintiff ran to where the switch tender was, who said:

"You will have to quit fighting as long as I am tending switches here."

Plaintiff then said he was going home to put on another shirt, as the one he had was torn, and started to walk along the tracks, when the foreman came towards him, and plaintiff ran through the right of way fence into a field, then turned east to Twenty-Second street, where he had to go through a barbed wire fence, and the foreman caught up with him about 25 feet north of the defendant's tracks and beat him severely. Plaintiff finally broke loose and started home. The foreman went back to the right of way, got a piece of iron about a foot long, and threw it at the plaintiff. In his cross-examination plaintiff testified:

"Q. Did you say anything to this man Larson (the foreman) except what you told us now? A. No, sir.

"Q. Before he started to choke you, had you refused to get off the track? A. No, sir; he never even ordered me to get off the track.

"Q. He just started in without saying anything? A. Yes, sir."

The theory of the defense is predicated upon a number of decisions in somewhat similar cases. The rule is stated in *Kemp v. Railway Co.*, 91 Kan. 477, 138 Pac. 621:

"An employer may be held liable for the wrongful acts of his employee done in the scope of his employment. * * * If done solely to accomplish the employee's own purpose or device, although in an interval of his regular service, the employer is not liable." Syl. par. 2.

In that case the trial court overruled a demurrer to the evidence which presented the question whether upon the facts the railroad company was liable for the wrongful act of its brakeman in firing a shot which killed a trespasser—one of two young men who were riding from station to station on a freight train without paying fare. They had gotten off at a station about 10 o'clock at night intending to board the train again. As they stood near the train, a brakeman got a revolver from the baggage car, started towards them, and with an oath ordered them to get "out of there." The young men ran up the bank out of the cut in which the train was standing, which was from 10 to 20 feet from the car and about 10 feet high. On reaching the top of the bank, one of them shouted, "Go to hell!" The brakeman said, "What's that?" climbed up the bank, ran after them, and fired the fatal shot. The evidence showed that it was the duty of the brakeman to keep

trespassers, including those who attempted to ride without paying fare, away from the train, and that he had authority to use force if it was necessary. It was held in the opinion that, in order to fix liability upon the employer, it is not sufficient that the employment afforded the opportunity to do the wrong, or that it was done during the employment, but it must be done in the course or within the scope of the employment.

The opinion distinguishes between acts done by the servant in pursuit of his own ends, although done in the time covered by his employment, and those done in pursuance of his duty in the course of his employment, and quotes as follows from 1 Thompson's *Commentaries on the Law of Negligence*, § 526:

"If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities."

Also from *Wood's Master and Servant* (2d Ed.) § 307, as follows:

"The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business; but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him."

The judgment was reversed with directions to enter judgment for defendant because, as stated in the opinion:

"After careful consideration we are constrained to hold that a candid mind acting normally could not reasonably infer from the facts presented in this record that the brakeman supposed or believed that these men fleeing as they were away from the train just about to start on its way, intended to suddenly turn back and board it. The fact that they were upon an embankment of considerable height and the train in the cut below between 40 and 50 feet distant, and that their assailant not only climbed the bank but still pursued and fired while they were in flight, not toward, but away from the train, precludes a person whose mind is acting fairly and impartially from believing that the brakeman was acting within the scope of his employment when he fired the shot." 91 Kan. 483, 138 Pac. 623.

Other cases which support the same doctrine and which are reviewed in the case just cited are: *Hudson v. M., K. & T. Ry. Co.*, 16 Kan. 470; *Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366; *Orelly v. Telephone Co.*, 84 Kan. 19, 113 Pac. 386, 83 L. R. A. (N. S.) 328.

[1] The evidence of the plaintiff in this case shows that he was not a trespasser. He was invited on the premises by the switch tender. He had been accustomed to running errands for the employees of the defendant. As is said in the plaintiff's brief, "going to

the store for them and getting his mother to fix up lunches for them, and they paid him for so doing. On the very day of the assault, while he was crossing the tracks on his way home, the switch tender called him and sent him on an errand." The plaintiff was not a trespasser on the right of way; he was at least a licensee. The plaintiff's evidence shows that he had not refused to get off the track before the foreman started to choke him. Up to that time the foreman had not even ordered him to get off the track, but started to commit the assault without saying anything. Upon the doctrine of the *Kemp Case*, supra, and other decisions cited, the demurrer was rightly sustained for the reason that it is obvious that a candid mind acting normally could not reasonably infer from the facts stated in the plaintiff's testimony that Larson in making the assault, and in following up the plaintiff for a half block after he had left the right of way and again assaulting him, supposed or believed that he was engaged in an attempt to discharge any duties devolving upon him, or that the foreman was in fact acting within the scope of his employment while assaulting the plaintiff.

[2] The plaintiff contends that it was error to sustain the demurrer because of the state of the pleadings; it is insisted that the averments of the petition respecting the authority of the section foreman must, by virtue of section 110, Civil Code (Gen. St. 1915, § 7002), be taken as true because there was no verified denial of his authority in the answer. The petition alleges:

"One . . . Larson, whose first name is unknown, the section foreman, and an agent, servant, and employee of the defendant, in charge of the defendant's tracks and right of way at said point, ordered this plaintiff to leave said building and right of way, of the defendant, and struck and beat," etc.

"While this plaintiff was thus proceeding down said tracks, the said Larson, acting as the agent, servant, and employee of the defendant, following after this plaintiff, again willfully, wantonly, maliciously, wrongfully, and violently struck, cursed, beat, and abused this plaintiff, striking him with a club and forcibly ejecting him from the premises of the defendant, and inflicting upon him the following injuries, to wit."

The verified denial is a restricted one and reads:

"For a third and further defense this defendant denies that it had in its service at the time and place mentioned in said petition any man named Larson employed as section foreman, agent, servant, or employee."

[3] The plaintiff contends that this is nothing more than a negative pregnant which implies an affirmative statement that the defendant did have in its employ a section foreman, agent, servant, and employee at the time and place mentioned who was in charge

of the defendant's tracks and right of way, and that such foreman, whether his name was Larson or not, "acting as the agent, servant and employee of the defendant, again willfully, wantonly, maliciously, wrongfully, and violently struck, beat, and abused this plaintiff," etc.

"A negative pregnant involves and admits of an affirmative implication, or at least an implication of some kind favorable to the adverse party." Words and Phrases, vol. 5, p. 4739.

It may be conceded that plaintiff's contention is true to the extent that the language of the verified part of the answer must be considered as an admission or affirmation that the person who made the assault was an agent, servant, and employee in charge of defendant's tracks and right of way. We do not believe, however, that it can be taken as an affirmative implication that the section foreman, while following up and assaulting plaintiff, was acting within the scope of his employment as such agent. It would require the most technical application of formal rules of pleading to give to the verified answer such an interpretation. Besides, the question whether the section foreman in assaulting the plaintiff was acting within the scope of his employment was on the petition itself a question of law; it was still a question of law when the demurrer was interposed to the evidence.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 320)

GRAVES v. O'BRIEN et al. (No. 24075.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Contracts \S 99(3)—Evidence held to prove that conveyance and execution of notes and contract was induced by fraud and duress.

The plaintiff brought an action to set aside a conveyance, to cancel certain notes and a mortgage, also another agreement upon the ground that he had been put in fear and compelled to execute them under duress excited by threats of prosecution and imprisonment, for an alleged offense, when in fact the act charged against him was not an offense. The relief asked was granted, and it is held that the evidence is sufficient to show the fraud of the defendants participating in the transaction, that duress was established, and that the plaintiff was entitled to the relief given.

2. Contracts \S 268—Plaintiff, induced to convey and execute notes and mortgage by duress, held not barred from relief on ground that parties were equally at fault.

Held, further that plaintiff was not barred from the relief asked on the ground that the

parties were equally at fault in the illegal agreements, nor because he yielded to the demands of the defendants.

3. Contracts §95(5)—Duress.

A case of duress is made out where one party is compelled to make agreements through fear of prosecution and imprisonment excited by the threats of other parties to the agreements.

4. Contracts §266(1)—Plaintiff, who had received nothing of value in fraudulent transaction, held not barred from relief on ground that he did not offer to restore that which he had received.

Under the circumstances shown to have existed the plaintiff could not be denied relief on the ground that he had not offered to restore that which he had received in the fraudulent transaction, and in fact nothing of value had been so received.

5. Husband and wife §221—Wife, who took no part in fraudulent transaction, not a necessary party in husband's action to compel reconveyance of land, and to cancel notes and a contract on account of duress.

The wife of the plaintiff was not a necessary party in the action brought.

6. Banks and banking §112—Bank held responsible for fraudulent acts of cashier.

The notes and a mortgage were procured to be given through the active fraud of its cashier. As he was acting for the bank, and as the bank received and appropriated the fruits of the fraudulent transaction, it is responsible for the fraud.

7. Bills and notes §525—In action to cancel notes for fraud, bank holder of notes held not holder in due course.

Under the evidence the bank to which the notes and mortgage were indorsed and transferred by the payee bank is not a holder in due course.

(Additional Syllabus by Editorial Staff.)

8. Bills and notes §497(5)—Transferee of party shown to have procured notes by fraud had burden of proving itself a holder in due course.

In an action to cancel notes shown to have been fraudulently procured by transferor of defendant bank, holder of the notes, the bank had the burden of proving itself a holder in due course.

Appeal from District Court, Clay County.

Action by John W. Graves against Harry O'Brien and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. T. Roche and Geo. L. Davis, both of Clay Center, and A. E. Crane, of Topeka, for appellants.

C. Vincent Jones and R. C. Miller, both of Clay Center, for appellee.

JOHNSTON, C. J. This was an action to compel the reconveyance of certain real es-

tate, the cancellation and surrender of promissory notes, and of a mortgage given as security for the notes, and to cancel an agreement, all executed by the plaintiff through the alleged fraud and duress of the defendants. Plaintiff also asked that defendants be enjoined from transferring the property pending the action, and that, in case the relief asked could not be granted, he recover the actual damages sustained through the fraud and duress of the defendants. Judgment was given for plaintiff, and defendants appeal.

Upon the evidence, about which there is practically no dispute, the court made elaborate findings of fact. A summary of the special findings and undisputed evidence is that John W. Graves is a farmer about 73 years of age, who had reared a family of seven children, five of whom are still living, and one of whom is his daughter, Laura A. Reid, who is married to Frank M. Reid. Plaintiff's first wife and the mother of his children died in 1908. He resides on a farm near Clifton in Washington county, and had transacted all of his banking business with the Citizens' State Bank of Clifton. Harry O'Brien is the cashier of that bank, and plaintiff had great confidence in him, and trusted him to look after, not only his banking business, but also to advise him in his personal affairs, and he had also entrusted him with the drawing up of practically all of his legal papers. On February 27th, just before going on a journey to Arkansas to be married, he had prepared a deed, purporting to convey the legal title of 120 acres of land to his daughter Laura, in which he reserved the life estate in himself, but he did not sign or acknowledge the instrument at that time. On March 2, 1918, he was married to Allie Johnson, in Arkansas, and returned with her to his home near Clifton on March 4, 1918. She lived with him only about seven weeks and then returned to her former home in Arkansas, and since that time she and plaintiff have not lived together as husband and wife.

Within a week after plaintiff returned from Arkansas with his wife, he took the deed formerly prepared, conveying the land to his daughter, and signed and acknowledged the instrument before O'Brien, who was a notary public, and O'Brien took charge of the instrument and filed it for record. While the acknowledgment was dated March 2, 1918, it was not in fact made on that day, but was made after the return of plaintiff from Arkansas, and some time between the 4th and 11th of March, 1918. The plaintiff did not direct the antedating of the acknowledgment, but it was done by O'Brien without the knowledge of plaintiff. This juggling of dates was subsequently used to terrorize the plaintiff, on the theory that the change of dates constituted a crime, and that plaintiff

could only avoid imprisonment in the penitentiary by the execution of the instruments involved in this action. Plaintiff had a disagreement with Frank M. Reid as to some alfalfa and silage grown on one of his farms.

It was shown and found that on February 7, 1919, Frank M. Reid was indebted to the Citizens' State Bank in the sum of \$3,130.05, and also before that time the bank commissioner had ordered the bank to reduce this indebtedness. At that time Reid was unable to pay the indebtedness, and was practically insolvent. On February 7, 1919, O'Brien telephoned to Elmer Graves, a son of plaintiff, to bring his father to the bank to attend to a business matter, and in response to the call plaintiff and his son went to the bank, arriving there about 2 p. m. O'Brien invited them into a private room of the bank, and then informed them that Frank M. Reid had called at the bank that morning, and had said to O'Brien that he had learned of the wrongful dating of the acknowledgment on the deed, that the dating back was a penitentiary offense, and that he intended to institute a prosecution against plaintiff and O'Brien for the crime. He had further stated that he had already employed two of the best lawyers in the state to conduct the prosecution, and had arranged with plaintiff's wife in Arkansas that she would send a lawyer to co-operate with the Kansas lawyers in sending O'Brien and the plaintiff to the penitentiary unless the plaintiff would settle on the terms proposed by Reid. O'Brien professed to plaintiff to be greatly excited about the danger he and plaintiff were in on account of the purposes and threats of Reid, and because of these threats and the apparent excitement of O'Brien plaintiff too became agitated and fearful that he might be sent to the penitentiary. By reason of the confidence he had in the honor and integrity of O'Brien he strongly relied on his advice and judgment, and when he told the plaintiff that an offense had been committed, which made them liable to imprisonment, he believed him, although plaintiff did not know until that time that the acknowledgment had been dated back, nor did he know that such an act was a violation of law, and a penitentiary offense. During the interview an attendant knocked at the door of the room, and, upon being admitted, informed O'Brien that Reid was in the bank and wished to see him. O'Brien told the attendant to show Reid in. When Reid entered he assumed an angry attitude, slammed his hat and coat on the floor of the room, advanced in front of plaintiff, shook his fists in his face, and said, in substance, that he was there for blood and a fight to the finish, and if plaintiff did not settle with him on his terms he would send plaintiff and O'Brien to the penitentiary. He said that he had lawyers employed, and they would be there in a few hours if plaintiff did not make the proposed settle-

ment. Because of the statements and threats plaintiff was put in great fear, and was led to believe that he would be put in prison if he did not settle. Reid then left the room, whereupon O'Brien advised plaintiff that Reid be brought back and asked the terms upon which a settlement could be made. O'Brien then left the room and soon returned, saying he had found Reid in a long distance booth of the telephone office, talking to some one in Atchison, and while he could not hear the conversation, he thought that he was talking with Atchison lawyers, and he then insisted that plaintiff had better settle with Reid. Soon Reid returned to the conference, and O'Brien then asked him to state his terms of settlement. Reid replied that if plaintiff would accept his terms there would be no prosecution, and the terms stated were that plaintiff should take up Reid's indebtedness at the bank of \$3,130.05, make a deed conveying to Laura A. Reid the farm of 120 acres, deliver certain named quantities of alfalfa and silage, give him a lease for a year of a tract of alfalfa land on terms that were named, and plaintiff, laboring under fear and duress, and under the advice of O'Brien, agreed to accept Reid's terms. It was then too late to complete the papers, as the conference had lasted from 2 p. m. until dark and it was arranged that plaintiff should return the next morning to execute them. When he returned a deed to the farm that had been prepared was signed and acknowledged before O'Brien, and was left with him for delivery, two notes were executed by plaintiff to the bank, one for \$1,630.05 and the other for \$1,500, both payable one year after date with interest at the rate of 6 per cent. payable semiannually. A mortgage upon a farm of plaintiff was given to secure the payment of the notes, but by reason of his excitement and duress, plaintiff did not know that he had signed the mortgage until September 12, 1919. Another paper was executed by him, and the Reids, called "final settlement agreement," which recited that plaintiff was desirous of making full and final settlement with Laura A. Reid as to any estate that he might leave, and it was stipulated that in consideration of \$3,130.05, paid by plaintiff, the delivery of 2 tons of alfalfa and 12 loads of silage, a lease on alfalfa land, Laura A. Reid released and relinquished forever all claims she might have in plaintiff's estate, and that Frank M. Reid would drop all differences he had with plaintiff. All these papers were acknowledged before O'Brien. At this time plaintiff did not owe either of the Reids anything, and he did not receive any consideration from either of them for the obligations and instruments which he was fraudulently induced to sign. It was found that all were signed when he was unable to exercise his free will; that he was in a state of terror by reason of the threats that had been made, and led to be-

Heve that he could only escape imprisonment in the penitentiary by settling upon the terms proposed. After the bank got the notes and mortgage, and on September 15, 1919, O'Brien indorsed and delivered them to the Union State Bank of Clay Center, which gave the Citizens' State Bank a credit upon its books for \$3,130.05. The Citizens' State Bank never checked against the credit thus given in the Union State Bank, and the latter has never paid anything out of that fund, but the amount still stands there to the credit of the Citizens' State Bank. Before indorsing and delivering the notes to the Union State Bank, O'Brien made an indorsement of the payment of six months' interest on the notes, and this was done without any payment having been made, and without the direction or knowledge of the plaintiff. He did not know that the interest payment had been made or the amount charged to his account until after the commencement of the action.

The action was begun on September 24, 1919, and summons was served on that day on the Union State Bank and other defendants, notifying them of the fraud and duress charged and of the relief demanded. Some other findings were made by the court as to the rental value of the land transferred, the life expectancy of plaintiff, and the value of the life estate of plaintiff in the land conveyed to his daughter. Plaintiff did not consult with counsel as to his rights or as to whether the antedating of the acknowledgment constituted a public offense, and during all the intervening time he had labored under the belief that he and O'Brien had committed a public offense and was under the fear and duress by reason of the statements and threats made to him by Reid and O'Brien. As the Reids were attempting to sell the land conveyed, an order of injunction was made, restraining them from disposing of it. It was further found that the Union State Bank was not a holder in due course of the notes transferred to it, and that they are still in the possession of that bank. The court concluded and adjudged that within 10 days the Reids should reconvey the land in question to plaintiff, that the Union State Bank should surrender into court the notes, together with the mortgage, with a release of the mortgage, that the final settlement agreement should be surrendered for cancellation, and that by reason of the fraud and duress the notes, mortgage, and agreements should be canceled. It was also adjudged that plaintiff recover from the Reids, O'Brien, and the Citizens' State Bank a judgment for \$1,600, the value of the use of the land since the deed was executed, and for the further sum of \$93.90 for the interest payments which had been charged to plaintiff's account in the bank.

[1] One contention of the defendants is

that the evidence does not warrant a recovery by the plaintiff. The recital of the facts, only the substance of which has been given, reveals a cunningly devised plan to defraud the unsophisticated plaintiff by the Reids, the Citizens' State Bank, and its cashier, O'Brien. They were actuated by different motives, and were seeking to accomplish different results, but used the same culpable means of securing them. The Reids sought to obtain the payment of a debt of Frank M. Reid to the bank, and the full title, including a life estate in a valuable tract of land, as well as some other advantages of less value. The Citizens' State Bank and O'Brien connived to secure the payment of an indebtedness to the bank of Frank M. Reid, who was insolvent. The loan made to him by the bank was in excess of the prescribed limitation, and the bank commissioner had brought pressure upon it to reduce that indebtedness, and it undertook to do so by the unconscionable means already stated. These parties seized upon the circumstance of the antedating of the acknowledgment to frighten the plaintiff into the belief that he had committed a crime and could only escape imprisonment in the penitentiary by yielding to their demands for the conveyance of the land to Mrs. Reid, the payment of the obligations of Mr. Reid, and giving him other property and benefits, and also to relieve the bank from its embarrassment by compelling plaintiff to pay an obligation which it held against an insolvent debtor. It may be said that not many would have been so easily lured into the baited trap that was set for plaintiff, but it appears that he was ignorant of the law relating to the conveyance of real estate, the acknowledgment of instruments by an officer, and the penalty prescribed for false certificates in the acknowledgment of instruments of conveyance. Besides he had full confidence in the intelligence, fidelity, and honesty of O'Brien, who had been his trusted advisor in business matters for years. When O'Brien advised him that the law had been violated and that both were subject to imprisonment for the false statement as to dates in the acknowledgment, he naturally accepted his statements as true, and believed that he was giving him honest advice. The pretended excitement and distress of O'Brien because of the imminent peril that both might be sent to the penitentiary if plaintiff did not appease Reid and comply with his demands were well calculated to intimidate plaintiff and deprive him of his free will and that state of mind essential to the making of a valid contract. The evidence abundantly establishes the threats of Reid, the co-operation of O'Brien, the bank and Reid in the fraudulent scheme, and it is worthy of remark that no one of these parties denied the statements made by the plaintiff in his tes-

timony, or offered any testimony in explanation or exculpation of the frauds and wrongs offered in evidence by the plaintiff.

[2] There is a contention by defendants that the untruthful statements in the acknowledgment was a public offense, that plaintiff was equally guilty with O'Brien, the bank, and Reid in concealing the crime through the making of the illegal contracts, and that, plaintiff's hands not being clean, he has no right to set aside the illegal contracts, or to ask the aid of a court of justice in vacating or enforcing any of the illegal acts. The contention is not tenable. The parties are not, as defendants contend, in *pari delicto*. The statute does provide that any one taking an acknowledgment, who willfully certifies that a conveyance was proved when no proof was made, or certifies falsely as to any material matter contained in a certificate of acknowledgment, shall upon conviction be adjudged guilty of forgery in the second degree. Gen. Stat. 1915, § 3500. O'Brien, who placed the false statement as to dates in the certificate, may be liable to prosecution and punishment under the statute, if the act was done willfully, but the plaintiff had no part in making the false statement, and, according to the testimony and findings, had no knowledge that a wrong date had been placed in the certificate until the time that he was terrorized and coerced into the execution of the written instruments. He was not on equal footing with the defendants, as he had not in fact committed a crime. Neither can the rule invoked that he should be denied relief because of the compounding or concealment of crime. The agreements made were not for any profits to plaintiff, but were extorted from him by overcoming his will. That which was done by him was without his consent. The agreements, having been made without his consent, were nullities, and therefore it may be said that he had done nothing. The rule invoked by defendants can have no application to the circumstances of the case, and under the facts proven it is clearly within the power and duty of a court of equity to declare the contracts void and grant the relief asked.

[3] There is a further contention that actual duress was not shown because the plaintiff was in possession of his faculties, was accompanied by an adult son, and was free to leave the bank at any time while the pressure upon him was exerted. The threat that he would be arrested and imprisoned and the consequent disgrace was sufficient to put him in fear and lead him to act contrary to his will and inclination. A case of duress is made out where there is a fear of prosecution or imprisonment, excited by threats. In *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803, it was held:

"Written securities, extorted by means of threats of prosecution for criminal offenses of

which the party threatened was guilty in fact, but which were in no manner connected with the demand for which compensation was sought, may be avoided by the parties executing them, not only in the hands of the original payee, but of his assignees having notice of the circumstances under which such securities were taken." Syl. 1.

In *Williamson v. Ackerman*, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484, it was held that where a father was coerced into executing a mortgage to secure the payment of the defalcation of his son by reason of the threats and prosecution of the son for embezzlement, which amounted to duress, it would avoid the mortgage. It was held that the test in determining whether there was duress was not so much the means by which the father was compelled to execute the mortgage as it was the state of mind induced by the means employed, the fear which made it impossible for him to exercise his own free will. It was further held that if the threats deprived the father of his free will, the actual guilt or innocence of the son upon the criminal charge was not a material question in determining whether there was duress.

[4] There is nothing substantial in the contention that plaintiff did not restore, or offer to restore, that which he had received in the transaction. He had nothing of consequence to restore. It was a one-sided transaction in which all the benefits went to the defendants. The plaintiff did receive the final settlement agreement, which, as we have seen, is a void instrument. Those who prepared it evidently had some misgivings as to the adequacy of the consideration, for the deeds, notes, and mortgage, and compelled the plaintiff to sign this agreement, reciting as a consideration that Laura A. Reid had agreed to relinquish all her rights in the estate of the plaintiff. She had no claims against him, and no mention was made of the surrender of rights of inheritance. There was no purpose to subserve in tendering back the agreement, as the plaintiff had brought it into court, and had asked to have its validity determined.

[5] Nor is there any good ground for the complaint that Allie Johnson, to whom plaintiff had been married, was not made a party. She had taken no part in the transaction, and was not concerned with the question of fraud in litigation nor with the relief asked. She was in no sense a necessary party.

[6] It is further argued that the Citizens' State Bank should not be held responsible for the fraud perpetrated by the cashier. He acted for the bank, and it did not disavow his act in either pleading or evidence, but took the fruits of the fraud, and is still insisting that it is entitled to them. It was sufficiently shown that O'Brien was acting for that institution, and that the bank cooperated with Reids and O'Brien in the extortion.

[7, 8] It is further argued that the Union State Bank is a holder in due course. When the transfer was made a credit was given the Citizens' State Bank, but no checks were ever drawn by it, and it was the manifest intention that none should be drawn. The notes and mortgage, as well as the money represented by them, were still in the hands of the Union State Bank when the action was begun and the fraud in the transaction had been fully revealed. When it was shown that the notes had been fraudulently procured, and that the title of the Citizens' State Bank that negotiated the notes was defective, the burden was shifted to the Union State Bank to prove that it was the holder in due course. This burden was not met by the Union State Bank. We think the court was warranted in finding from the evidence that the bank was not a holder in due course. *Ireland v. Shore*, 91 Kan. 328, 137 Pac. 926; *Bank v. Bank*, 100 Kan. 194, 164 Pac. 137.

Some other exceptions are mentioned by defendants, but we find nothing in them that is material, or which requires special comment. The judgment rendered was within the power of the trial court, was well supported by the evidence, and its judgment is affirmed.

All the Justices concurring.

(111 Kan. 267)

KASPER v. KANSAS CITY, L. & W. RY. CO.
(No. 23718.)*

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Commerce \S 27(1) — Interurban railway held not engaged in "interstate commerce" within federal Safety Appliance Act.

An interurban railway company which confines its business to transportation of passengers and goods from place to place within the state, but which rents its cars and transfers its employes to the service of a street railway company for street car traffic in Kansas City, Kan., and Kansas City, Mo., located contiguously on opposite sides of the Kansas-Missouri state line, is not engaged in the sort of "interstate commerce" which is governed by the federal Safety Appliance Act (U. S. Comp. St. \S 8605 et seq.).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. Master and servant \S 250—Whether action is under federal or state law, substantially similar, immaterial.

In an action for damages to an injured employe against an interurban railway company which confines its business to intrastate traffic, except as that traffic may be altered or qualified by the loan of its cars and employes to another company for street railway service

operated across a state line, it is immaterial whether such action be brought under the state law or the federal Employers' Liability Act (U. S. Comp. St. \S 8657-8665), where the state and federal acts are substantially similar in test and effect, following *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 38 Sup. Ct. 252, 60 L. Ed. 520.

3. Master and servant \S 250(1)—Employe's transfer to other employer dependent on employe's knowledge of transfer.

Where the services of an employe have been transferred by his master to another master, the question whether the employe should look to his own master or to his special master for compensation or damages for injuries depends upon whether or not the employe knew or should have known that his services were thus transferred, following *King v. Atchison, T. & S. F. R. Co.*, 108 Kan. 373, 195 Pac. 622.

Appeal from District Court, Wyandotte County.

Action by Joseph G. Kasper against the Kansas City, Leavenworth & Western Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

McCabe Moore and Warner, Dean, Langworthy, Thomson & Borders, all of Kansas City, Mo., for appellant.

Herrod & Roberts, of Kansas City, Kan., for appellee.

DAWSON, J. This was an action by a motorman against an interurban railway company for injuries sustained because of an alleged defective brake equipment on the defendant's car operated by plaintiff. The action was brought under the federal Safety Appliance Act (U. S. Comp. St. \S 8605 et seq.) and under the federal Employers' Liability Act (U. S. Comp. St. \S 8657-8665); and it is defendant's contention that the defendant was not engaged in interstate commerce, and consequently that neither of these acts had anything to do with the rights and liabilities of the litigants in the matter in controversy.

The defendant is a Kansas corporation having a line of electrically operated railway from Ft. Leavenworth, Kan., to Kansas City, Kan. It does not profess nor hold itself out to do an interstate business. It sells tickets only from station to station in Kansas. By a contract with a street railway company doing business in Kansas City, Kan., and Kansas City, Mo., there is an arrangement whereby the defendant's interurban cars, at the end of each run on the defendant's railway from Ft. Leavenworth to Kansas City, Kan., become street cars for street car traffic to the center of Kansas City, Mo., and return, and such cars then resume their interurban service between Kansas City and Ft. Leavenworth. Under this arrangement, when the interurban cars are

performing this street railway service, street car fares are charged and collected as in ordinary street cars, and the earnings for street railway service are divided between the street railway company and the defendant company according to an agreement between them. In this street railway service, also, the motorman and conductor of the interurban company who make the run to and from Leavenworth continue in charge of the car, as employes of the street railway company, to and from Kansas City, Mo. They receive their instructions from the latter company, and this feature of the traffic is governed to some extent by city ordinances.

The accident which led to plaintiff's injury occurred on the intercity viaduct on the street-railway tracks. Plaintiff says the air brake equipment was defective, that it would not pump air, and that it failed to maintain pressure, and that this defect caused his car to collide with one in front of it and injured him. The defendant offered evidence tending to show that the plaintiff's injury was caused solely by his own negligence or that he was guilty of contributory negligence, which would have barred or minimized a recovery if the jury gave it credence; but the trial court held that the federal Safety Appliance Act governed the traffic, and that a violation of that act barred the defense of contributory negligence otherwise available under the federal Employers' Liability Act. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125.

[1] We do not think the federal Safety Appliance Act had anything to do with this case. The defendant was not doing an interstate business—at least, not the sort of interstate business governed by that act. The pertinent provision of the federal Safety Appliance statute reads:

"* * * The provisions and requirements [of the acts of March 2, 1893, and April 1, 1896] * * * shall be held to apply to all * * * cars * * * engaged in interstate commerce * * * excepting those * * * which are used upon street railways." Act of March 2, 1903, 32 Stat. 943 (section 8613, U. S. Comp. Stat.).

The case of *Spokane & I. E. R. Co. v. U. S.*, 241 U. S. 344, 36 Sup. Ct. 668, 60 L. Ed. 1037, is cited and relied on to sustain the ruling of the trial court. In that case an interurban railway company doing an interstate business between Spokane, Wash., and Coeur d'Alene, Idaho, was prosecuted for non-compliance with the federal Safety Appliance Act. It claimed that its transportation business was exempt from the regulations of the act by the terms of the exception relating to street railways, because, in addition to its interstate business, its cars were "used on street railways." The Supreme Court disapproved that contention. We think the case is not in point, or, rather, that it is

helpful in reaching an opposite conclusion in the case at bar. The Spokane company was undeniably and principally engaged in interstate commerce, and it was not relieved from the control of the federal Safety Appliance Act merely because its cars were also used on a street railway. But here, conversely, the defendant was exclusively engaged in intrastate commerce, except possibly where its cars were used in street railway service, and consequently its transportation business was not governed by the federal Safety Appliance Act. *United States v. Geddes*, 131 Fed. 452, 65 C. O. A. 320; *United States v. Geddes* (D. C.) 180 Fed. 480.

Whether the defendant's business was interstate commerce of any sort so as to subject the defendant to the control of the federal Employers' Liability Act is a much closer question. Street railway service between Kansas City, Kan., and the adjacent town of Kansas City, Mo., is, of course, a sort of interstate commerce—a transportation business across a state line—but it is not the sort of interstate commerce with which Congress ordinarily concerns itself.

In *Omaha & C. B. Street R. Co. v. Inters. Com. Com.*, 230 U. S. 324, 336, 33 Sup. Ct. 890, 891, 57 L. Ed. 1501, 1506 (46 L. R. A. [N. S.] 385), the Supreme Court said:

"Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.'"

In *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51, 36 Sup. Ct. 252, 60 L. Ed. 520, the Supreme Court intimated that, under the then existing traffic arrangements between this company's predecessor and the street railway in the two Kansas Cities (an arrangement now substantially changed), the business of defendant was regulated by Congress, but did not find it necessary to decide the question positively, for the obvious reason that the federal and state statutes were so similar in terms and effect that defendant's liability to its injured employe was the same whether the action should have been brought under the Kansas statute (Gen. Stat. 1915, § 8480 et seq.) or under the federal Employers' Liability Act (Act of April 22, 1908, and amendments of April 5, 1910, Comp. Stat. § 8657 et seq.).

[2] And so here. It can lead to no conceiv-

able difference whether the cause is tried under the state statute or under the federal Employers' Liability Act, so long as it is made clear that the action is not governed by the federal Safety Appliance Act. *Rockhold v. Railway Co.*, 97 Kan. 715, 720, 156 Pac. 775; *Defenbaugh v. Railroad Co.*, 102 Kan. 569, 171 Pac. 647.

[3] In view of this conclusion, some matters argued by counsel need no discussion, but one other point should be noted. If the plaintiff did not know of the renting of the defendant's cars to the street railway company and that his services were transferred to the latter during the time the cars were being used in street railway service, the plaintiff had a right to continue to look to the defendant for his damages if he was entitled thereto (*King v. Atchison, T. & S. F. R. Co.*, 108 Kan. 373, 195 Pac. 622), otherwise he should look to his special employer for the time being (1 *Labatt's Master and Servant* [2d Ed.] § 52 et seq.; note in 37 L. R. A. 33 et seq.; and see, also, *Behen v. Street Railway Co.*, 85 Kan. 491, 496, 118 Pac. 73, Ann. Cas. 1913A, 828). From the record here, this court is unable to say whether plaintiff was so apprised or not. If this cause is not otherwise determined, this question should be given due consideration in another trial.

Judgment reversed, and cause remanded for a new trial.

All the Justices concurring.

(111 Kan. 225)

HILL et al. v. NORTH RIVER INS. CO.
(No. 23531.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

Insurance § 425.—Contract to protect automobile dealer against "theft, robbery or pilferage" held to protect against swindler.

Under a contract of insurance issued to protect a dealer in automobiles against "theft, robbery or pilferage," the act of a swindler who deprived the insured of an automobile by means of a preconceived plan which involved impersonation, misrepresentation, and fraud was a species of "theft" for which the insurance company was liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Theft.]

Appeal from District Court, Cowley County.

Action by Emmett H. Hill and another, doing business as the Hill-Howard Motor Company, against the North River Insurance Company. Judgment for plaintiffs, and the defendant appeals. Affirmed.

Ellis Fink, of Winfield, and C. C. Crow, of Kansas City, Mo., for appellant.

W. L. Cunningham, of Arkansas City, for appellees.

DAWSON, J. The question in this case is whether the holder of an insurance policy "against theft, robbery or pilferage" of his automobile may recover on such policy in a case where he was deprived of his car by a preconceived scheme of impersonation, misrepresentation, and fraud. The facts were as follows:

A reputable mechanic in Arkansas City named Ben Cole, who was a member of the Boilermakers' Union, employed by the Santa Fé Railway, and who had money in the bank, was robbed of his union card and bank check book by a rogue named Montgomery, who afterwards appeared at the plaintiff's place of business. Plaintiff was engaged in selling automobiles on easy payments to Santa Fé workmen. Montgomery pretended that he was Ben Cole, and said he desired to purchase an automobile on periodical payments. He gave his name as Ben Cole, showed Cole's union card and check book, and made a bargain to buy a car from plaintiff on payments, \$100 cash, etc., and contracted in writing that the ownership of the car should remain in plaintiff and that the car would not be removed from Cowley county without plaintiff's written consent. The swindler haggled with plaintiff until after banking hours, and then proffered a check for a hundred dollars drawn on Cole's bank and signed in the name of Ben Cole. The plaintiff called the bank by telephone and was assured that Ben Cole had an account with it, and that Cole's check was good for that sum. Led by these inducements, plaintiff parted with the car and accepted the check. The swindler took the car, got his personal belongings from his boarding house, and he and the car vanished.

Action on the insurance policy. Judgment for plaintiff. Defendant appeals.

Was plaintiff's loss within the terms of the insurance policy? Our criminal law defines stealing and obtaining property by false pretenses as distinct offenses, although the punishment for each is the same. Gen. Stat. 1915, §§ 3487, 3448, 3449. It may well be that in a prosecution for the crime narrated the strict rules of our criminal law would require that the swindler be charged with the latter offense rather than the former. But it cannot be said that the contract of insurance was drawn to fit the narrow limitations of the Kansas Crimes Act. In the analogous case of *Grain & Supply Co. v. Casualty Co.*, 108 Kan. 370, 195 Pac. 978, 16 A. L. R. 1488 and note, where the action was against a fidelity company to reimburse plaintiff "for such loss of money, securities and personal property * * * which the employer shall have sustained by reason of any act or acts

constituting larceny or embezzlement, committed by the employee," it was held that acts constituting embezzlement were not to be construed under the strict rules of local criminal law, but that—

"The bond is to be interpreted in the light of its nature as a contract of insurance, in view of its purpose as such, and with a considerable degree of liberality in favor of the insured and against the insurer by reason of its having framed the contract. A risk fairly within its contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words. The term 'embezzlement' must be deemed to have been used in its general and popular sense rather than with specific reference to the precise definition of the local statute." 108 Kan. 382, 383, 195 Pac. 978, 980 (16 A. L. R. 1488).

The prevailing rule is that any scheme, whether involving false pretenses or other fraudulent trick or device, whereby an owner of property is swindled out of it with the preconceived intent of the swindler not to pay for it, is classed as larceny and is punished accordingly. Here the swindler planned to fraudulently get possession of the plaintiff's property with intent to deprive him of it without his consent. The swindler's pretense that he was Ben Cole, and the exhibition of Cole's union card and check book, his delaying the deal until after banking hours, etc., were merely the means which he used to obtain possession of the car and deprive the owner of it. So, too, the taking of the car out of Cowley county was a fraudulent taking of possession with intent to deprive the owner of it. Plaintiff never freely consented to sell the automobile to any person except the real Ben Cole. He never consented to part with his title without full payment. He never consented to anybody's possession of the car except within the limits of Cowley county.

Under these circumstances, the plaintiff was deprived of his property by a species of "theft," and such an offense is generally so defined.

In 3 Bouvier (Rawle's 3d Ed.) 3267, "theft" is thus defined:

"A popular term for larceny.

"It is a wider term than larceny and includes other forms of wrongful deprivation of property of another.

"Acts constituting embezzlement or swindling may be properly so called."

In 25 C. J. 657, the distinction is drawn between the closely allied crimes of obtaining property by false pretenses and larceny, but there, supported by many authorities, it is said:

"The distinction between the crimes of obtaining by false pretense and larceny lies in the intention with which the owner parts with the property. If the owner in parting with the property intends to invest the accused with the title as well as the possession, the latter has

committed the crime of obtaining the property by false pretense. But if the intention of the owner is to invest the accused with the mere possession of the property, and the latter with the requisite intent receives it and converts it to his own use, it is larceny."

Here it was perfectly plain that Montgomery's fraudulent scheme to deprive plaintiff of the automobile was preconceived. This constituted "larceny" as defined in Corpus Juris, supra, and as defined in Bouvier, supra. In *State v. Woodruff*, 47 Kan. 151, 27 Pac. 842, 27 Am. St. Rep. 285, the defendant was convicted of stealing a mare. The evidence showed that he had preconceived the plan to deprive the owner of the animal, and he effected that object by going to the owner and telling him he had the toothache and wanted to hire the beast to ride to town, stating that he would return it at noon. The owner consented and assisted in saddling and bridling the mare. The defendant made away with the mare, and it was never found or recovered. This court said:

"Where a person obtains possession of a horse with the consent of the owner, by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him to the owner at a specified time, when in fact he intends to and does wholly deprive the owner of the horse and appropriates him to his own use, there is such a taking and carrying away as to constitute the offense of grand larceny." Syl. par. 1.

In *State v. Flaherty*, 103 Kan. 393, 173 Pac. 919, the defendants were convicted of grand larceny. The evidence showed that they preconceived a plan to swindle George Roth out of \$5,350 by inducing him to bet that sum of money on a fake horse race. The money was received by an associate of defendants, and the swindlers pursuant to their preconceived scheme converted it to their own use. This court said:

"It is argued that the statute does not embrace every act which was larceny at the common law, and, that it is not larceny to obtain possession of money by some trick, fraudulent device, artifice, or means, with the intention of stealing the same. This argument is not good. 17 R. C. L. 16, uses this language:

"Obtaining money under the pretense that it is to be bet on a race, and with the intent at the time to convert it to the bailee's own use, the race being a mere sham to aid this purpose, is larceny." 103 Kan. 394, 173 Pac. 920.

In *Tredwell v. United States* (C. C. A.) 266 Fed. 350, it was held:

"If, at the time of lawfully coming into possession of property of another, the one to whom the property is intrusted has the intention of appropriating it to his own use, the crime thus committed is larceny."

In *Towns v. State*, 167 Ind. 315, 78 N. E. 1012, 119 Am. St. Rep. 501, it was held that

the soliciting and receipt of money, by defendant, at a church, with the intent to appropriate such money to his own use, falsely representing to the contributors that such money was to be used for a certain benevolent purpose, constituted the felonious elements of larceny.

To the same effect are *State v. Brown* (impersonation with intent to deprive owner of mare) 25 Iowa, 561; *People v. Morsa* (false pretenses with intention to deprive owner of money) 99 N. Y. 662, 2 N. E. 45; *Commonwealth v. Lawless* (impersonation of a soldier with intent to deprive of bounty) 103 Mass. 425.

We have examined the case of *Delafeld v. London & Lancashire Fire Ins. Co.*, 177 App. Div. 477, 164 N. Y. Supp. 221, relied on by appellant. The reference to the insurance policy in both opinions is too brief to compare its terms with the one at bar, and the facts appear to have involved a bailment to the swindlers with power to sell and their promise to pay a fixed sum for the car after its sale by the bailee, etc. The court, Appellate Division, held:

"While this policy insures against 'theft,' it seems clear that it was not the intention of the parties to the contract of insurance to insure against larceny by trick and device; that is theft, the commission of which involves as an essential element, the deception of the insured, resulting in a surrender of the possession of his property. The term 'theft,' as used in this policy, does not include all forms of larceny recognized by law. It does not include a larceny perpetrated as this was under the form and guise of a business transaction conducted by the insured himself." 177 App. Div. p. 480, 164 N. Y. Supp. 223.

It seems that this New York case may have had several features to distinguish it from the one before us; but, whether it had or not, it does not persuade us to abandon the reasoning of our own analogous case first above cited, nor of the other cases which we have mentioned, nor does it shake our conviction that the case at bar was correctly decided; and the judgment is affirmed.

All the Justices concurring.

(111 Kan. 260)

JOHNSON v. HUTCHERSON. (No. 23715.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

Appeal and error \Rightarrow 1024(1)—Order overruling motion for dismissal, on ground that plaintiff has died and no revivor has been had, will not be reversed, notwithstanding vagueness of information in affidavit of plaintiff's attorney.

A defendant moved to dismiss a case because the plaintiff had been dead more than a

year and no revivor had been had. It was shown that a person had died who bore the plaintiff's name and who was related to and lived with the attorney who brought the suit, but that attorney made an affidavit that this was not the plaintiff. On appeal, the overruling of the motion is affirmed, notwithstanding the vagueness of the information given in the affidavit referred to concerning the identity of the plaintiff, inasmuch as the disputed matter of fact in that regard can be finally settled at the trial.

Appeal from District Court, Wyandotte County.

Action by Walker Johnson against S. T. Hutcherson. From an order overruling a motion to dismiss the case, on the ground that plaintiff had died and that no revivor had been had, defendant appeals. Affirmed.

Thos. White and W. A. Morris, both of Kansas City, for appellant.

W. L. Wood, I. F. Bradley, and I. F. Bradley, Jr., all of Kansas City, for appellee.

MASON, J. In 1916 a petition in ejectment was filed in the district court of Wyandotte county, in the case of Walker Johnson against S. T. Hutcherson. In 1921 a supplemental petition was filed, adding a claim of title under a tax deed executed September 16, 1920, the grantee in which conveyed the land to the plaintiff by a deed dated October 22, 1920, and recorded November 8, 1920. Answers were filed to both petitions. On April 23, 1921, the defendant suggested the death of the plaintiff, and five days later moved for the dismissal of the action, on the ground that the plaintiff had died February 15, 1920, and no revivor had been had. The motion was overruled, and this appeal is taken from that order.

It was shown and admitted that Walker Johnson, who was the father-in-law of the attorney who brought and prosecuted the suit, and who lived in the same house with him, had died February 15, 1920. The attorney, however, filed his affidavit that this Walker Johnson was not the plaintiff; that the plaintiff was a resident of Kansas City, Kan., when the action was begun, but had since lived temporarily at Leavenworth and had spent a part of the time in Kansas City, Mo., St. Joseph, and Omaha, and possibly other places. One of the defendant's attorneys filed an affidavit that he had made inquiries at Leavenworth and could not learn of any Walker Johnson having lived there—the city directories not containing the name. The city directories of Kansas City, Kan., showed but one person of that name—the one who died.

The affidavit of the plaintiff's attorney offered but meager information as to the person who he alleged to be the plaintiff. It did however contain the positive statement that the man who died was not the plaintiff.

Moreover the deed conveying the tax title to Walker Johnson was alleged to have been executed more than six months after the death of the Walker Johnson, who was the father-in-law of the attorney who brought the suit, and it seems improbable on any theory that it would have been made to a dead man. The trial court having overruled the motion to dismiss must have found that the man who died was not the plaintiff, and we do not feel warranted in reversing its decision in that regard. No serious injustice can result to the defendant from this ruling. The disputed question of fact can be fully gone into upon the trial. If it is there proved that a person now living brought the action and is entitled to recover the property, it will follow that the motion to dismiss was rightly overruled. If such proof is not forthcoming, then the defendant will prevail and will have suffered no injury, beyond being required to meet the issue as to the plaintiff's identity upon a full trial, instead of having it determined in a summary way upon a mere motion.

A motion to require the defendant to make more definite an allegation of its answer, to the effect that the tax deed was invalid, by setting out the grounds of invalidity, was sustained. The defendant complains of this ruling, because it was made after the death of the plaintiff had been suggested, and also because it was not well founded upon the merits. Our affirmance of the ruling on the motion to dismiss disposes of the first objection, and the fact that the defendant has already complied with the order to make his pleading more definite dispenses with the occasion to consider the other, if it would in any event be reviewable in this proceeding.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 269)

STITT v. BUIST et al. (No. 23714.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

Brokers — Broker held not entitled to commission under contract requiring him to make a sale, where purchaser procured but did not complete sale because of inability to do so.

In an action for a real estate agent's commission, the petition alleged employment to sell,

and a sale. The terms of the agent's authority were that he should contract a sale on specified terms, which included a cash deposit of 25 per cent. of the purchase price with the contract. No contract was concluded, no cash deposit was secured, and the negotiations did not result in a sale. *Held*, the agent was properly denied a commission on the theory he procured a purchaser ready, able, and willing to buy.

Appeal from District Court, Mitchell County.

Action by J. J. Stitt against F. J. Buist and others. Judgment for defendants, and plaintiff appeals. Affirmed.

R. M. Anderson, of Beloit, for appellant.
Kagey & Smith and Lutz & Jordan, all of Beloit, for appellees.

BURCH, J. The action was one to recover a real estate agent's commission. A demurrer was sustained to the plaintiff's evidence, and he appeals.

The plaintiff pleaded he was employed to sell the defendants' land, and did sell it at the agreed price, whereby he earned the stipulated commission. The proof was the plaintiff found a person whom he believed would buy, and solicited the defendants to sell. The defendants responded by telegram, which specified the conditions upon which the plaintiff might act. He was to contract a sale on definitely stated terms, and was to procure a deposit of 25 per cent. of the price with the contract. The prospective purchaser read the the telegram, said to the plaintiff he would deal on the basis of the telegram, and gave the plaintiff a check for a small portion of the price, to bind the deal until papers could be drawn. No contract of sale was concluded, no cash deposit of 25 per cent. of the price was made, and the negotiations did not result in a sale. The plaintiff gave what he regarded as reasons why he did not or could not comply with the conditions of the telegram, and now insists, contrary to his pleading, that he should recover as if his employment were simply to find a purchaser ready, able, and willing to buy. The plaintiff had no employment or authority except that contained in the telegram, and he failed to establish the cause of action stated in his petition.

The judgment of the district court is affirmed.

All the Justices concurring.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(111 Kan. 160)

GRATNEY v. BOARD OF COM'RS OF WYANDOTTE COUNTY et al. (three cases).
Appeal of QUINDARO TP. Appeals of
GRATNEY. (Nos. 22668, 22142, 22143.)

(Supreme Court of Kansas. Jan. 7, 1922.
On Rehearing May 7, 1922.)

(*Syllabus by the Court.*)

1. Highways \Leftrightarrow 198—Township held not liable for injury from defective highway which it neither constructed nor maintained.

Under chapter 237 of Laws 1887 (Gen. St. 1915, § 722), it is held that, in view of chapter 276 of the Laws of 1899, and subsequent legislation touching the construction and maintenance of certain roads by Wyandotte county, the defendant township is not liable for the injury herein involved.

On Rehearing.

2. Highways \Leftrightarrow 198—County's demurrers to petition for damages for injuries from defects in highway constructed and maintained by it held erroneously sustained.

In view of the legislation mentioned in paragraph 1, it is held, that the demurrers to the petition by the defendant county were erroneously sustained.

West and Burch, JJ., dissenting. Mason, J., dissenting as to first paragraph, and Marshall, J., as to second paragraph.

Appeal from District Court, Wyandotte County.

Action by S. D. Gratney, as next friend of Gladys Gratney, a minor, against Quindaro Township, Wyandotte County, and others, and two actions by S. D. Gratney against the Board of Commissioners of Wyandotte County and others. From a judgment in the first action after denial of a new trial, the defendant Township appeals, and from the judgments in the second and third sustaining the County's demurrers to the petitions, the plaintiff appeals. The first case is reversed and remanded with directions to enter judgment for the defendant Township, and the second and third cases are reversed and remanded for further proceedings.

In No. 22668:

C. W. Trickett, of Kansas City, for appellant.

David F. Carson and James T. Cochran, both of Kansas City, for appellee.

In Nos. 22142 and 22143:

David F. Carson and James T. Cochran, both of Kansas City, for appellant.

J. H. Brady and T. F. Railsback, both of Kansas City, for appellees.

WEST, J. An opinion in this case was filed June 11, 1921, but, in view of the mo-

tion for rehearing, it was not officially reported. After considering the motion, and again going over the entire matter, the court has reached the final conclusion indicated below.

The action was brought in 1916 for injuries occurring in October, 1915, by reason of a defect in a highway in Wyandotte county, known as the Leavenworth road, against the county and township under chapter 237 of the Laws of 1887, being section 722 of the General Statute of 1915. The township moved to make the petition more definite by stating whether or not the highway was a county or township road, which motion was overruled. Then the township demurred to the petition, which demurrer was overruled, and thereafter an answer was filed alleging that the accident was on a county road over which the township had no control or authority. An objection to testimony under the petition was overruled. An instructed verdict was asked for and denied.

The jury were charged that the petition alleged the township had caused and suffered a large hole to be and remain at a point about 600 feet west of the intersection of the Kansas City Western Railway Company's line and the Leavenworth rock road, and had failed and neglected to erect any barrier or other guards around the same, and had failed and neglected to warn persons traveling upon the road against the defect, which was well known to the trustees of the township, who had actual notice thereof more than five days before the injury; that under the laws of this state any person who shall, without contributing negligence on his part, sustain damages by reason of a defect in a road within a township may recover such damages from such township, when the township trustee shall have had notice of such defective condition for at least five days before the injury. The township objected to this instruction. The plaintiff recovered. A motion for a new trial was overruled, and the township appeals.

[1] Counsel for the township insists that the liability, if any, rests upon the county, and calls attention to chapter 276 of the Laws of 1899, entitled:

"An act empowering the county of Wyandotte to improve and maintain certain public highways and to levy and collect taxes for that purpose."

The act authorizes and empowers the board to improve and maintain certain roads, including the one in question, and provides that, whenever these highways, or any part of them, shall have been properly graded, and prepared for macadamizing by township boards, road overseers, or by private parties, it shall then become the duty of the board of county commissioners to cause the same, or such parts of sections thereof as

shall have been graded and prepared, to be macadamized, and provides that to defray the expense thereof a county tax not exceeding 2 mills on the dollar shall be levied, and the funds derived therefrom set aside and used exclusively for this purpose.

In 1874 the Legislature enacted chapter 108, which, until after the compilation of 1885, remained a general statute in relation to roads and highways. Beginning with section 16 of that act, it appears that an incorporated city of more than 600 inhabitants should constitute a road district. Section 27 provided that, if at any time a highway should be obstructed or become impassable, or any bridge should be impaired so as to make it unsafe—

"it shall be the duty of the overseer of the district in which such obstruction, impassable road or impaired bridge may be situated, to cause such obstruction to be removed, or such road or bridge to be repaired forthwith. * * *

In the compilation of 1885 this statute was included with chapter 150 of the Laws of 1883, requiring road overseers to remove all cockle burs and other obnoxious weeds, and to prohibit the ploughing up of the public highway for the purpose of scouring plows except under the direction of the overseer. No further act of a general nature was passed until 1887, when chapter 214 was enacted, providing for the maintenance of county roads by the county commissioners. At this session was also passed chapter 237, the only statute ever enacted by the Legislature of this state providing for recovery of damages for defective highways. The Legislature of 1901 enacted chapter 296, amending section 12 of the act of 1874, and required each road overseer to open or cause to be opened all state and county roads, "and the overseer shall keep the same in repair, and remove or cause to be removed all obstructions that may be found therein." He was also authorized to enter upon any uncultivated land and use materials, dig ditches necessary for such keeping in repairs; all claims to be allowed and paid by the county board. Chapter 299 authorized the board of Wyandotte county to improve and maintain the ~~the~~uncle boulevard. Chapter 300 amended chapter 276 of the Laws of 1899, and authorized the board to improve and maintain the Reidy road, the Leavenworth road, the Kaw Valley road, and certain other roads named therein, repealing section 1 of the act of 1899. Chapter 301 authorized a certain other road, the act being made supplemental to chapter 276 of the Laws of 1899, and section 2 made it the duty of the county commissioners to expend in the improvement or macadamizing and maintenance such proportion of the 2-mill tax levy authorized by chapter 276 of the Laws of 1899 as should be equal to the amount of such levy expended and used by the board for the improvement and

maintenance of other roads in the county under such act and acts supplemental thereto. Of a similar character were chapter 420 of the Laws of 1903, chapter 421, and chapter 422.

The Legislature of 1905 passed a general act in relation to public highways, being chapter 362. This made the township board commissioners of highways of their respective townships.

"And all roads shall be under the direct control of the township commissioners of roads and highways, except incorporated cities of more than six hundred inhabitants. * * *

Section 4 provided that such commissioners should have entire control and general supervision of all roads and highways in their respective townships, and all tools and implements and road machinery, together with all materials for the construction of culverts and bridges. Chapter 375 was like the act of 1899, as were also chapters 376 and 377. Chapter 378 authorized the grading, curbing, and macadamizing of certain other roads, to be let on bids and paid for by a tax levied by the board. Chapter 379 gave similar authority with reference to Eighteenth street, and required the board to expend therefor the proper proportion of the levy provided for by the act of 1899. Section 5 provided:

"That to defray the cost of macadamizing and maintaining county roads, the board of county commissioners are hereby authorized and empowered to levy and collect annually, on all of the taxable property of said county, a tax not exceeding two mills on the dollar, and the funds provided from such taxation shall be set aside and used exclusively for the improvement of county roads, and for no other purpose."

This appears, therefore, to have been a general authority and requirement touching macadamizing and maintaining of all county roads in Wyandotte county. Chapter 292 of the Laws of 1907 amended section 1 of chapter 362 of the Laws of 1905, and made members of the township board commissioners of roads and highways of their respective townships, and provided that—

"All roads shall be under the direct control of the township commissioners of roads and highways, except incorporated cities. * * *

Chapter 294 authorized the commissioners of roads and highways to divide their respective townships, further amending the act of 1905. Chapter 299 amended section 1 of chapter 276 of the Laws of 1899, naming certain roads, not including the Leavenworth road, by name. Chapter 300, supplemental to the act of 1899, authorized the board to improve, macadamize, and maintain certain other named roads. Likewise chapter 301, the costs to be defrayed by an annual tax not exceeding two mills, and chapter 302,

touching Eighteenth street, required the expenditure of the proper proportion of the tax levied by the act of 1899. Substantially similar were chapters 305 to chapter 315, inclusive.

The Legislature of 1909 enacted chapter 197, requiring township boards to designate such roads as in their judgment should be known as drag roads, and to divide such roads into sections as would best carry out the purpose and provisions of the act. Also chapter 198, relating to roads and highways, creating the office of engineer of highways and bridges, amending various provisions of the acts of 1905 and 1907, relating to the commissioners of highways, and the Road Drag Act of 1907, and repealing chapters 292 and 294, Laws of 1907, touching the duties of township road commissioners. This act (section 2) required the county engineer to classify the roads of his county, designating them as county, township, and local roads, according to their importance and the amount of travel—

"and he shall see that the roads so classified be kept and maintained in condition in proportion to the importance and the amount of travel. The township highway commission shall classify the roads in their respective townships. * * *

Section 4 amended section 1 of chapter 362 of the Laws of 1905, and provided that—

The township board "shall be and the same are hereby made commissioners of roads and highways of their respective townships, and all roads outside of incorporated cities shall be under the control of said commissioners of roads and highways, subject to the authority of the county engineer. * * *

Section 5 provided that all taxes assessed for the purpose of maintaining public roads and highways should be paid in cash and collected as provided for in relation to other taxes, and used exclusively for road purposes. Section 6:

"The said commissioners of roads and highways shall have control and general supervision of all roads and highways in their respective townships, except that in counties having a county engineer such control shall be subject to the authority of the county engineer, as provided for in this act."

Section 9:

"For the purpose of carrying out the provisions of this act the commissioners of roads and highways shall recommend to the county commissioners of each county in this state, * * * a levy of not more than one mill on the dollar * * * and it shall be the duty of the county clerk to place such levy on the tax rolls of said county; provided, that at least seventy-five per cent. of all moneys collected from the taxable property in each road district, including cities of the third class, shall be used to improve the roads within such district."

Chapter 201 of the Laws of 1909, providing for the maintenance of county roads, authorized the county commissioners upon a certain petition to cause a county road to be improved as prayed for, such petition to be signed by 60 per cent. of the landowners along the line of any regularly laid out road. Section 10 provided that all bridges and culverts costing more than \$200 should be built by the county and paid for from the general fund or bridge fund.

The Legislature of 1911 enacted chapter 248, another general statute of 56 sections, covering the subject of roads and highways, and repealing various former enactments. Section 53 provided that no provision of that act should be construed to repeal or supersede any special act then in force in any county in this state. Chapter 254 authorized the county commissioner of any county having 90,000 inhabitants or over, where county roads were macadamized out of funds raised by direct tax levy, to grade and macadamize roads leading to public buildings and connecting rock roads already constructed, the cost to be defrayed out of the macadam fund and not to exceed \$3,000 a year. Section 3:

"This act shall not be construed as repealing any laws now in existence except in so far as it directly conflicts with the provisions of this act, but it shall be supplementary to said chapter 276 of the Laws of Kansas for the year 1899 and all acts amendatory and supplemental thereto."

Chapter 255 amended section 3 of the act of 1899, and provided that the macadamizing of roads might be done in sections from time to time as there might be funds provided for that purpose, etc. Section 1, c. 248, defined mail routes as "the free rural delivery mail routes within a municipal township," and township roads as "all roads within a township other than free rural delivery mail routes," and county roads, "all roads designated as such by the board of county commissioners of a county connecting cities and market centers, whether both such cities or centers are within the county, or one is within and the other without the county."

Section 18 classified all roads as "state roads," "county roads," "mail routes," and "township roads."

"The 'county roads' shall be all roads designated as such by the board of county commissioners of a county. * * * Free delivery mail routes shall be known as 'mail routes,' and all other public highways within a township are 'township roads.' All county and state roads shall be maintained at the expense of the county, and all mail routes and township roads where they do not coincide with county and state roads at the expense of the township in which they are situated; provided, that all roads designated as county roads under the provisions of chapter 198 of the Session Laws

of 1909 and established as such at the time of taking effect of this act shall be and remain county roads and shall be maintained under the provisions of this act."

Section 19:

"All mail routes and township roads shall be under the control of said board of commissioners of highways."

Section 23:

"That the highway commissioners shall have charge of the mail routes, township roads and township bridges of their respective townships, and it shall be their duty to keep the same in repair, and to improve them so far as practicable."

Section 32 provided that the taxes assessed for the purpose of constructing and maintaining public roads should be paid in cash, and the county treasurer should pay that proportion of the same which should be used upon mail routes and township roads or upon city streets to the treasurer of the township or city from which said taxes were collected, to be used exclusively for such road purposes. Section 40 made it the duty of the township trustee to remove all obstructions at least once a year at such times as the county commissioners might direct, from all public roads and highways in his township. Section 41:

"That if at any time any highway shall be obstructed or become impassable, or any bridge shall be impaired so as to be unsafe, it shall be the duty of the township trustee of the township in which such obstruction, impassable road or impaired bridge may be situated, to cause such obstruction to be removed or such road or bridge to be repaired forthwith."

In 1913 the Legislature enacted chapter 262, supplemental and amendatory to chapter 276 of the Laws of 1899, requiring the county board to expend therefor the proportion of the taxes authorized by the act of 1899.

The Legislature of 1915 passed chapter 186, similar to those already mentioned, making the act supplemental to that of 1899; also chapter 290, amending section 19 of chapter 248 of the act of 1911, making the township board the adding board for their respective townships.

"All mail routes and township roads shall be under the control of said board of commissioners of highways."

Counties and townships are mere creatures of the Legislature. Const. art. 9; Gen. Stat. 1915, c. 25, art. 2; Gen. Stat. 1915, § 2562; chapter 117, art. 1. The Legislature has the power to abolish counties and county organizations. Division of Howard County, 15 Kan. 195. The Legislature has plenary power over roads and highways. It may establish a state road and cast the cost on the county in which the road lies without any vote of the

inhabitants. *State v. County of Shawnee*, 28 Kan. 431. It was contended in that case that the Legislature had no authority to establish a state road and compel Shawnee county to pay for it, but it was said by Brewer, J., that this was done in 42 instances by chapter 70 of the Laws of 1861. It was also said that it is not like compelling a county to take stock in a railroad corporation; while a road is open to the use of all citizens, it is yet of special value and benefit to the county upon which the burden of its cost is cast.

"It is not like an attempt to tax the citizens of Topeka with the cost of improving the streets of Lawrence. It simply cast upon counties of Shawnee and Jefferson the cost of roads wholly within their territorial limits, and it is making each county bear the burden of public improvements within such limits. * * * We know of no reason why the Legislature might not pass an act declaring all highways state roads, and place the management and control of them in commissions appointed directly by the state; and yet if such an act were passed, the special value and benefit of each road to the community in which it is located would be unchanged." 28 Kan. 434.

Speaking of counties, it was said:

"They are political organizations, whose powers and duties are within the control of the Legislature. That body defines the limits of their powers, and prescribes what they must and what they must not do. It may prescribe the amount of taxes which each shall levy, and to what public purpose each shall devote the moneys thus obtained. It may require one county to build a certain number of bridges at certain specified places, and of a particular size and quality. It may require another to open roads in given localities; and another to build a court house and to levy a tax to a prescribed amount for the purpose of paying therefor. In short, as a general proposition all the powers and duties of a county are subject to legislative control; and provided the purpose be a public one and a special benefit to the county it may direct the appropriation of the county funds therefor in such manner and to such amount as it shall deem best." 28 Kan. 434.

In *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207, holding that a city may be required by legislative act to establish parks and boulevards and pay the expenses therefor, it was said that—

"Whatever view may be taken of those concerns of cities which are mainly private or proprietary in their nature, in matters in which the state has an interest, and which, as we have seen, are undoubtedly subject to the sovereign control of the state, the state may interfere at will with the local bodies, and may compel the local community to tax itself in order to carry out the obligations imposed upon it by the state." 77 Kan. 374, 94 Pac. 212.

State v. Lawrence, 79 Kan. 234, 257, 100 Pac. 485, quoted from the case *In re Dalton*, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380:

"Indeed, everything relating to the management of counties, cities and townships not defined and limited by the Constitution may be taken away by the state acting through its Legislature, and as to these political divisions and their agents the Legislature has the same power that it possesses over state officers." 79 Kan. 257, 100 Pac. 498.

Further:

"The state is the sovereign power, and cities, towns and all other municipalities are its subsidiary agencies for governmental purposes, * * * It may well be that the state has the power, if necessity should arise, to require a city to erect a bridge or to construct a road, or to assume a part of the burden of the cost thereof, and that the form of the legislative act would not affect its validity. * * * It is true that streets, roads and bridges are subjects of public interest and of state-wide concern, but more truly speaking they are local in character." 79 Kan. 257, 258, 100 Pac. 494.

In *City of Emporia v. Griffith*, 86 Kan. 976, 122 Pac. 1053, it was held that a county has the right to tax for the purpose of maintaining county roads under the act of 1911, which is to be expended under the direction of county officers, and that the officers of a city within such county are not entitled to the possession of any portion of the fund and have no control thereof. Near the conclusion of the opinion it was said:

"It is competent for the Legislature to give the control of the highways of the county, including the streets of cities, to any of its subordinate agencies. It may exercise the power directly or confer it upon county officers, or it may allow the officers of cities and townships to share in the control." 86 Kan. 980, 122 Pac. 1055.

See, also, *Kansas City v. Stewart*, 90 Kan. 846, 136 Pac. 241; *Jefferson County v. Drainage District*, 97 Kan. 302, 155 Pac. 54; *Washburn v. Shawnee County*, 103 Kan. 169, 172 Pac. 997; and *Albright v. Douglas County*, 108 Kan. 184, 194 Pac. 913.

The foregoing sufficiently shows that the Legislature is not restricted, but in a general way is free to provide much as it sees fit respecting roads and highways. Of course it can take certain municipalities and roads out from the general category, and can impose damages for defects on whatever quasi municipality it deems proper. Let us examine the act of 1887 and see what the legislative intent evidenced thereby is:

"An Act Making Counties and Townships Liable for Defects in Bridges, Culverts and Highways in Certain Cases.

"Section 1. Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge, culvert, or highway, may recover such damage from the county or township wherein such defective bridge, culvert or highway is located, as hereinafter provided; that is to say, such recovery may be from the county when such damage was

caused by a defective bridge constructed wholly or partially by such county, and when the chairman of the board of county commissioners of such county shall have had notice of such defects for at least five days prior to the time when such damage was sustained; and in other cases such recovery may be from the township, where the trustee of such township shall have had like notice of such defect."

It must be conceded that the wording is such that interpretation is necessary. It is clear, however, that the subject indicated by the title is the liability of counties and townships for defects in bridges, culverts, and highways. It is equally clear that in case of county liability it is required that the chairman of the board must have had five days' notice of the defect, and, in case of township liability, the trustee must have had such notice. Also that the damage is to be recovered from the "county or township wherein such defective bridge, culvert or highway is located." Of course, if either were in a given township, it would necessarily be within a county. The ambiguity comes from the language "As hereinafter provided; that is to say, such recovery may be from the county when such damage was caused by a defective bridge constructed wholly or partially by such county; * * * and in other cases such recovery may be from the township. * * *". The court holds that the intent was and the meaning is that, in cases in which the township has no duty to keep in repair, or to maintain, no liability was to be attached, whatever the defect. Also that, while the duty under the road legislation rests generally on the township to keep the roads safe and in repair, the Wyandotte county legislation in 1899 and since evidences the manifest intent to take this Leavenworth road out from the operation of such general duty and consequent responsibility. The repeated provisions that the county should improve and maintain mean that such improvement and maintenance were thereby removed from the burden of the township, and that, being thus expressly relieved of the duty and burden, the township was by clear implication to be also relieved from liability for defects in a road over which it had no control, and in respect to which it owed no duty. It seems unnatural that, with the subject thus expressed in the title, and the purpose to permit damages to be recovered by those injured by highway defects, the law-makers would wittingly have restricted recovery from a county to the single case of a bridge partially or wholly constructed by it. It appears to the court more reasonable and more in accord with the probabilities to construe the act as permitting recovery from the municipality which by subsequent legislation had been given the task of construction, maintenance and control. Otherwise in this instance the township which neither con-

structed nor maintained the road must respond in damages for a defect in a road which it was the duty of the county to construct, and which it is its duty to maintain. There is something incongruous in the notion that the taxpayers of one township should be required to make an injured traveler whole when the entire county owed him the duty to maintain the highway, and by natural, if not imperatively necessary, implication, keep it safe for travel.

It is therefore held that the township is not liable, and the judgment is reversed and the cause remanded, with directions to enter judgment for the defendant township.

In the companion cases, Nos. 22142 and 22143, against the county, demurrers to the petition were sustained. By reason of the foregoing this ruling is reversed, and those cases are remanded for further proceedings.

JOHNSTON, C. J., and PORTER and DAWSON, JJ., concur in the result.

WEST, J. (dissenting). It is the province of the courts to construe, but not to amend, statutes. The act of 1887 is to my mind fairly susceptible of only one construction—the one given in the opinion formerly filed in this case.

As early as *Eikenberry v. Township of Bazaar*, 22 Kan. 557, 31 Am. Rep. 198, it was held that, in the absence of express statutory enactment, placing liability on townships for injuries sustained on account of defects in highways, such organizations are not liable for damages. This was reaffirmed in *County of Marion v. Riggs*, 24 Kan. 255, and in *Township of Quincy v. Sheehan*, 48 Kan. 620, 29 Pac. 1084. That was an action brought under the act of 1887, concerning which it was said:

"Under the statute quoted, the township may be required to respond in damages where the injury results from a defective bridge, culvert, or highway. * * *" 48 Kan. 623, 29 Pac. 1085.

In *State ex rel. v. Shawnee County*, 57 Kan. 267, 45 Pac. 616, the objection urged under the statute was that it withdrew a portion of Topeka from its corporate control. The court said:

"The fact that a county may have built a bridge within the limits of a city does not necessarily imply that the burden of maintaining it is upon the county, nor that the city will be excluded from its control. * * *" 57 Kan. 270, 45 Pac. 617.

Com'rs of Shawnee County v. City of Topeka, 39 Kan. 197, 18 Pac. 161, was cited to the effect that—

"The mere fact that it may have built the bridge was held to be no reason why the county should be compelled to keep it in repair." 57 Kan. 271, 45 Pac. 617.

In *Cunningham v. Clay Township*, 69 Kan. 373, 76 Pac. 907, it was decided that under the act of 1887 it is not sufficient defense to show that the township officers had exercised ordinary care to prevent the defect.

"Before the enactment of that section in 1887 (Laws 1887, c. 237), such an action could not have been maintained. * * * The limit of the township's liability therefore must be found in the statute itself. * * *" 69 Kan. 376, 76 Pac. 908.

"When injury is sustained by reason of a defective highway, if the township trustee has had five days' notice of the defect the township is liable, however great care the officers may have exercised; but if the trustee has had no such notice the township is not liable, however negligent the officers may have been. The statute makes its own definition of actionable negligence." 69 Kan. 377, 76 Pac. 908.

This disposes of the contention that liability is based on mere negligence. *Fisher v. Township*, 87 Kan. 674, 125 Pac. 94, 41 L. R. A. (N. S.) 1074, Ann. Cas. 1914A, 554, exhaustively reviewed the former decisions of this court touching the liability of townships, and declared the law to be that a township engaged in improving a highway is not liable for damages occasioned by the negligence of its officers. In *Drainage District v. Highway Commissioners*, 102 Kan. 535, 171 Pac. 613, it was held that the statute defining the powers of a drainage district does not vest the board with authority to regulate the construction of highways or of culverts forming parts of the highways within the district.

"But such power over township highways is vested in township officers. * * *" Syl.

"Culverts constitute a part of the highway and are necessary to its construction, and the township officers are not only given control of the construction, but the township itself is made liable for injuries which result from defective construction." 102 Kan. 536, 171 Pac. 614.

In *Wagner v. Edwards County*, 103 Kan. 719, 176 Pac. 140, 665, the liability of counties for injuries sustained by reason of defective bridges, culverts and highways was held to be statutory and not coextensive with the common-law liability for negligence. The action involved an alleged defect in a culvert placed in the highway. The case turned on the question of notice, and no reference was made to any distinction between liability of the county or township. *Irvin v. Finney County*, 106 Kan. 171, 186 Pac. 975, held that a county is not liable for defects in a highway unless it has been duly designated as a county highway, nor for defects in bridges unless wholly or partially constructed by it.

"The extent of the liability of counties for such damage and the conditions on which a recovery may be had against them are found in section 722 of the General Statutes of 1915. * * * The section last referred to provides

that when a bridge has been wholly or partially constructed by the county, a recovery may be had against the county for damages resulting from the defects in it, if due notice of the defects has been brought to the chairman of the board five days prior to the time the damage was sustained." 106 Kan. 174, 186 Pac. 977.

Dubourdieu v. Delaware Township, 106 Kan. 650, 189 Pac. 386, involved a suit against Delaware township, in Wyandotte county, for injuries caused by a defective highway a short distance out of Bonner Springs, crossing Wolf creek, over which a steel bridge was maintained by Wyandotte county. When the plaintiff reached a point south and west of the bridge a portion of the side of the road caved, causing the accident. The act of 1887 was attacked as unconstitutional, but sustained. It was insisted that under the statute a defective bridge need not be upon a highway at all, but it was said that a bridge is a part of the highway.

"If an accident were caused by a defect in a bridge erected and maintained by a county on a township road, the county under certain conditions would be liable; if the injury were caused by a defect in the part of the road maintained by the township, the township would under similar circumstances be liable. Under the present road laws all public roads are either state roads, county roads, mail routes, or township roads (Gen. Stat. 1915, § 8772), and certain classes of bridges on a township road are county bridges, because it is made the duty of the county to build them where the cost exceeds a certain amount. * * * As we have seen, it was the legislative purpose to define the liability of townships and counties in certain instances for defects in highways, and each provision of the act is fairly adapted to accomplish the purpose, and has a logical connection with the general subject." 106 Kan. p. 654, 189 Pac. 388.

It is quite clear that, among all the multitude of road statutes passed in 1874 and since, this is the only one which in any way has ever sought to impose any liability upon a township or county on account of defects in a highway, and this is the first case in the history of the state that has ever presented the clear and square question now raised as to which of the two municipalities is liable. Of course whatever was said and held by the court in the last two cases cited had reference to statutory enactments since the injury now under consideration occurred, and hence was not directly in point.

Counsel cites *City of Eudora v. Miller*, 30 Kan. 494, 2 Pac. 685, *Comm'rs of Shawnee County v. City of Topeka*, 39 Kan. 197, 18 Pac. 161, and *City of Rosedale v. Golding*, 55 Kan. 167, 40 Pac. 284, to show that a bridge constructed by a county and afterwards taken into a city must be maintained by the latter. In the *Eudora Case* it was also held that, though the bridge were built

by the county, and came within the limits of a city of less than 600 inhabitants, forming a part of two road districts, the city was still obliged to keep it in repair. In the *Topeka Case* the fact that a city and a county joined in the purchase of a bridge, and exercised joint control over it for some time, was held not to impose any liability on the county for the future. The *Rosedale Case* involved a bridge which had been built and maintained by the county within the corporate limits of the city, forming a part of one of its streets, and, under the general duty of cities to keep their streets reasonably safe for travel, the city was held liable.

A supposed poser is put by counsel: That, had the county piled rock, gravel, and sand along this road, the township would have been helpless to remove such dangerous impediments to travel. We can find, however, no provision of any statute or any fair implication therefrom in any wise authorizing the county thus to endanger travel, or preventing the township from speedily removing such impediments. Indeed, a number of the statutes quoted from carry express commands to the highway commissioners to keep the roads in their townships free from obstructions. In his brief he says that there is an entry in the journal of the county board recommending that the Leavenworth road be classed as a county road, under date of December 1, 1913. But this decides and determines nothing respecting the liability of the two municipalities under the Damage Act of 1887.

The strongest argument, and the one most vigorously pressed by counsel for the township, is that the Legislature by the act of 1899 and subsequent supplemental statutes has withdrawn this road from the ordinary category of roads, and taken it out from under the obligations and liabilities incident to such ordinary highways within Wyandotte county. Let us see. When chapter 237 was passed in 1887, the General Road Law was found in the Compiled Statutes of 1885, and of necessity the act must be judged and construed as of that date, and in view of the legislation then existing.

"The Legislature is presumed to have had former statutes before it, to have been acquainted with their judicial construction, and to have passed new statutes on the same subject with reference thereto." 25 R. C. L. 1063, § 287.

An examination of that legislation shows that the road overseer was required to open or cause to be opened "all county and state roads and highways which have been or may hereafter be laid out or established through any part of the district assigned to such overseer * * * and the overseer shall keep the same in repair, and remove or cause to be removed all obstructions that may from

time to time be found thereon. * * *

Comp. Laws 1885, c. 89, § 12.

Section 27:

"If at any time any highway shall be obstructed or become impassable, or any bridge shall be impaired so as to be unsafe it shall be the duty of the overseer of the district in which such obstruction, impassable road or impaired bridge may be situated, to cause such obstruction to be removed, or such road or bridge to be repaired forthwith. * * *

Section 42 provided for declaring a township one road district on proper petition.

"And for the purpose of repairing the roads leading into any city, town or village, any two adjoining townships, or any adjoining city and township, may * * * consolidate. * * *

Section 27 of chapter 16, concerning bridges, required the road overseer to "inspect all the bridges in his district from time to time, and in case any repairs became necessary to any bridge, or approach to a bridge," to repair or report to the county board. That chapter provided that the county board should determine what bridges should be built and repaired at the expense of the county and what by the road district. In case the estimated cost was over \$200 they were to appoint the township trustee commissioner to contract for its building. Section 9 provided that, when it should become "necessary to repair any public bridge (for which the county has appropriated money for the construction thereof)," the county commissioners should require the township trustee of the township in which such bridge was located to examine and estimate the cost of repairing, the county board to appropriate money therefor and "proceed forthwith to cause said bridge to be repaired in the way they may order and direct."

With this existing legislation in view, it is proper to examine Chapter 237. It will be observed that the damage is to be recovered from the "county or township wherein such defective bridge, culvert or highway is located, as hereinafter provided." Three things—a defective bridge, a defective culvert, or a defective highway—are the only possible causes of injury included. Damages caused by either may be recovered in only one way—that is, "as hereinafter provided." Then come the prescribed way and conditions; when damage was caused by a defective bridge constructed wholly or partially by the county, and the chairman of the county had five days' notice. This is one case. And, "in other cases," which must mean all other cases, "such recovery may be had from the township. * * *" So, according to the unmistakable terms of the act, the county is liable in one case only—when the damage was caused, not by a defective culvert or highway, or even by a defective bridge, but by a bridge wholly or partially constructed

by the county. Why the act was drawn this way instead of some other we are not advised, nor does it concern us. It is sufficient to know that thus it was written. Nothing whatever in the road law of this state when this statute was passed, and nothing in the act itself, shows the slightest intention to make liability dependent on maintenance; and yet this has been left untouched by the Legislature for 34 years, and remains the sole legislative instance of making either a township or a county liable for defective bridges, culverts or highways. In view of this history, and the plain provisions of the act in question, all subsequent acts providing for building and maintaining roads by Wyandotte county can have no effect to repeal or modify this act, which relates not to construction and maintenance of roads or bridges, but only to damages for defects in them.

There will soon be a session of the Legislature, and, if the interpretation contended for by counsel is desired, a proper amendment can easily be made or a new act passed.

BURCH and MASON, JJ., join in this dissent.

MARSHALL, J. I concur in the conclusion that the township is not liable, but I dissent from the conclusion that the county is liable. My reasons for this are as follows: This action was prosecuted under section 722 of the General Statutes of 1915. Under that section no liability is placed on the county for a defective highway. Under section 722 the township had absolute control of the road. That control has been taken away by subsequent legislation. This subsequent legislation by implication has repealed that part of section 722 imposing liability on the township for a defect in the highway. My judgment is that the Legislature may impose liability on the township even if it has no control over the road, but I am of the opinion that, in this instance, subsequent legislation is so inconsistent with the liability of the township under section 722 that the part of that statute imposing liability on the township has been repealed by implication. In other words, my judgment is that there is no liability on the part of either township or county in this action.

On Rehearing.

WEST, J. [2] In the former opinion it was held that the township is not liable. A rehearing was granted for the purpose of determining finally whether the county is liable. The question hinges upon the act of 1887 (Gen. Stat. 1915, § 722) and subsequent legislation respecting roads in Wyandotte county.

Considering the title and purpose of the act, it is held that the legislative intention was to impose a liability upon counties and

townships for defects in roads and bridges, and not to restrict such county liability to defects in bridges constructed wholly by a county. Also that subsequent legislation touching Wyandotte county evinces an intent to place the liability on the county or township whose duty it is to maintain the road or bridge where the defect exists.

The acts cited in the former opinion are held to manifest an intention to place in a case like the one before us the liability upon the county; its clear duty being to maintain such road. It is therefore held that the trial court improperly sustained the demurrer of the county, and the cause is remanded for further proceedings in accordance herewith.

WEST, J., dissents.

MARSHALL, J. (dissenting). This action is prosecuted under section 722 of the General Statutes of 1915. That section reads:

"Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge, culvert, or highway, may recover such damage from the county or township wherein such defective bridge, culvert or highway is located, as hereinafter provided; that is to say, such recovery may be from the county when such damage was caused by a defective bridge constructed wholly or partially by such county, and when the chairman of the board of county commissioners of such county shall have had notice of such defects for at least five days prior to the time when such damage was sustained; and in other cases such recovery may be from the township, where the trustee of such township shall have had like notice of such defect."

This statute fixes liability on the county for injuries sustained on a bridge, but does not place liability on the county for injuries sustained on a highway. The accident in this case occurred on a highway; the plaintiff was not injured on a bridge. Therefore the county is not liable under section 722 for the damages sustained by the plaintiff. So far as the county is concerned, this section of the statute has not been amended or repealed. It is the statute fixing the liability of the county, if there is such a statute. No other statute has been cited fixing liability on the county for defect in a highway. It is safe to say that none exists.

In *County of Marion v. Riggs*, 24 Kan. 255, this court in the syllabus said:

"In the absence of a liability expressly declared by statute, a county is not liable for damages accruing from defective highways or public bridges."

That principle has often been followed by this court. *Tp. of Quincy v. Sheehan*, 48 Kan. 620, 628, 29 Pac. 1084; *Reading Tp. v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; *Silver v. County*, 76 Kan. 228, 230, 91 Pac. 55; *Shawnee County v. Jacobs*, 79

Kan. 76, 99 Pac. 817, 21 L. R. A. (N. S.) 209; *Fisher v. Delaware Tp.*, 87 Kan. 674, 125 Pac. 94, 41 L. R. A. (N. S.) 1074, Ann. Cas. 1914A, 554; *Thomas v. Ellis County*, 91 Kan. 443, 138 Pac. 409; *Harper v. City of Topeka*, 92 Kan. 11, 14, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032; *Gray v. Sedgwick County*, 101 Kan. 195, 198, 165 Pac. 867, L. R. A. 1918F, 182.

In *Silver v. Clay County*, 76 Kan. 228, 230, 91 Pac. 55, 56, this court said:

"We have not been cited to any statute, and believe none exists, which imposes any obligation upon a county to respond in damages for the negligence or even wrongful act of its officers in relation to the maintenance of public road or bridges, except section 579 of the General Statutes of 1901." (Section 479 of the General Statutes of 1901 is section 722 of the General Statutes of 1915.)

Taking liability away from the township does not fix the liability on the county. That method of establishing liability would be in violation of section 16 of article 2 of the Constitution of this state. In my judgment the county is not liable.

BURCH, J., joins in this dissent.

DAWSON, J. (concurring specially). This action is brought under a statute the avowed purpose of which is expressed in its title:

"An act making counties and townships liable for defects in bridges, culverts and highways in certain cases." Laws of 1887, c. 237 (Gen. Stat. 1915, § 722).

In the text of the statute it is similarly declared:

"Section 1. Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge, culvert, or highway, may recover such damage from the county or township wherein such defective bridge, culvert or highway is located, as hereinafter provided; that is to say, such recovery may be from the county when such damage was caused by a defective bridge constructed wholly or partially by such county, * * * and in other cases such recovery may be from the township. * * *"

It is my opinion that the words "culverts and highways" as first used in the text of the statute are merely omitted in repeating the declaration of the county's liability through a careless ellision, and not through any intention that counties shall be relieved of liability for defective culverts or highways. Note that, in the concluding language of the act, where the liability of townships is prescribed, all three of the words "bridges, culverts and highways" in *hæc verba* are omitted, but without in the least destroying the avowed legislative intention as declared in the title and in the earlier part of the text.

It seems to me that the familiar and often invoked rule of statutory construction is pertinent here:

"It is familiar law that legislative enactments are not any more than any other documents to be defeated on account of errors, mistakes or omissions. Where one word or figure has been erroneously used for another or a word omitted, and the context affords the means of correction, the proper word or figure will be deemed substituted or supplied. This is only making the naked letter of the statute yield to its obvious intent. *Brook v. Blue Mound*, 61 Kan. 184, 59 Pac. 273; *Reese v. Hammond*, 94 Kan. 459, 146 Pac. 997; *Sutherland on Statutory Construction*, § 260." *Coney v. City of Topeka*, 96 Kan. 46, 49, 149 Pac. 689, 690; *Tatlow v. Bacon*, 101 Kan. 26, 31, 165 Pac. 835, 14 A. L. R. 269; *State ex rel. v. City of Hutchinson*, 106 Kan. 532, 534, 188 Pac. 433.

Certainly if the county liability is limited to recovery of damages sustained by defective county bridges the text of the statute, "such recovery," etc., would compel a similar limitation on the liability of the township to defective township bridges. This would grossly distort the declared legislative intention.

The construction I suggest has one virtue—that of making the naked letter of the statute yield to the declared purpose of the Legislature in enacting it. Thus construed, the county is liable where with adequate notice it has neglected its duty touching county bridges, culverts, and highways, and the township is liable for its similar neglect of duty touching township bridges, culverts, and highways.

JOHNSTON, C. J., and PORTER, J., join in this special concurrence.

MASON, J. (concurring specially). To me the statute seems to say that the township is liable, but, in view of the rejection of that interpretation, I think it may, and should, by a liberal construction, be held to impose liability on the county.

(111 Kan. 183)

KAW VALLEY DRAINAGE DIST. OF WYANDOTTE COUNTY v. MISSOURI PAC. RY. et al. (No. 19115.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by Editorial Staff.)

Mandamus ¶185—The court will deny plaintiff's motion to enjoin defendants from obeying its own order where plaintiff is at fault.

Plaintiff's motion to enjoin defendants from obeying an order of the Supreme Court in an original proceeding in mandamus will be denied, particularly where the court is asked to order the total demolition of a bridge where the defendants would have corrected the de-

fects in the bridge and have removed a flood menace long ago if it had not been for plaintiff's persistent and protracted course of obstruction.

Original proceeding in mandamus by the Kaw Valley Drainage District of Wyandotte County against the Missouri Pacific Railway and others. On motion for an injunction to prevent the defendants from obeying an order of the Supreme Court. Motion denied, and jurisdiction of case retained.

T. A. Pollock, R. J. Higgins, and Henry E. Dean, all of Kansas City, for plaintiff.

Waggener, Challiss & Brown, of Atchison, Geo. L. De Lacy, of Omaha, and A. L. Berger, of Kansas City, for defendants.

DAWSON, J. We have here to consider an unusual motion presented by the Kaw Valley Drainage District. The motion is for an injunction to prevent the defendants from obeying an order of this court entered June 15, 1917.

It may be remembered that the plaintiff filed an action in this court on May 3, 1913, to require the defendants to remove an interstate railway bridge near the junction of the Kaw and Missouri rivers on the alleged ground that it was an obstruction to the flow of water, and tended to increase the hazard of floods at Kansas City. After four years' time was consumed in preparing this case for trial, a large trunkful of evidence and a mass of other documentary and probative matter was gathered by the litigants, at much needless cost to the taxpayers of the drainage district as well as to the defendants. This court found that plaintiff's demand for the total destruction of the bridge was unreasonable (99 Kan. 188, 161 Pac. 937), and that the obstructive defects could be corrected as suggested by the evidence of competent engineering experts, as follows:

"By raising the entire bridge 27/10 feet and removing the southeast approach within the harbor line, and removing the piling, the southeast cylinder piers, the girder span thereat, and the riprap down to 15 feet under low water level, and by substituting steel sheet piling to protect the southeast concrete pier in lieu of the present riprap protection, and by removing the latter, and by removing all the present bridge structure extending from the southeast concrete pier to the southeastern shore and substituting therefor a new steel truss span approximately 250 feet in length to rest upon the southeastern concrete pier and stretching without obstruction over a free waterway to the harbor line on the southeastern shore and to rest thereupon a suitable and durable abutment conforming to the plaintiff's dike."

It was therefore ordered:

"That the defendant owner of this bridge and L. S. Cass, receiver, proceed forthwith to prepare plans for the reconstruction of the bridge

in substantial conformity with the foregoing finding, and when so prepared that the defendants submit the plans to the plaintiff board for its approval, and that thereafter upon the approval or disapproval of the plaintiff board the said plans be submitted to this court for approval, and that upon the approval of this court, the said plans shall be filed with the United States Secretary of War and the proper application be made for the requisite federal sanction to reconstruct the bridge, all of which the defendants are ordered to do with diligence and good faith; and when the proper federal sanction is obtained the defendants shall proceed with all convenient speed to reconstruct the bridge and to prosecute the work diligently until its completion. Reasonable allowance of time will be made, as may be necessary, for delays occasioned without fault of defendants.

"It is further ordered that the costs of this action be divided, plaintiff to pay half and defendants to pay half.

"It is further ordered that the jurisdiction of the cause be retained."

Waiving a review by the United States Supreme Court of the federal questions involved, and which in a similar case had led to the defeat of the plaintiff in its attempts to enforce its similar order for the destruction of another interstate bridge less than a mile away (*Kansas Southern Ry. v. Kaw Valley Dist.*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857) the defendants proceeded at once in good faith to comply with the order of this court. Their engineering plans, being prepared in accordance with the order of this court, were submitted to the plaintiff board for approval. That approval was denied. Defendants were compelled to return to this court for instructions. We held that the plaintiff's refusal was arbitrary and unreasonable, and should be held for naught.

The defendants then submitted the plans to the War Department. The plaintiff made an ineffectual attempt before that department to prevent their approval. Consideration of the matter was necessarily deferred by the World War, but on April 6, 1920, the plans were approved by the proper officials of the War Department. Meantime the defendants were involved in financial troubles, partly owing to the greatly increased cost of labor and materials, and the War Department extended the time in which to commence the work of reconstruction.

On January 16, 1922, the plaintiff applied to the Secretary of War for the revocation of its former approval of the plans for the reconstruction of the bridge, and the whole matter was again patiently reviewed (see Appendix to this opinion) and the revocation denied.

Now the plaintiff asks this court to enjoin the defendants from obeying our own order. Indeed, it goes further, and asks us to order the total demolition of the bridge. We shall certainly grant nothing of the sort.

Moreover, these interminable maneuvers, which only hinder and delay the reconstruction of the bridge to correct its interference with flood waters, ought to have stopped long ago. They must stop now. If the defendants had been permitted to correct the defects of this bridge, without this persistent and protracted course of obstruction on the part of plaintiff, the flood menace of this bridge would have been eliminated years ago. It could have been done at a cost of \$80,000. Now, it is shown that it will cost \$225,000.

This motion in all its phases is denied, the defendants are admonished to proceed with diligence to discharge their duty under the order of this court issued June 15, 1917, and, in the event that defendants are further hindered or delayed in the performance thereof, they may resort to this court for relief. Jurisdiction of the cause is retained.

All the Justices concurring.

APPENDIX.

War Department, Office of the Judge Advocate General, Washington.

J. A. O. 823.

February 18, 1922.

Memorandum for the Secretary of War.

Subject: Application of the Kaw Valley Drainage District for revocation of approval of plans for bridge over Kansas river, Kansas City, Kansas.

The history of this case may be briefly stated as follows: The predecessor of the Kansas City Northwestern Railway Company constructed in 1903-1904 a bridge over the Kansas river, a navigable stream wholly within the boundaries of the state of Kansas, without having the plans of the bridge approved by the Secretary of War and the Chief of Engineers. The Kaw Valley Drainage Commission, incorporated under the laws of Kansas (General Statutes of Kansas Ann. 1915, p. 743 et seq.), instituted suit in the courts of the state of Kansas to compel removal of the bridge as being a flood menace. The matter was decided by the Supreme Court of Kansas (99 Kans. 188, 161 Pac. 937). The court refused to order the removal of the bridge, but in an order entered June 15, 1917, directed its modification according to plans to be submitted for the approval of the Drainage District and the Supreme Court of Kansas, and thereafter to be filed with the Secretary of War with proper application for the requisite federal sanction to reconstruct the bridge. Plans of the bridge, prepared in accordance with this order, were subsequently disapproved by the drainage commission. Thereupon the Kansas Supreme Court, in an order dated July 11, 1917, found that the disapproval was based solely upon grounds theretofore decided adversely to the plaintiff; that said disapproval was arbitrary and unreasonable and should be held for naught. The court therefore approved the plans and directed that they be presented to the War Department and to the proper federal authorities in further compliance with its order of June 15, 1917. In compliance with this order by application dated August 7, 1917, the plans were submitted to the Secretary of War for approval, and a public hearing was held by the district engineer at

Kansas City on February 11, 1917 [1918?]. Consideration of the matter was suspended during the World War, but it was again taken up in 1919, and on February 20, 1920, a special hearing was given to interested parties by the Secretary of War at his office. Immediately thereafter the Secretary of War requested a ruling of this office upon the question "whether the Secretary of War and the Chief of Engineers can approve these proposed modifications." The matter was given careful consideration by this office, and in a memorandum for the Secretary of War, dated March 8, 1920, the opinion was expressed that the Secretary of War and the Chief of Engineers had authority to approve the plans. This opinion was approved by the Secretary of War on March 16, 1920, and in accordance therewith the plans of the bridge were formerly approved by War Department instrument signed by the Chief of Engineers, March 30, 1920, and by the Assistant Secretary of War, April 6, 1920. By the terms of the instrument the approval thereby given was to cease and be null and void, unless the actual work of reconstruction was commenced within one year and completed within three years from the date of the instrument; but these dates were extended by the Secretary of War on February 16, 1921, to April 6, 1922, and April 6, 1924, respectively. It is understood that the railway company has not yet begun the reconstruction of its bridge, but that it contemplates commencing the work prior to the expiration of the time limit.

Under date of January 16, 1922, the Kaw Valley Drainage District, through its board of directors, transmits to the Secretary of War an application for the revocation of the War Department instrument approving the plans of this bridge and a request that the United States institute a suit for the removal of the bridge as an unlawful structure. In a memorandum addressed to the Secretary of War, February 11, 1922, the Chief of Engineers remarks as follows: "So far as navigation is concerned, it was my conclusion when the approval of the plans was given, that the bridge was not an unreasonable obstruction to navigation then existing, and that there was no prospective increase of traffic on the river, and I know of no reason for changing this conclusion. The bridge serves an important interstate commerce, and I concur with my predecessors that under the circumstances the Department would not be justified in inaugurating any procedure either for its alteration or removal. Moreover, it is believed that the orderly administration of the public business requires that matters which have received such exhaustive consideration and repeated decision as this should be deemed settled, and not open to reconsideration and readjudication at the pleasure of those interested in them; otherwise the acts of the department will be kept perpetually unsettled and afloat. The Kaw Valley Drainage District has had ample opportunity to present its views relative to the phases of the case within the jurisdiction of the department, and I see no occasion for a further hearing. As a matter of courtesy, however, inasmuch as the action of the department in approving the plans for reconstructing the bridge is challenged on legal grounds, it is suggested that the papers might be referred to the Judge Advocate General for further con-

sideration of this question. If he find no error in law, I recommend that the Kaw Valley Drainage District be advised that the department feels constrained to deny the application."

The federal law applicable to this case is as follows: Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151) provides, in part: "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. * * *"

Section 12 of the same act provides (30 Stat. 1151), as amended by the Act of February 20, 1900 (31 Stat. 32) that "every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section eleven, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

And section 18 of the act provides: "That whenever the Secretary of War, shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall

forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, that in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts [or from the existing circuit courts] direct to the Supreme Court either by the United States or by the defendants."

The power of Congress to regulate the placing of obstructions in the navigable waters of the United States is based upon the commerce clause of the Constitution (Const. art. 1, § 8, cl. 3), and in the act cited supra Congress has prescribed that it shall be unlawful to place any of the structures therein mentioned, including bridges, in such waters until its consent to the building of such structure has been obtained, and until the plans for the same have been submitted to and approved by the Chief of Engineers and by the Secretary of War; but has further provided that in the case of waterways the navigable portions of which lie wholly within the limits of a single state, such structures may be built under authority of the Legislature of a state, provided the location and plans of such structure are submitted to and approved by the Chief of Engineers and by the Secretary of War prior to the commencement of construction. A violation of the provisions of section 9 is by the terms of section 12 of the act made a misdemeanor, punishable upon conviction by fine or imprisonment, or in the discretion of the court by both such punishments, and in addition legal proceedings looking to the removal of such unlawful structures may be instituted in behalf of the United States.

It seems clear, although it has been questioned by complainants in this case, that there was sufficient state authority for the original erection of this bridge by the railway company. By act of October 31, 1868 (as found in General Statutes of Kansas 1915, § 2328), it was provided that "every railroad corporation shall, * * * have power: * * * "Fourth. To construct its roads across * * * any stream of water, water course, * * * which the route of its road shall intersect or touch." And in any event it is well settled that authority to build a railroad implies power to construct necessary bridges. *Union Pacific Railway Co. v. Hall*, 91 U. S. 343; *Hamilton v. Vicksburg, etc., Railway Co.*, 119 U. S. 280. As was pointed out by the court in the latter case, two conditions must be deemed to be embraced within

this implied power: First, that the bridge shall be so constructed as to insure safety to the crossing of the trains, and be so kept at all times; second, that the bridge shall not interfere unnecessarily with navigation. The location and plans of the bridge not having been submitted to and approved by the Chief of Engineers and the Secretary of War in accordance with the provisions of section 9 of the act of March 3, 1899, it was a structure erected in violation of the provisions of section 9, whose removal might have been enforced under the provisions of section 12 of the act. If found by the Secretary of War to be unreasonably obstructive to navigation, its alteration or removal might also have been effected under the provisions of section 18 of the act.

Such action, however, is not mandatory, and in the view apparently that this bridge was not an unreasonable obstruction to navigation it was not interfered with by the federal authorities. As has been seen, its removal was, however, sought by the Kaw Valley Drainage Commission, not on the ground that it was an obstruction to navigation, but that it was a flood menace, which action resulted in an order of the court directing its reconstruction along certain lines. This action by the Supreme Court of Kansas, after a consideration of the pertinent state legislation, would appear to set at rest any question of state authority for the bridge when reconstructed in accordance with the order of the court; and as was pointed out by this office in its former memorandum, the fact that the original structure was built without federal approval of the plans did not operate to prevent the approval by the Chief of Engineers and the Secretary of War of plans covering the reconstruction of the bridge.

In a printed brief and argument submitted in support of its request for a reconsideration of the former action of the War Department in this case, the Kaw Valley Drainage District states as follows: "The Secretary of War, in granting the approval complained of, appears to have based his action upon an opinion of E. A. Kregar, Acting Judge Advocate General, of date March 8, 1920, to the effect that the proposed alterations constitute a 'reconstruction,' and that permits for 'reconstruction' could be granted under the provisions of section 9 of the act of March 3, 1899. The point as to whether or not the proposed alterations constituted a 'reconstruction,' and as to whether or not the Secretary of War and Chief of Engineers are authorized to approve the making of the proposed alterations, were not raised in the Supreme Court of Kansas. The judgment of that court merely requires: The said plans shall be filed with the United States Secretary of War and the proper application be made for the requisite federal sanction to 'reconstruct' the bridge. The Kaw Valley Drainage District contends that 'the requisite federal sanction' for the proposed alterations can be secured only through an act of Congress, and that the War Department, under existing statutes, has no authority to authorize or consent to the proposed alterations of the present bridge. The validity of the approval given depends upon the correctness of the opinion of the Acting Judge Advocate General."

The Kansas Supreme Court in the case re-

ferred to on page 1 of this memorandum¹ considered the provisions of the federal act of March 3, 1899, with respect to the placing of structures in navigable waters, and remarked with respect thereto: "This statute is a specific recognition by Congress itself that, notwithstanding its paramount jurisdiction of the means and instrumentalities of interstate commerce, the bridging of navigable waters is likewise one of vital interest to the states, and that they also have a governmental concern as to proper bridging of such waterways."

In using the term "requisite federal sanction" in its subsequent order, therefore, the court undoubtedly referred to the requisite application for approval by the Chief of Engineers and the Secretary of War of the location and plans of a bridge proposed to be reconstructed across a waterway whose navigable portion lay wholly within state limits. Obviously, in the case of a bridge over such a waterway, this was the appropriate method of obtaining such federal sanction. This office remains of the view that the Secretary of War and Chief of Engineers had full authority to approve the location and plans of the bridge under the provisions of section 9 of the act of March 3, 1899.

Complainants, however, still insist that it will be proper for the federal authorities to take action to compel the removal of this bridge, and indeed that this is the imperative requirement of the law. On page 37 of their brief they say: "The giving of the approval involved acquiescence in, perhaps more correctly, the approval of a criminal offense—a violation of the act of Congress of March 3, 1899. Courts refuse to aid suitors in cases where the granting of relief involves recognition, acquiescence in, or approval of fraudulent or criminal acts. Does not a similar rule apply as to administrative officers of both the state and federal government in the exercise of discretionary powers? Is not the approval of the plans for the proposed alteration of the bridge in controversy contrary to public policy. We admit that the rule to which we now refer permits a wrongdoer to remedy his wrong—but in this case the successors of the wrongdoer seek to perpetuate, to continue, the wrong, with the assistance and approval of one of the highest officers of the United States."

Referring to the provisions of section 12 of the act of March 3, 1899, with respect to the consequences which may follow the construction of a bridge in violation of the provisions of section 9 of that act, this office in its former memorandum remarked: "It will be noted that the consequences may be twofold, a criminal prosecution for the act, and a civil action for the removal of the unlawful structure. It is obvious that the action of the Secretary of War and Chief of Engineers in approving the plans for the reconstruction could have no effect upon the criminal features; the 'misdemeanor' having been committed the guilty party is subject to prosecution, providing, of course, that the prosecution is started within the limitation as to time pertaining to criminal prosecutions. However, the effect upon the civil action is entirely different. When the reconstruction is completed the old bridge, the unlawful structure, has ceased to exist, and a new and different structure stands in its place.

The purpose of the civil action, viz. the removal of the unlawful structure, will have been accomplished by the reconstruction. The object upon which the civil action could act having ceased to exist, the right to bring the action ceases. The effect of the approval of the plans for the reconstruction is not to 'legalize' the old structure, but to bring about its removal and place in its stead a new and different structure. No taint of the illegality of the old structure would be transmitted to the reconstructed structure, the latter standing on its own merits, and having been built according to law will be a lawful structure."

It is to be noted that the enforcement through appropriate legal proceedings under the provisions of section 12 of the act of March 3, 1899, supra, of the removal of a structure built in violation of other provisions of the act, is not in the nature of a punishment. That is provided for in the penal portion of the section. It is rather in furtherance of the general purpose of the act, which is to preserve intact the navigable capacity of the navigable waters of the United States by regulating the nature of structures that may be placed therein and providing for the alteration or removal of such structures as may unreasonably obstruct navigation.

In the case of the bridge in question there appears never to have been any affirmative finding by the War Department that it was an obstruction to navigation. Had there been, it would have been the duty of the Secretary of War to proceed under the provisions of section 18 of the act of March 3, 1899, supra, to bring about its alteration or removal. It is a matter of record that the Acting Chief of Engineers in an indorsement dated December 8, 1919, considered by this office when the matter was previously before it, pointed out that "the question of obstruction to navigation is discussed by the district and division engineers in the first and second indorsements hereon, and both in substance reach the conclusion that *the bridge as it stands* is not an unreasonable obstruction to navigation, and that the proposed changes will tend to improve conditions. The division engineer thinks, however, that *they are not necessary to render navigation thorough or under the bridge reasonably free, easy and unobstructed. I concur in their views on that subject.*"

Clearly in such a situation it was not the duty of the Secretary of War to bring the matter to the attention of the Attorney General with a view to the institution of legal proceedings looking to the removal of the bridge.

No different situation exists to-day. The Chief of Engineers, acting within the scope of his jurisdiction, has assured the Secretary of War that a bridge built or reconstructed in accordance with certain plans will not be an unreasonable obstruction to navigation, and those plans have already been approved by the Secretary of War and Chief of Engineers. In this situation, so far as the War Department is concerned, there is no ground for the initiating of action looking to the removal of the bridge.

In addition to requesting revocation of the approval of the plans of this bridge, and the institution of a suit for removal, complainants request that no extension of time for the commencement or completion of the work under

¹ 90 Kan. 188, 161 Pac. 237.

said approval be granted. As to this it is sufficient to say that the time limit for beginning construction does not expire until April 6, 1922. So far as this office is advised no request for extension is before the Department, and in the absence of such request it seems inappropriate to consider the matter at this time.

In conclusion, it may be well to remark briefly upon the legal effect of an approval by the Secretary of War and the Chief of Engineers, under the relevant statutes, of the plans of structures to be placed in or across navigable waters. On this point the case of *Cummings v. Chicago*, 188 U. S. 410, is illuminating. In that case the plaintiffs, citizens of Illinois, brought suit in the Circuit Court of the United States for the Northern District of Illinois, against the city of Chicago for the purpose of obtaining a decree restraining the defendant from interfering with the construction of a dock in front of certain lands owned by the plaintiffs and situated on the Calumet river, within the limits of that city. Plaintiffs alleged that they were proceeding under a permit issued by the Secretary of War under pertinent provisions of the act of March 3, 1899, and that the defendant refused to recognize the permission thus given. Judgment was rendered for the defendant, and on appeal to the United States Supreme Court that judgment was affirmed. With respect to the effect of the act of March 3, 1899, and the instrument issued thereunder by the Secretary of War the Supreme Court of the United States said: "The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies. (Italics supplied). To the same general effect are: *Escanaba Co. v. Chicago*, 107 U. S. 678; *Willamette Bridge Co. v. Hatch*, 125 U. S. 1; *Lake Shore & Mich. Ry. v. Ohio*, 165 U. S. 365; *Montgomery v. Portland*, 190 U. S. 89.

This comment seems necessary because of the great weight which complainants appear to attach to the instrument whose revocation they seek and which is referred to in several places in their brief as a "permit." The fact is that without the requisite state authority it is ineffectual. It is true that it is not the practice of the War Department to issue instruments of approval in cases of this nature unless there is a showing of state authority for the work, and such a showing appears in the present case; but the action of the War Department has, of course, no binding effect upon the state, whose power in the matter is plenary and will not be interfered with by the federal government unless it come in conflict with the power vested in the federal government with respect to the protection, preservation and improvement of navigation.

This office, having found no error or law in respect of the former action of the War De-

partment in this case, shares the view of the Chief of Engineers that nothing is to be gained by affording the complainants a further opportunity to be heard, and joins in his recommendation that their application be denied.

[Seal. Feb. 21, 1922] J. A. Hull,
Acting Judge Advocate General.

Approved Feb. 23, 1922.

[Seal War Dept. Feb. 23, 1922.]
J. M. Wainwright,
Assistant Secretary of War.

(111 Kan. 303)

STATE ex rel. HOPKINS, Atty. Gen., v.
TURNER, State Auditor. (No. 23740.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Navigable waters \S 44(3), 45—Statute providing for sale of abandoned channels of navigable streams and distribution of proceeds held void.

The statute of 1921, relating to sale and conveyance, in certain cases, of abandoned channels of navigable streams (Laws 1921, c. 272), misconceived the effect on title to the bed of the stream of a change of channel, and the provision for distribution of proceeds of sale is void.

(Additional Syllabus by Editorial Staff.)

2. States \S 119—May not make gift of public money or of public property for private benefit of individual.

The Legislature may not make a gift of public money, any more than it may make a gift of public property, for the private benefit of an individual.

Original proceeding in mandamus by the State, on the relation of Richard J. Hopkins, as Attorney General, against Norton A. Turner, as State Auditor, etc. Writ denied.

Richard J. Hopkins, Atty. Gen., and J. K. Rankin and Dennis Madden, both of Topeka, for plaintiff.

Fred L. Crabbe, of Topeka, for defendant.

BURCH, J. The action is one to compel the state auditor to sell an abandoned channel of the Kaw River, and to distribute the proceeds according to chapter 272 of the Laws of 1921.

The act is entitled:

"An act relating to the sale, disposition and conveyance, in certain cases of the abandoned channel of navigable streams in the state of Kansas."

The act provides that, whenever a channel of a navigable stream is so changed that the land between the old banks is abandoned by the water and a new channel is established, the land forming the old channel shall be sold by the auditor, and patented to the purchaser. Sections 2 and 3 read as follows:

"The proceeds arising from the sale of said land shall be applied as follows: First. To the payment of all expenses necessarily incurred in surveying, appraising and selling the same. Second. To pay the respective owners of the land taken by said stream for the new channel, for the value of the land, as fixed by the state auditor, thus taken from them, in the ratio that the land taken by the new channel bears to the selling price of the land sold in the abandoned channel.

"The balance, if any, shall be paid in to the state treasury to become a part of the common school fund of this state."

[1] The petition states that the Kaw river, a navigable stream, has established itself in a new channel, at a place near St. Mary's, and the owners of land taken by the new channel have requested the auditor to execute the statute. The auditor answers that the statute is based on an erroneous assumption of fact respecting what the state owns, and that the provision relating to distribution of proceeds of sale is illegal and void. The auditor is correct in both his contentions.

Before the change of channel occurred, the state owned the bed of the stream. The petition does not tell how the change of channel occurred, whether by gradual and imperceptible relinquishment of one and acquisition of the other, or by sudden and violent eruption of the water, whereby the new channel was cut and the old one deserted. If the change was accomplished by the first method, the state no longer owns the old channel, and has nothing to sell. If the change was accomplished by the second method, the state does not own the new chan-

nel, and would get nothing for its money. Assuming the change was caused by flood, the state has full jurisdiction over the river in its present location, for preservation and protection of its public highway character; but the proprietors whose lands were invaded and degraded by the avulsion still own the bed and banks of the stream. *Fowler v. Wood*, 73 Kan. 511, 529, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534.

The brief for the state suggests that the statute is a condemnation statute. Both the title and the body of the act forbid such an interpretation. The statute states that it is supplemental to chapter 322 of the Laws of 1915. That act declared abandoned beds of navigable rivers to be school lands, provided for survey and sale, and provided for placing the proceeds in the school fund. The Attorney General offers no suggestion of public purpose to be promoted by using money which has been regarded as belonging to the school fund, or for that matter, by using any other public money, in buying river beds; the statute does not present a single feature characteristic of a condemnation statute; and the declared purpose is to sell land which the state owns, not by exercise of eminent domain, to acquire other land.

[2] The Legislature may not make a gift of public money, any more than it may make a gift of public property, for the private benefit of an individual (*Winters v. Myers*, 92 Kan. 414, 140 Pac. 1033), and that would be the result of selecting a few flood sufferers of a special class and reimbursing them for their losses.

The writ is denied.

All the Justices concurring.

(120 Wash. 365)

MUSTAR et al. v. RUSSELL et ux.
(No. 16938.)

(Supreme Court of Washington. June 6, 1922.)

1. Landlord and tenant §22(3) — Owners held not in default under contract to erect and lease building.

Where owners' contract to erect and lease a building was made April 1, action by the lessees for breach, brought June 23, held premature, plaintiff's witness having testified that the building could be erected in 90 days, and it appearing that defendant owners had at no time refused to go forward with their contract, but that their failure to proceed was due to their inability to secure a loan needed to finance the construction.

2. Landlord and tenant §22(3) — Contract held not to require lessors to sign lease at time demand was made.

A contract by which defendants were to erect and lease a building held to contain nothing which required the defendants to execute a lease or more formal contract prior to the time that the building was at least half done, or in response to a demand served before construction was begun if not delayed for an unreasonable time.

3. Frauds, statute of §131(1) — Written contract held not modified by writing not signed by parties, nor by oral subsequently executed agreement.

A written agreement for the erection of a building by defendants, to be occupied by the plaintiff for a period of 10 years, was not modified by a subsequent writing which was not signed by the parties, nor by a subsequently executed oral agreement.

Department 2.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by Z. P. Mustar and another, doing business as the Mustar Motor Company, against C. E. Russell and wife. Judgment for plaintiffs, and defendants appeal. Reversed, with directions that cause be dismissed.

P. C. Kibbe, of Tenino, and Vance & Christenson, of Olympia, for appellants.

Coleman & Fogarty, of Everett, for respondents.

MAIN, J. The plaintiffs, by this action, seek to recover from the defendants the sum of \$7,000, and interest thereon. The trial before the court without a jury resulted in findings of fact, conclusions of law, and a judgment sustaining a recovery. From this judgment the defendants appeal. On the 1st day of April, 1920, the respondents, Z. P. Mustar and J. H. Weber, under the name of Mustar Motor Company, were dealers in automobiles in the city of Everett. The appellants are husband and wife, and resided in Tenino, Wash., where they owned and

operated a shingle mill. The appellants were the owners of three lots in the city of Everett, which will be referred to as the Wetmore property, and desired to erect thereon a garage and lease the same. The respondents desired to move from the location in which they were doing business, but did not desire to lease a building on the property owned by the respondents. Negotiations were had between the parties, which, on April, 1920, resulted in a written agreement wherein the respondents and one H. S. Wright agreed to acquire and convey to the appellants four lots in the city of Everett at the corner of Wall street and Rucker avenue, which property will be referred to as the Rucker avenue property. In consideration of the conveyance of this property to the appellants, the latter were to convey to the respondents and Wright the Wetmore property. The agreement was signed by the respondents, Wright and C. E. Russell. It provided for the erection of a garage upon the Rucker property, and specified in a general way the size and character of the building, and fixed the rental. The Rucker property was acquired and conveyed to the appellants. Wright not advancing his portion of the purchase price, the appellants paid the same, which was the sum of \$3,500. Wright was an architect and builder, and was to superintend the construction of the building. The contract contained no limit of time within which the building was to be completed. After the execution of the contract Wright proceeded with the excavation for the building, for which on April 29 he was paid by the appellants approximately the sum of \$4,000. The building to be erected was to cost about \$50,000. In order to carry out the contract it was necessary for the appellants to borrow \$30,000. After the contract was made they made diligent effort to borrow this money in the cities of Seattle, Tacoma, and Everett, but were unable to get it, apparently on account of the rate of interest being greater than they had contemplated paying. The rent for the building as testified to by the appellants was fixed on the basis of securing money at approximately 6 or 6½ per cent. On about the 1st of June the respondents served notice upon the appellants to proceed immediately with the erection of the building, and signed a more formal contract, which was then presented them, than one above referred to. This latter contract was one which was drafted on about April 16, after conference between the parties, but was not signed by any one. Whether it be considered a lease for the building or merely a more formal contract and an agreement for a lease is not material. The appellants did not sign this contract, but at all times continued their efforts to borrow the money for the erection of the building.

On June 23, 1920, the summons and complaint were served upon the appellants, and recovery sought by the respondents of the \$7,000 which they had invested in the Rucker property upon which the building was to be erected, and title to which was conveyed to the appellants. Prior to the time of the service of the demand referred to, the appellants had tendered to the respondents a deed to a two-thirds interest in the Wetmore property, which was declined; the position of the appellants being that, since the respondents had paid for only a two-third interest in the Rucker property, and they had paid the other third which should have been paid by Wright, they were not required to convey more than a two-thirds interest in the Wetmore property to the respondents, and were not required to convey any portion thereof to Wright because he had not advanced anything for the Rucker property. It is the theory of the respondents that the appellants had breached the contract by failing within a reasonable time to proceed with the erection of the building, and by failing to execute the agreement drafted on April 16, when the demand was served upon them to do so. Before the respondents are entitled to recover it is incumbent upon them to show that the appellants had breached the contract. The first question to be considered is whether the appellants had failed to proceed with the erection of the building within a reasonable time. At the time the contract of April 1 was made the respondents were occupying the building, the lease of which would expire on January 1, 1921. Wright, who may be considered as an adverse witness so far as the appellants are concerned, testified that the building could be erected within a period of 90 days, and probably could have it done in less time than that. It does not appear from this testimony whether the 90-day period would include the excavation or not. It will be assumed, however, that it would. The contract was made on April 1. The action was brought on June 23. It thus appears that the 90-day period had not elapsed before the action was instituted, assuming that this would be the test.

In determining what would constitute a reasonable time within which to perform the contract, all the pertinent facts and circumstances should be taken into consideration. The trial judge as shown by his oral opinion, delivered at the conclusion of the trial, was of the opinion that the respondents were not entitled to judgment because of the failure of the appellants to proceed with the erection of the building within a reasonable time.

[1] Without reviewing the evidence in detail, it may be said that we concur in this view. It is plain from the record that the appellants had at no time abandoned or refused to go forward with the contract, but diligently prosecuted their efforts in an endeavor to secure a loan. A reasonable time

had not elapsed when the action was begun; it being accepted by both parties that since the contract mentioned no time the law would fix a reasonable time. The respondents rely upon the rule stated in *Lake Shore & Michigan Southern Railway Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, to the effect that a breach of a contract which will justify the party not in default in suing for such breach need not be of such a character as to render the further execution of the contract impossible. But if the other party refused to treat it as subsisting and binding upon him, or by his act or conduct shows that he had renounced it, there is in legal effect a breach which would justify an action. The evidence in this present case does not bring it within the rule. The appellants at all times treated the contract as subsisting and binding upon them, and their conduct was such as to show that they had not renounced it.

[2] The trial court was of the opinion that the appellants in refusing to sign the agreement presented at the time of the demand, and which was drafted on April 16, had breached the contract to make a lease and therefore for this reason the respondents were entitled to recover. It will be remembered that the agreement, neither at the time it was drafted nor at any other time, had been signed by any of the parties. The signed agreement, that of April 1, contained two clauses which will be referred to. It was provided therein that—

C. E. Russell, one of the signers, would "erect a three-story building on lots on the northeast corner of Wall and Rucker avenues to be occupied by the Mustar Motor Company for a period of five years at a rent of \$650 per month."

The other clause is:

"Mustar Motor Company to put up \$5,000 to guarantee rent to be furnished to Mr. Russell when building is half done for which he is to pay seven per cent. per annum semiannually."

From the first clause quoted it appears that Russell was to erect the building which was to be occupied by the Mustar Motor Company for a period of years and at the rent specified. By the second clause the Mustar Motor Company, when the building was half done, was to put up the \$5,000 as there specified. There is nothing in this contract which requires the respondents to execute a lease or more formal contract prior to the time that the building was at least half done. When the demand was served the construction upon the building had not been commenced and, as we concluded above, had not been delayed for an unreasonable length of time. There was no legally binding agreement upon the parties which would require the appellants to execute a lease at the time the demand was served. There was oral tes-

timony as to the circumstances under which the contract of April 16 was prepared. This contract was more formal, and differed from the other with reference to the term for which the respondents would have a right to occupy the building. The first agreement specified 5 years and this one 10 years.

[3] It will not be contended that a contract to erect the building upon real property and make a lease thereof for a period of 10 years is valid under the statute of frauds, unless it be in writing. The contract of April 1 was either valid under the statute of frauds or void. If it were valid, being one which is required to be in writing, it could not be modified subsequently, except in writing signed by the parties or an executed oral contract. *McInnis v. Watson* (Wash.) 200 Pac. 578; *Oregon & W. R. Co. v. Elliott Bay Mill & Lum. Co.*, 70 Wash. 148, 126 Pac. 406. This case does not come within the rule of either of those cases. The agreement of April 1 was not modified by the subsequent writing which was not signed by the parties and was not modified by a subsequently executed oral agreement. If the contract of April 1 be assumed not to be good under the statute of frauds, then the basis of the respondent's actions falls, and no recovery could be had.

It is apparent therefore that the action was prematurely brought, and must result in a reversal and the direction that it be dismissed; and it is so ordered.

PARKER, C. J., and HOLCOMB, MACK-INTOSH, and HOVEY, JJ., concur.

(121 Wash. 359)

STATE ex rel. JACOBSON v. SUPERIOR COURT FOR SPOKANE COUNTY.
(No. 17153.)

(Supreme Court of Washington. June 6, 1922.)

Divorce ¶209, 221—Husband not entitled to temporary maintenance, suit money or attorney's fees from wife pending action.

Rem. Code, § 988, as amended by Laws 1921, p. 332, and sections 989 and 5931, as to temporary allowances and permanent alimony in divorce proceedings and liability of both husband and wife for family expenses, do not change the common-law rule so as to authorize awarding the husband temporary maintenance, suit money, or attorney's fees from the wife's property pending divorce.

Writ of review by the State of Washington, on the relation of Agnes Jacobson, against the Superior Court for Spokane County, to reverse an order in a divorce action between relator and John Jacobson. Order reversed and set aside.

O. C. Moore and B. B. Adams, both of Spokane, for plaintiff.

Berkey & Cowan and McCarthy, Edge & Lantz, all of Spokane, for respondent.

PARKER, C. J. The relator, Agnes Jacobson, seeks in this court a review and reversal of an order of the superior court for Spokane county entered in an action for divorce commenced by her against her husband, John Jacobson, in which the court awarded him "temporary suit money," "temporary attorney's fees," and "temporary maintenance," to be paid to him by her pending her appeal to this court from a prior order entered in that action. We shall assume for present purposes that the conditions of this controversy are such that relator has the right to have the order in question reviewed and, if found erroneous, reversed, by this review proceeding, and is not compelled to resort to an appeal looking to that end; no contention being made to the contrary.

In view of our conclusion we find it necessary to consider only the question of law as to whether or not the husband in a divorce action is by the law of this state under any circumstances legally entitled to such temporary allowance as is here sought, and was awarded by the superior court. It is elementary that, in states and countries having the source of their jurisprudence in the common law, a husband has no legal right to an award of alimony, as against the wife, in the absence of statutory enactment so providing. In the text of 1 R. C. L. 874, the rule and the reason thereof are well stated as follows:

"Since alimony is an allowance made in the enforcement of the common-law liability of a husband to support his wife, it follows that in the absence of a statutory provision on the subject there is no authority for such an allowance to the husband, as at common law no corresponding duty is imposed upon the wife." 19 C. J. 204.

This being the common-law rule as to alimony—which for the present we may regard as meaning only maintenance—it seems to us to follow as a matter of course that it applies as well to suit money and attorney's fees incident to a divorce proceeding. It was so held in the well-considered cases of *State ex rel. Hargert v. Templeton*, 18 N. D. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234, and *Eisenring v. Superior Court*, 34 Cal. App. 749, 168 Pac. 1062. So our real problem is as to whether or not this common-law rule has been changed in our state by legislation, so as to warrant the awarding of such relief to the husband as was awarded to him by the order here on review.

Counsel for respondent invoke the provisions of the following sections of Rem. Code:

"Sec. 988 [as amended by chapter 109, Laws of 1921]. Pending the action for the divorce, the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof. * * *

"Sec. 989. * * * In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

"Sec. 5931. * * * The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately."

Section 988 seems to us to clearly negative any legislative intent to authorize the making of a temporary award to the husband, of the nature here in question, pending a divorce proceeding. The first few lines of that section, down to and including the word "proper," read apart from the other words of the section, may seem to lend some support to the view that the husband, equally with the wife, upon proper conditions shown, would be entitled to such relief as is here sought; but the concluding above-quoted words of that section, "and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof," seem to us to clearly negative any expression of legislative intent to change the common-law rule in favor of the husband. There seems to us to be no reason for making such express provision for temporary allowance to the wife, except to preserve the common-law rule upon that subject. Section 989 does authorize disposition of the property of the parties upon the final granting of a divorce, and we have held that this means the disposition of the separate property of both wife and husband as well as their community property; which means that upon the granting of a divorce the husband may have an award even out of the separate property of the wife. *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864; *Budlong v. Budlong*, 43 Wash. 423, 86 Pac. 648; *Hale v. Hale*, 76 Wash. 34, 135 Pac. 481; *Fitzpatrick v. Fitzpatrick*, 105 Wash. 394, 177 Pac. 790. While that section may furnish some ground for arguing that the husband may be awarded permanent alimony in the form of a periodical allowance as against the wife, as well as being awarded a portion of her separate property, we think it does not follow that

the husband may be awarded a temporary allowance pending the divorce proceeding. Section 5931 renders the wife's separate property chargeable with the expenses of the family, and we have held, in *Russell v. Graumann*, 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830, that the furnishing of the husband with hospital and medical services during his last illness, while the family relation of the two spouses had not been severed in the sense that they were living separate and apart, was chargeable against the separate property of the wife at the suit of the person furnishing such services. But even that, we think, does not argue at all conclusively that such temporary award as is here sought by the husband can be lawfully made.

The California case of *Eisenring v. Superior Court*, 34 Cal. App. 749, 168 Pac. 1062, seems to be directly in point and against respondent's contention touching this phase of our problem. In that case it was held that a husband was not entitled to suit money and alimony pendente lite notwithstanding section 176 of the California Civil Code then in force, providing that—

"The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself."

The court rested its decision upon a provision of the divorce statute, in substance the same as ours, reading as follows:

"When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action."

In disposing of the case the court made the following pertinent observations:

"Clearly the power of the court under this provision is restricted in the exercise thereof to the wife, and no similar provision is made in favor of the husband. To our minds, this section measures the power of the court in the matter of allowing suit money and alimony pendente lite, and, as said in *Hagert v. Templeton*, 18 N. D. 525, 128 N. W. 283, 25 L. R. A. (N. S.) 284, 'was intended to be exclusive and to embrace the entire subject-matter of the allowance of alimony pendente lite.'"

Counsel for respondent call our attention to, and seem to place considerable reliance upon, the decision of the Iowa court in *Lindsay v. Lindsay*, 189 Iowa, 326, 178 N. W. 384, wherein an award of temporary allowance in substance the same as was made by the order here in question was sustained; but that decision was rendered in the light of section 8177 of the Iowa Code, reading as follows:

"The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party

and the children, and to enable such party to prosecute or defend the action."

Plainly the common-law rule was changed by this language of the Iowa statute. No case has come to our notice, and we think none can be found, wherein any appellate court in this country has held that a husband is legally entitled under any circumstances to an award such as was made by the order here on review, in the absence of statute plainly authorizing such award to be made.

The order of the superior court entered on March 15, 1922, awarding to John Jacobson, the husband of relator, "temporary suit money," "temporary attorney's fees," and "temporary maintenance," is reversed and set aside.

MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

(120 Wash. 346)

STATE v. SHAFFER. (No. 16919.)

(Supreme Court of Washington. June 1, 1922.)

1. Assault and battery \S 96(1)—Criminal law \S 829(3)—Instruction defining the word "willfully" held properly refused in view of charge given and evidence.

In a prosecution for assault in the second degree, defined by Rem. Code 1915, \S 2414, subd. 4, as a willful assault on another with a weapon or other thing likely to produce harm, a requested instruction that "willfully" meant intentional, with a bad motive, and without justifiable excuse or reasonable ground for believing the act unlawful, was properly refused, where the court charged that the word meant "intentional, that is, not accidental," and the evidence showed that accused pointed a pistol at an officer, and by such means prevented a search of accused's house for the purpose of discovering intoxicating liquors kept therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful—Willfully.]

2. Criminal law \S 814(20)—Instruction on assault in third degree not called for where no evidence relating thereto.

In a prosecution for assault in the second degree, refusal to submit assault in the third degree was not error, where there was no evidence to sustain a conviction of that crime.

3. Assault and battery \S 60—Pointing unloaded revolver may constitute assault in second degree.

Assault in the second degree may be accomplished by pointing a revolver at another within shooting distance, accompanied with apparent present ability to give effect to the attempt if not prevented, though the revolver is in fact unloaded.

4. Intoxicating liquors \S 248—Search warrant issued on affidavit valid, though affiant had no positive knowledge.

Where a search warrant was issued upon affidavit of the sheriff which stated that intoxi-

cating liquor was being bought, sold, manufactured, and given away at the home of accused, it was valid, though the sheriff testified that he did not know positively that there was any liquor in the house.

5. Assault and battery \S 100—Sentence of 2 years for assault in second degree held not an abuse of discretion.

Where a statute fixes the maximum penalty for assault in the second degree at 10 years, the imposing of a sentence of 2 years on one who pointed a pistol at officers and prevented them from making a search of his house for intoxicating liquors under a proper warrant is not an abuse of discretion.

Department 2.

Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Dan Shaffer was convicted of assault in the second degree, and appeals. Affirmed.

Herman Howe, of Leavenworth, for appellant.

Sam R. Sumner and Frank Lebeck, both of Wenatchee, for the State.

MAIN, J. The defendant was charged by information with the crime of assault in the second degree. The trial resulted in a verdict of guilty. After motion for new trial was overruled he was sentenced to the state penitentiary for a minimum period of 2 years, and thereafter appealed from the judgment. The facts necessary to the understanding of the questions to be determined may be summarized as follows:

On the 2d day of December, 1920, and for some time prior thereto, the appellant resided in Chelan county, a short distance from the town of Leavenworth. In addition to himself, his family consisted of his wife and two young ladies, one of whom was his daughter. The sheriff of the county, believing that the appellant had intoxicating liquor in his home in violation of the law, regularly obtained a search warrant, and on the evening of the day above mentioned, together with two deputies, went to the home of appellant for the purpose of making a search. They arrived there a few minutes past 9 o'clock in the evening, and in response to their rap at the door the appellant appeared, and was advised by the sheriff who he was and what his purpose was. In response to this the appellant unequivocally stated that the officers would not be permitted to make the search, because he claimed that his wife was ill and could not be disturbed. The sheriff told him that if his wife was ill they would not search the room where she was, and would not in any manner disturb her. After some conversation the appellant entered the house, and, as he says, went up stairs to consult his wife, who was lying upon a bed. As he returned and approached

the door the officers were just opening it for the purpose of entering. One of the deputies had stepped inside, when he was met by the appellant, who pointed at him a revolver and refused to permit the officers to proceed further. A conversation then took place, which lasted for approximately 10 minutes, during which time the appellant kept the revolver in his hand and pointed at the deputy sheriff, who was in advance. Before the conversation ceased, the wife of the appellant came downstairs and into the room, where she engaged in conversation with her daughter and the other young lady. The officers finally gave up the attempt to make the search, and thereafter the defendant was charged with the crime of assault in the second degree, with the result above indicated.

The charge is based upon subdivision 4 of section 2414 of Remington's 1915 Code, which reads as follows:

"Every person who, under circumstances not amounting to assault in the first degree—
* * * (4) Shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm; * * * Shall be guilty of assault in the second degree and be punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both."

[1] The first error assigned is that the court did not directly define, in instructing the jury, the term "willfully" as used in the statute. In the instruction given this word was said to mean "intentional; that is, not accidental." Appellant objects to the instruction because, he says, it did not go far enough. He requested one to the effect that the word meant not only intentional, but with a bad motive or purpose, and without justifiable excuse or reasonable ground for believing the act to be unlawful. Conceding that there might be a set of facts which would require a more amplified definition of the term, the instruction given was correct as far as it went, and that requested by the appellant was properly refused. There is no evidence which would authorize the giving of an instruction that the appellant had ground for believing that he was acting in a lawful manner or had any justifiable excuse for his conduct. He admitted in testifying that he was making the gun play as a bluff.

[2] It is next claimed that the court erred in refusing to submit to the jury the question as to whether the appellant was guilty of the crime of assault in the third degree. It may be admitted that, if there was any evidence which would justify the jury in finding a verdict of guilty of assault in the third degree, the instruction should have been given. The evidence showed that the appellant was guilty of assault in the second degree as defined by the provision of the statute above quoted or he was not guilty of any offense. The evidence brings the cause

squarely within the statute under which the prosecution was had. It was not error to refuse to submit to the jury the question whether the appellant was guilty of assault in the third degree when there was no evidence which would sustain the conviction of that crime.

[3] The next question is whether the court erred in defining what constituted an assault under the statute. The officers testified that the revolver was loaded. The witnesses for the defendant testified that it was not loaded. The appellant claims that if the revolver was not loaded there was only an apparent attempt to commit an assault and that this was not sufficient to constitute the crime. The jury were instructed that an assault was an attempt to unlawfully use force or inflict bodily injury on another, accompanied with apparent present ability to give effect to the attempt if not prevented. Outside of this jurisdiction the authorities are in conflict as to whether an apparent ability to carry into effect is sufficient, or whether there must be an actual ability. In other words, under one line of authorities the pointing of an unloaded revolver at a person would not constitute an assault while under the other it would. The instruction given is based upon the holding of this court in *Howell v. Winters*, 58 Wash. 436, 108 Pac. 1077. The court, in that case, which was a civil action, adopted the rule that apparent ability was sufficient. The appellant admits the force of that holding in a civil action but claims that it should not apply in a criminal proceeding. At least one of the cases cited in support of the holding there was a criminal case, and the court in that opinion did not seem to make any distinction between the two classes of action. In any event, we see no reason why one rule should be adopted for a civil action and another in a criminal proceeding. In 2 Bishop's New Criminal Law, § 32, it is said:

"If, within shooting distance, one menacingly points at another with a gun, apparently loaded yet not in fact, he commits an assault the same as if it were loaded. There must be some power, actual or apparent, of doing bodily harm; but apparent power is sufficient."

In a further discussion the author heartily disproves of the rule adopted in some jurisdictions that the pointing of an unloaded revolver at a person does not constitute an assault. The instruction given was correct.

The next assignment of error relates to the manner in which the appellant claims a search for intoxicating liquor should be made. It is his contention that it should be made in a reasonable manner. That it should be so made in view of all the attendant facts and circumstances may be admitted. In this case no search was made at all because the appellant prevented it. There is no evidence that the officers proposed to

make the search in any other than a reasonable manner, and when told that the wife of the appellant was ill they offered to make the search without entering the room where she was and without disturbing her. The appellant, as he testified, was willing that the search should be made on the following day or any other time, but would not permit it to be made that night.

[4] Some question is made with reference to the regularity of the search warrant, but there is no merit in the appellant's position in this. The warrant was issued upon the affidavit of the sheriff which stated, as the appellant says in his brief in positive terms, that intoxicating liquor was being bought, sold, manufactured, and given away at the home of the appellant. Upon the trial on cross-examination the sheriff testified that he did not know positively that there was any liquor in the house, but that does not militate against the regularity or validity of the warrant.

[5] Finally, it is contended that the penalty imposed was so excessive as to constitute an abuse of discretion on the part of the trial court. The court fixed the sentence at a minimum of 2 years, and the statute fixes the maximum at not more than 10 years. Under the repeated holdings of this court there was no abuse of discretion in imposing the sentence complained of. *State v. Bliss*, 27 Wash. 463, 68 Pac. 87; *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Kenney*, 83 Wash. 441, 145 Pac. 450.

The judgment will be affirmed.

PARKER, C. J., and MACKINTOSH,
HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 317)

DE VON v. TOWN OF OROVILLE.
(No. 16940.)

(Supreme Court of Washington. May 22,
1922.)

1. Municipal corporations §109—Ordinance not recorded in book provided not thereby invalidated.

That a municipal ordinance was not recorded by the town clerk in the book marked "Ordinances" as provided by Rem. Code 1915, § 7744, did not render it invalid, and its due passage could be proven by the introduction of the original ordinance itself, which was signed by the mayor and attested by the clerk as provided by section 7734.

2. Newspapers §1(4)—Evidence sufficient for conclusion that paper at time of publication of ordinance therein was the official paper of the town.

Rem. Code 1915, § 7733, provides that any town of the fourth class may select or designate any newspaper of general circulation in such town as the official paper, and all notices pub-

lished in said paper for a period and in the manner provided by law shall be legal, and, where it was shown in evidence that, notwithstanding no paper had been officially designated, but that for the past several years legal notices were published in the paper in which an ordinance was published, that was sufficient to call for the conclusion that the paper was at the time of the publication of the ordinance therein the official paper of the town.

3. Municipal corporations §603—Within power to enact that frame buildings in fire limits damaged to greater than 50 per cent. should not be rebuilt.

Rem. Code 1915, § 7732, provides that cities of the fourth class are given the power to establish fire limits with proper regulations, and Ordinance No. 66 of the town of Oroville, providing that any frame building within fire limits which may hereafter be damaged by fire, etc., to an amount greater than one-half of its present value shall not be rebuilt, but shall be removed, was a valid exercise of power.

4. Appeal and error §1177(6)—Where submission of case on appeal was for determination of law, and not sufficient as to the facts, case will be remanded for further proof.

Where the submission of a case on appeal was on stipulation of counsel for the determination of law, and not on admitted facts, and no evidence had been introduced on the question of facts in behalf of the parties upon whom the burden rested, and the stipulation was not sufficient as an admission of the facts by the other party, the case will be remanded for further proof.

Holcomb, J., dissenting.

Department 2.

Appeal from Superior Court, Okanogan County; C. H. Neal, Judge.

Action for injunction by George De Von, individually and as executor of the estate of Sophia De Von, deceased, against the Town of Oroville. From judgment for defendant, plaintiff appeals. Reversed and remanded.

J. Henry Smith, of Okanogan, for appellant.

P. D. Smith, of Okanogan, for respondent.

PARKER, C. J. The plaintiff, De Von, commenced this action in the superior court for Okanogan county seeking an injunction restraining the defendant town of Oroville, a municipal corporation of the fourth class, and its officers from destroying a building owned by him, which building was damaged by fire; the town officers claiming the lawful right and authority to destroy the building by virtue of a fire and building ordinance of the city hereinafter noticed. The plaintiff alleges in his complaint that he owns the building in question, that it is of the value of more than \$10,000; and that the town's officers are threatening to destroy it without warrant or authority of

law. As an affirmative defense the town alleges:

The existence of the ordinance in question, which, after defining the fire limits of the town, within which wooden buildings shall not be constructed, contains the following provision: "Sec. 5. Any existing frame building within the fire limits which may hereafter be damaged by fire, decay or otherwise, to an amount greater than one-half of its present value, exclusive of the foundation, shall not be repaired or rebuilt, but shall be removed from said fire limits." That the building is a wooden building. That it is within the fire limits as defined by the ordinance. "That shortly prior to the commencement of this action said frame building was destroyed by fire to the extent of more than 50 per cent. of its value and as provided in said Ordinance No. 66, exclusive of the foundation, and, though many times requested by the proper authorities of the said town of Oroville, the plaintiffs refused and still do refuse to remove said building. That said building was at the time of the commencement of this action, and still is, a menace to the said town of Oroville and its inhabitants. * * *

And it concludes with a prayer as follows:

"That said partially destroyed building be adjudged a nuisance, and that the plaintiffs be required to remove the same within a time specified by the decree of this court, and, in case the plaintiffs shall fail or refuse to do so, the defendant may abate said nuisance at the costs of the plaintiffs."

The plaintiff in his reply denies in substance the legal existence of the ordinance, and also damage to the building to an amount greater than one-half of its value. With the issues so made by the pleadings the case proceeded to trial in the superior court, resulting in judgment being rendered by that court as follows:

"It is further found, adjudged, and decreed that that certain frame building owned by the plaintiffs and situated on lots 13 and 14 in block 45 of the town site of Oroville, Wash., is within the fire limits of the said town of Oroville as established by ordinance of said town duly passed and enforced, and is a nuisance under the provisions of said ordinance and the laws of the state of Washington.

"And it is hereby adjudged and decreed that said nuisance be abated.

"It is further adjudged and decreed that the plaintiffs be, and are, given 60 days from the date hereof in which to abate said nuisance, and upon their failure so to do the defendant abate and remove said nuisance at the cost and expense of the plaintiffs."

From this disposition of the case in the superior court the plaintiff has appealed to this court.

[1] It is first contended that the legal existence of the ordinance has not been properly evidenced of record, in that it has not been recorded as required by law. Counsel invoke the provisions of Rem. Code, § 7744, relating to the duties of the town clerk, reading as follows:

"He shall keep a book marked 'Ordinances,' into which he shall copy all town ordinances, with his certificate annexed to said copy, stating that the foregoing ordinance is a true and correct copy of an ordinance of the town, and giving the number and title of said ordinance, and stating that the same has been published or posted according to law. Said record copy, with said certificate, shall be prima facie evidence of the contents of the ordinance, and of the passage and publication of the same, and shall be admissible as such evidence in any court or proceeding. Such records shall not be filed in any case, but shall be returned to the custody of the clerk. Nothing herein contained shall be construed to prevent the proof of the passage and publication of ordinances in the usual way. * * *

The argument seems to be that the ordinance has no legal existence, so as to be proven in any manner, until it has been recorded as contemplated by this statute. We cannot agree with this view of the law. It appears from the evidence introduced upon the trial that, instead of this ordinance being copied in a book and certified as a true copy by the clerk, as provided by that section, he has followed the custom of attaching the original ordinances together from time to time in the order of their passage and numbering them accordingly, each being evidenced as to its passage and the time of its passage by the signature of the mayor, attested by the clerk, as provided by Rem. Code, § 7734. Instead of the due passage of this ordinance being proven upon the trial by a record of it made in a book as provided by Rem. Code, § 7744, its due passage was proven by the introduction in evidence of the original ordinance itself, which was signed by the mayor and attested by the clerk. Manifestly the original ordinance, so duly authenticated, is as high an order of proof of its due passage as a copy of it in a book certified by the clerk as prescribed by Rem. Code, § 7744, would be. 19 R. C. L. 908; 28 Cyc. 897. Plainly a record of the ordinance as provided by Rem. Code, § 7744, above quoted, would be no more than a certified copy of the ordinance. There is nothing in our statutes even suggesting that a failure to so record the ordinance renders it void or of no effect. As we view the above-quoted statute, it is nothing more than a rule of evidence prescribing a simple method of making prima facie proof of the due passage of an ordinance. Even the concluding sentence of the statute above quoted negatives the idea that such method of proof is exclusive. It seems quite plain to us that the passage of the ordinance was amply proven.

[2] It is also contended that no proper proof of the publication of the ordinance has been made. The evidence clearly shows that it was published in a newspaper published in the town. This was proven by the testimony of the town clerk and the admis-

sion in evidence of a copy of the paper. We do not find any statute prescribing the method of proving or preserving the proof of the publication of an ordinance other than the certificate of the clerk to be made with the recording of the ordinance as provided in Rem. Code, § 7744, above quoted; but that, as we have seen, is not an exclusive method of proof. Some contention is made in this connection that there is no evidence of a designation by the town authorities of the paper in which the ordinance was published, as the official paper of the town. Rem. Code, § 7733, touching this question, reads as follows:

"Any town of the fourth class in the state of Washington may select or designate any daily or weekly newspaper published or of general circulation in such town as the official paper of said town, and all notices published in said paper for the period and in the manner provided by law or the ordinances of said town shall be due and legal notice."

The evidence introduced upon the trial of this case warrants the conclusion that the town authorities have never formally designated any paper as the official paper of the town; but the evidence is all but conclusive that since several years prior to the passage of this ordinance all of the official publications of the town, including its ordinances have been made in the paper in which this ordinance was published. This, we think, is sufficient to call for the conclusion that this paper was at the time of the publication of this ordinance therein the official paper of the town, and that therefore the ordinance was duly published. It is to be noted that there is nothing in the language of Rem. Code, § 7733, designating the manner in which the official paper of the town shall be so designated.

[3] It is contended that, even though the ordinance may have been passed and published in due form, it is void in that it is beyond the power of the city to enact it. We note that the ordinance is silent as to any method of procedure by which it shall be determined as to whether or not a building damaged by fire has been so damaged to a greater amount than one-half of its value. It seems to be argued that the threatened summary removal of the building by the town officers would be the taking of property without due process of law, and that this renders the ordinance void. Whatever may be said as to the method the city officers may pursue in determining the extent of the damage to the building and the question of its removal, manifestly their procedure, however summary or unlawful, would not render the ordinance void in view of the fact that it is silent on the question of procedure. So the only real question we can make out of the argument going to the invalidity of the ordinance is the contention that it is void because of the prescribing of

the condition which shall call for the removal of a wooden building from the fire limits, to wit, its damage "to an amount greater than one-half of its present value." That this prescribing of such condition as cause for removal of a building does not render the ordinance void is made plain by our decision in *Davison v. Walla Walla*, 52 Wash. 453, 100 Pac. 981, 21 L. R. A. (N. S.) 454, 132 Am. St. Rep. 983, wherein it is held that an ordinance providing that a building damaged to the extent of 30 per cent. of its value should be removed from the fire limits is valid and within the power of the city to enact. Among the powers expressly given to municipalities of the fourth class we find in Rem. Code, § 7732, the following:

"Cities of the fourth class are hereby given the power to establish fire limits with proper regulations. * * *"

We are quite convinced that the ordinance in question was duly passed and published, and that it constitutes a valid exercise of power by the town, in so far as we are here called upon to notice its provisions.

[4] Some contention is made that, even though the ordinance be valid as prescribing conditions calling for the removal of a damaged building from the fire limits, the threatened action of the town officers would be arbitrary and without authority of law, since their threatened act would, if consummated, be without any previous hearing accorded to appellant as to whether or not the building had been damaged more than one-half of its value. The question as to whether or not such summary action on the part of the town officers would be lawful is not now in this case, because, instead of so proceeding, the town officers have by their affirmative answer and prayer in this case submitted herein for judicial determination the question of whether or not the town has the lawful right to have appellant's building removed from the fire limits of town. In the state of the pleadings as we find them in this case it is apparent that the town officers are no longer seeking to summarily remove this building, but are affirmatively seeking a decree of a court of equity to enforce its removal from the fire limits, the same as if the town were plaintiff in the case.

We now come to a controversy between counsel for the respective parties which to us seems to render it impossible for us to finally decide this case upon this appeal. What we have said, so far, reduces the ultimate question to be decided in the case to this question of fact: Was the building damaged by the fire "to an amount greater than one-half of its present value?" Had respective counsel refrained from their seeming attempt to stipulate that the validity of the ordinance should be the all-controlling ques-

tion in the case, we would not be in our present difficulty; for then this question of fact as to the amount of damage to the building would have been tried out in an orderly way. But the fact remains that it was not so tried out. So it is still an open question in the case which cannot be finally determined until that question is settled. Had that question of fact been tried out and the court from the evidence been able to find that the building was damaged more than one-half of its value, there would have been ground to support the judgment which the court rendered; but no evidence was introduced upon that question in behalf of the town officers, where the burden of proof rested in view of the affirmative relief prayed for. This condition of the case plainly came about by a colloquy of uncertain ultimate meaning between counsel for the respective parties occurring during the trial, in which they seemed to attempt to stipulate that the validity of the ordinance should be the all-controlling question in the case. Counsel for the town now insist that the stipulation amounted to an admission on the part of appellant that the building had been damaged more than one-half of its value; while counsel for appellant insist that such is not its meaning. Now, whatever may be said as to the meaning of this claimed stipulation, we think it sufficient to say that we are quite convinced that it in no event amounts to an admission on the part of appellant or his counsel that the building was damaged more than one-half of its value. It is true that at the conclusion of counsel's colloquy the trial judge made this remark:

"The question of value or damage more than 50 per cent. are now all out of the case."

This seemed to be the learned judge's opinion of the meaning of the attempted stipulation; but even this remark of the learned judge leaves us in the dark. We do not gather therefrom that the stipulation means an admission on the part of appellant or his counsel that the building was damaged more than one-half of its value. The trouble with the present condition of the case is that that question of fact cannot be eliminated and the case finally decided upon its merits; and particularly it cannot be eliminated and the case decided upon its merits by the granting of the affirmative relief which the trial court's judgment purports to grant. If the attempted stipulation of counsel had amounted to an admission by appellant that the building had been damaged more than one-half of its value, as we find was the stipulation in *Davison v. Walla Walla*, 52 Wash. 453, 100 Pac. 981, 21 L. R. A. (N. S.) 454, 132 Am. St. Rep. 983, by reference to the original record in that case, we could of course sustain the trial court's judgment; but this judgment does not rest

upon either admission or proof touching that question of fact.

We feel constrained to hold that the judgment of the superior court must be reversed, and that, in view of the condition we find this record in, the case must be remanded to that court, with directions to try out the question of fact as to whether or not the building has been damaged more than one-half of its value, and render its judgment accordingly, as it may so find upon competent evidence touching that question of fact. Appellant will recover his costs incurred upon this appeal.

MACKINTOSH, HOVEY, and MAIN, JJ.,
concur.

HOLCOMB, J. I dissent. In my opinion appellant admitted that the building was destroyed to the extent of more than one-half of its value, and the trial judge, with his usual care and consideration, explicitly called that admission to the attention of counsel, and no contradiction or reservation was made thereto. Counsel seemed to rely wholly on the invalidity of the ordinance and proceedings.

It is, to my mind, unnecessary and useless to remand the case for trial upon that issue. As an issue it was waived to the trial court, or else the trial court was led into a trap.

The judgment should be affirmed in toto.

(120 Wash. 339)

**SOUTHERN MINING & DEVELOPMENT
CO. v. CLARK. (No. 16914.)**

(Supreme Court of Washington. May 31,
1922.)

Mines and minerals §53—Evidence held to support recovery from assignee of option contract for the price thereof.

Where no fraud, deceit or coercion appears, and where an assignee of an option contract for the purchase of mineral lands agreed to pay for the option if any part of lands were purchased under it, he cannot defeat a recovery for the price of the assignment on the ground that he canceled and abandoned the option, and purchased a part of the lands under a new agreement, where it was shown that the owner of the land ratified extensions of the option to assignors covering a period within which assignee purchased a part of the lands.

Department 2.

Appeal from Superior Court, King County; Augustus Brawley, Judge.

Action by the Southern Mining & Development Company against E. B. Clark. From a judgment for plaintiff, defendant appeals. Affirmed.

Farrell, Kane & Stratton, of Seattle, for appellant.

A. C. Hough, of Grants Pass, Or., and Winter S. Martin, of Seattle, for respondent.

HOLCOMB, J. Respondent sued for and had judgment against appellant for the sum of \$2,200 upon an alleged agreement wherein appellant agreed to pay that sum to respondent in case he exercised an option thereby assigned to him for the purchase of certain land in Arkansas. The option agreement covered about 714 acres of land, which were believed to be chiefly valuable for the manganese ore contained therein at a time when manganese was in great demand and very valuable.

Respondent's complaint alleged in substance that prior to May 28, 1918, it had, through its agent, J. B. Champlain, secured an option in writing from the owners and their agent of the Arkansas lands described in the complaint, by the terms of which it was given the right and privilege of purchasing the lands described therein for an average sum of \$25 per acre from the owners of the lands, until June 10, 1918. The complaint alleges the execution of the option agreement of May 28, 1918, which is fully set forth as an exhibit attached to the complaint, and that thereafter, in conformity with the contract, an agent of appellant went to Arkansas, and, after examination of the lands under option, negotiated with certain of the owners of the lands, and by and through such negotiations secured an extension of the option for a period of 30 days from June 10, 1918, and a further extension thereof, and on July 17, 1918, and after an examination of the lands, purchased 124 acres of the lands from the owners thereof. It is then alleged that by reason of such facts there is due and owing from the appellant the sum of \$2,200, no part of which has been paid.

Appellant's answer admits that he entered into the contract set up by respondent, and as an affirmative defense alleges that, after the execution of the written contract set out in respondent's complaint, appellant sent his agent, W. J. Rogers, to investigate the lands, and thereafter, on June 10, 1918, notified respondent that no lands would be purchased under the option, and that appellant would consider the option terminated, and that, after the termination of the option and contract on June 10, 1918, and after the abandonment of the same by respondent and appellant, appellant, through his agent, Rogers, entered into a subsequent agreement with respondent, by the terms of which appellant agreed to and did purchase approximately 125 acres of land in Arkansas, at an agreed price of \$25 per acre.

The affirmative allegations of the answer were denied by reply.

Appellant's assignments of error all re-

late to the claim that the evidence was insufficient to justify the court's findings, decision, and subsequent judgment thereon. The option for the purchase of the 714 acres recites the consideration of \$1, receipt of which is acknowledged, and provides that the appellant should first proceed and examine the land in such manner as he should elect for the purpose of determining its value, and, should he be satisfied with the nature, quality, value, and title to the property, he would pay the sum of \$25 per acre to the original owners for all or any part of such property as he might elect to obtain, first being satisfied by the usual customary method of abstract of title that the respondent had merchantable title therein and thereto. There were provisions for the first payment of \$2,200 as the purchase price of the option, and the further sum of \$5,000 from the sale of ore taken from the property, and the further sum of \$25,000 from the net receipts from the sale of ore from the land.

As originally drawn by the attorney employed by appellant, one paragraph of the contract read as follows:

"It is understood that the party of the second part shall first proceed to the land and examine the property in such manner as he may elect for the purpose of determining its value, and, should the party of the first part be satisfied with the nature, quality, value, and title of the property in the first party, he will agree to pay the sum of \$25 per acre in the manner hereinafter stated upon first being satisfied by the usual and customary method of abstract of title that the first party has merchantable title therein and thereto."

This paragraph was objected to by officers and agents of respondent, for the reason that it did not clearly appear that Clark should pay the purchase price of the option, that is, \$2,200, in the event he should see fit to take less than the total acreage of the option, which was 714 acres. After some discussion as to the advisability of a change in that regard, Clark agreed to the change and personally struck out with his pen the words "in the manner hereinafter stated" immediately after the words "\$25 per acre," and inserted with his pen the following words:

"To the original owners for all or any part of said land as party of the second part (appellant) may elect."

Under this paragraph of the contract as so changed, respondent contends that it is clear that Clark agreed to pay the company \$2,200 as the purchase price of the option, provided he should elect to take any part of the 714 acres offered to him in the option agreement; that he did first elect to take 204 acres, and afterwards did take 124 acres paying the original owners therefor, and that therefore he is bound by his agreement

to pay the \$2,200 as the purchase price of the option.

There is much conflict in the evidence as to what was done after appellant sent his representative to Arkansas to investigate the land. Rogers was not only the representative of appellant, but, as it developed at the trial, was a joint venturer with appellant in the project.

Several ambiguous and confusing telegrams were sent from Arkansas to appellant and to the officers of respondent, and appellant contends that on June 6, 1918, Rogers terminated the option agreement, and later, on June 10 or 11, entered into a new agreement whereby appellant and Rogers were to pay \$30 per acre and 20 per cent. commission to be paid out of royalties. On the other hand Champlain, who was the representative of respondent in Arkansas, contends that the offer of \$30 per acre and a commission of 20 per cent. was for entirely different tracts of land, being 860 acres, options on which had been obtained by one Renich, and who was negotiating for the sale thereof as manganese ore lands. There is evidence on the part of respondent that Rogers was inimical to the contract as drawn between appellant and respondent, and determined to defeat the contract from the start. This is denied by Rogers. It is clear, however, from all the testimony, that Rogers, after his investigation, determined, as he had a right to do under the option agreement between respondent and appellant, that most of the tracts optioned were not satisfactory and settled down to two tracts containing about 204 acres, owned by two men named Patterson. According to Champlain, the representative of respondent, the options on these lands would expire on June 10 (June 9 falling on Sunday), that being 30 days after May 9, when the Pattersons had given their options to one Hampton, their agent, with authority to sell their property. It was Hampton who entered into the option agreement with Champlain for the sale of the 714 acres of land supposed to contain manganese ore. Hampton was therefore the primary or immediate agent of the Pattersons. There is some contention that the option from the Pattersons had expired prior to the time the option from Hampton to respondent would expire—that is, that they gave their options to Hampton on May 4, to continue for 30 days—and the option would therefore expire on June 4, and consequently, after June 4, 1918, respondent and its agents had no options to sell.

That contention cannot be sustained, for the reason that the Pattersons ratified the options Hampton, their agent, had given respondent, and actually renewed them orally for another period of 30 days, and later for another period. These transactions, appellant contends, were transactions directly with Rogers, and had nothing to do with the options theretofore granted to Hampton, and by Hampton to respondent, and by respondent to appellant. There is testimony, however, tending to show that Champlain and Hampton attempted to procure an extension of the options from the Pattersons on a prior date, June 6, and failed at that time, but afterwards returned in company with Rogers, and then procured an oral agreement from the Pattersons whereby the Pattersons' power of attorney to Hampton and option to sell was extended 30 days upon the payment to them of \$150, \$50 to be paid, and which was paid, to one of the Pattersons, and \$100 to be paid, and which was paid, to the other Patterson, by Rogers. Champlain testifies that this extension of 30 days was agreed upon by Rogers and Hampton, and was distinctly and definitely understood to be an extension of Hampton's original power of attorney or option from the Pattersons.

The trial court accepted Champlain's version as to the dealings with the Patterson lands, and the options therefor, finding that the Hampton option was extended, and that respondent's option was extended after June 10. The Patterson lands were portions of the 714 acres involved in the agreement between these parties.

The trial court had the advantage of seeing and hearing the witnesses, and therefore was, as we have always held, much better able to judge of their credibility than are we, although it may have been an improvident bargain for appellant it was of his own making. The parties dealt with each other at arm's length, and there is not involved in this case any element of fraud, deceit or coercion. It is almost entirely a question of fact. It is somewhat similar to the case of *Hunner v. Mulcahy*, 45 Wash. 365, 88 Pac. 521.

We are unable to say that the evidence preponderates in any way against the findings of the trial court, and must therefore affirm the judgment.

Judgment affirmed.

PARKER, C. J., and MAIN, MACKINTOSH, and HOVEY, JJ., concur.

(120 Wash. 351)

ÆTNA CASUALTY & SURETY CO. v.
SKAGIT COUNTY et al. (No. 16930.)(Supreme Court of Washington. June 1,
1922.)

1. Subrogation ¶41(6)—Evidence held insufficient to show county had consent of surety to pay money to bank which financed road contractor.

In an action by a bonding company against a county to recover for its wrongful payment to a bank financing a contractor to the extent of the company's liability for claims filed, evidence held insufficient to show the money was paid with the knowledge and consent of the company.

2. Subrogation ¶7(1)—Bank which financed contractor has no claim to money to be withheld on the contract.

In view of Rem. Code 1915, § 1159, as amended by Laws 1915, p. 61, § 1, providing that all road contractors shall give bond to insure payment of just claims, except claims for money loaned on the contract, a requirement in the contract that the county shall retain 20 per cent. of the contract price to satisfy liens has the effect of creating a trust fund for the benefit of sureties on the bond, and a bank which financed the contractor has no claim thereto.

3. Subrogation ¶7(1)—County held liable to surety for money paid to bank which financed road contractor.

Under a county road contract providing for the retention of 20 per cent. of the contract price to satisfy liens, where the county paid the money to the bank which financed the contractor, without the knowledge and consent of the bonding company and while other claims were pending, it is liable to the bonding company for the claims which could have been paid out of the money paid to the bank.

4. Subrogation ¶7(1)—Verbal statement of contractor that all debts were paid held not a sufficient compliance with the contract.

Under a county road contract, providing that before final payment the contractor shall show to the "satisfaction" of the county that all just debts for labor and material are paid, the making of the final payment on the sole verbal statement of the contractor and without making an investigation was not a sufficient compliance with the contract, and a surety on the contractor's bond who satisfied unpaid claims was entitled to recover from the county money improperly paid and to which it was entitled to look for indemnity.

Department 2.

Appeal from Superior Court, Snohomish County; Augustus Brawley, Judge.

Action by the Ætna Casualty & Surety Company against T. L. Grant and others. Judgment for defendants, and plaintiff appeals adversely to defendant Skagit County. Reversed and remanded, with directions.

Coolley, Horan & Mulvihill, of Everett, for appellant.

W. L. Brickey and W. H. Hodge, both of Mt. Vernon, for respondent.

MAIN, J. The plaintiff brought this action to recover damages against the defendant county because it had paid out money on a road contract which the plaintiff claimed was to its prejudice. There are other defendants, but the principal controversy was between the plaintiff and the county. The trial resulted in a judgment adverse to the contention of the plaintiff, and it appeals.

The facts necessary to present the questions for determination may be summarized as follows: On August 27, 1917, the respondent, Skagit County, entered into a contract with T. L. Grant and L. P. Ervig, co-partners under the firm name of Grant & Ervig, for the construction of a certain road in that county known as the Cook road. The contract price was approximately \$60,000. The contract provided that upon the request of the contractor partial payments should be made as set forth therein each month, which payments were not to exceed 80 per cent. of the estimated value of the work done, which estimate was to be made by the county engineer. Final payment was due under the contract within 30 days from completion of the work and when the same was evidenced by a certificate from the engineer for the county. The contract further provided:

"That before making such final payment the contractor shall show to the satisfaction of said Skagit county that all just debts due for labor performed or material furnished the said contractor have been paid."

As the work progressed, from time to time payments were made upon the estimate of the engineer, and on September 8, 1919, at the time of the final acceptance there remained in the possession of the county approximately 20 per cent. of the amount earned by the contractors under the contract. While the work was in progress, two claims were filed against the contractors and against the bond, one by the Mt. Baker Contracting Company, for \$1,750.72, and one by J. H. Burmaster for \$208.50. After the acceptance of the work and before the expiration of 30 days, or on October 7, 1919, another claim was filed in the sum of \$5,976.55. On September 15, 1919, and before the 30-day period specified in the contract, the county paid out of the money it then had to C. E. Bingham & Co., a banking institution, the sum of \$9,000, leaving a balance of only \$1,105.11 for the payment of claims.

The appellant was surety for the faithful performance of the contract. Thereafter the appellant brought this action, claiming that the county had wrongfully paid out the \$9,000 and sought recovery against it to the extent to which it would be liable upon its bond for the claims filed. The claimants

were parties to the action, and the claims of the Seiffert Company and the Mt. Baker Contracting Company were adjudged to be valid. The court apportioned the balance in the possession of the county to these claims and entered judgment against the surety for the balance.

[1] The first question is whether a payment of the \$9,000 to the bank which was an assignee of the contractors was with the knowledge and consent of the appellant. A careful examination of the record discloses that there is no evidence from which it can be found that such payment was made with the knowledge or consent of the surety company. The representative of the surety company who had charge of the matter of issuing the bond, and who at one time visited the county for the purpose of looking over the situation, expressly denied any knowledge or consent. There was no affirmative evidence from which such knowledge or consent could be inferred. It is true that the representative of the company testified that when he visited the county he called at the bank and had a conversation with one of the officers with reference to the contract. This was while the work was in progress, and the conversation was only to the effect that the representative of the company thought that the bank, after having advanced some money to the contractors, should in fairness to them make further advance, for the reason that, the bank having undertaken to finance the contractors, it was too late for them to call upon any other bank for that purpose. The officer of the bank with whom the conversation took place had no memory of the conversation or of the person with whom he talked. This evidence has no tendency whatever to show that the \$9,000 was subsequently paid out to the bank with the knowledge or consent of the appellant.

[2] The next question is, assuming that the money borrowed from the bank went into labor and material for the contract, whether the bonding company is in a position to question the payment, since upon the bond it would have been liable for such labor and material if they had not been paid for out of money borrowed by the contractors from the bank. In this connection, the respondent cites the case of *Puget Sound State Bank v. Galucci*, 82 Wash. 446, 144 Pac. 698, Ann. Cas. 1916A, 767. In that case a bank was permitted to recover from the bonding company money which it had advanced upon a contract and which money had been used by the contractors for labor and material. The decision was rested upon the provisions of the contract then under consideration. The case was decided on December 11, 1914. At the subsequent session of the Legislature, Laws of 1915, c. 28, § 1, section 1159 of *Remington's Code*, was amended, in which it was provided:

"That the provisions of this act shall not apply to any money loaned or advanced to any such contractor, subcontractor or other person in the performance of any such work."

By this amendment the Legislature, in effect, abrogated the rule of the *Galucci* Case. The bank that drew the \$9,000 as assignee of the contractors had no claim which it could enforce against the surety company for the moneys which it had loaned or advanced to the contractors. The 20 per cent. which was to be held for 30 days was a trust fund for the benefit of creditors and collectible claims, and was also a fund to which the bonding company had a right to look for indemnity. In *Denham v. Pioneer Sand & Gravel Co.*, 104 Wash. 357, 176 Pac. 333, it was said:

"The fact that this 20 per cent. is also, and, it may be, principally was, held for the benefit of the laborers and materialmen furnishing work and material for public work, as we have held in the following cases: *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26; *First National Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837; *Maryland Casualty Co. v. Washington National Bank*, 92 Wash. 497, 159 Pac. 689; *Northwestern National Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, yet this fund is a trust fund for creditors and for collectible claims, and is also the bondsmen's security, as indicated."

[3] The county in paying out the \$9,000 to the bank within the 30 days fixed by the contract, failed in the performance of its duty to the prejudice of the rights of the appellant, and for this the county is liable. *Maryland Casualty Co. v. Washington National Bank*, 92 Wash. 497, 159 Pac. 689. The appellant is entitled to a judgment against the county to the extent to which it has been required to pay valid claims which would have been paid out of the 20 per cent. reserve fund had the \$9,000 warranty not been given to the bank, unless the county should prevail upon the next question to be discussed.

[4] The next question is whether the county performed its duty in requiring a showing on the part of the contractors that all valid claims had been paid prior to the time of the release of the \$9,000. Under the provision of the contract above quoted, it will be observed that the contractor was required to "show to the satisfaction" of the county that all just debts due for labor and material had been paid. This presents the question as to whether a showing of payment of the debts was sufficient to justify the county in its action. The two claims upon which the bonding company was held liable were filed in the office of the county auditor. When T. L. Grant, one of the contractors, made demand upon the county for the balance due under the contract, he stated to the county engineer, and also to the chairman of the board of county commissioners,

that all debts had been paid. Neither the county commissioners nor the engineer had any actual knowledge that the claims had been filed in the auditor's office. They made no investigation at the time the \$9,000 was paid out to ascertain whether any claims were on file. The evidence shows that the payment was made solely upon the statement of Grant, one of the contractors, and an interested party, that the debts were all paid. This was done in the face of the fact that the commissioners knew that during the progress of the work the contractors had had difficulty in financing it. Under the contract, before the commissioners could order the money paid, they were under obligations to require a showing to their satisfaction that all debts had been paid. The language of the contract undoubtedly means that it was necessary to make such a showing as would satisfy a reasonable person under all the circumstances of the case. To pay out the \$9,000 upon the uncorroborated word of one of the contractors when an investigation of the claims in the county auditor's office, which was in the same building in which the commissioners' and engineer's offices were, would have disclosed the true state of facts, was not the exercising of ordinary business prudence and was not meeting the requirement of the contract that it should be shown to their satisfaction that the debts had been paid. The county auditor is ex officio clerk of the board of county commissioners, and the claims were properly filed in that office.

The judgment will be reversed, and the cause remanded, with directions to the superior court to enter a judgment in accordance with the views herein expressed.

PARKER, C. J., and MACKINTOSH, HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 331)

BARTON v. TOMBARI et al. (No. 16974.)

(Supreme Court of Washington. May 23, 1922.)

1. Appeal and error §1011(1)—Trial court's findings on conflicting evidence not disturbed.

Where testimony as to misrepresentations inducing the execution of a contract for the purchase of a lot was conflicting, the findings of the trial court, which was in the best position to judge the facts, will not be disturbed.

2. Attorney and client §77—Attorney's authority limited to conducting litigation except as expressly authorized.

An attorney's authority in dealing with his client's affairs is limited to conducting litigation except in so far as he may be expressly authorized.

3. Attorney and client §101(1)—Attorney cannot bind client by surrender of any substantial right.

While an attorney may adopt any course he deems best calculated to secure the object of his employment, and has implied power to use all the usual means to that end, he cannot, under his general authority, bind his client by any act amounting to a surrender in whole or in part of any substantial right.

4. Attorney and client §101(1)—Attorney's acts in demanding authority to take possession of property to effectuate cancellation of sale held not binding on clients as rescission thereof.

The acts of an attorney for vendors of property under an installment contract containing no time essence or other provision for forfeiture, nor any provision making all payments due on default in one or more payments, in demanding possession after the purchaser filed suit to rescind the contract, and in accepting an instrument authorizing him to take possession in compliance with such demand, and "to effectuate the cancellation of the contract," did not amount, together with the purchaser's acts, to a rescission of the contract, in the absence of evidence that vendors, who were not present when such acts took place, authorized or ratified their attorney's conduct.

5. Vendor and purchaser §291—Vendor not entitled to deficiency judgment on foreclosure of vendee's equity of redemption.

There being no statute as to deficiency judgment on foreclosure of contracts for the sale of land as in the case of mortgage foreclosures (Rem. Code 1915, § 1119), where the contract itself makes no provision for a deficiency judgment, the vendor, in case of default, is confined to foreclosure of vendee's equity of redemption for the amount due.

Holcomb, J., dissenting.

Department 2.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Suit by Lucy Barton against Vito Tombari and another. Decree for defendants, and plaintiff appeals. Decree modified.

Harry Rosenhaupt and Lucius G. Nash, both of Spokane, for appellant.

Fred S. Duggan, of Spokane, for respondents.

HOVEY, J. On June 1, 1920, appellant entered into a contract with the respondents for the purchase of a lot in the city of Spokane upon which were situated two dwelling houses. The contract price was \$4,000 and of this \$700 was paid upon the execution of the contract, and the balance was payable in installments. The contract does not contain any time essence provision, nor any other provision for forfeiture, nor any provision making all payments due upon default in one or more payments, but merely provides that, upon full payment being made, deed shall be delivered, and the deed and a copy

of the contract were placed in escrow, and a copy of the contract was recorded in the office of the county auditor. The appellant was given immediate possession of the premises, but both houses were rented at intervals, and the actual possession has been that of tenants throughout the action.

At the time of the commencement of this action appellant resided near Spokane, but respondents left the state upon the execution of the contract, and have been represented throughout by Fred S. Duggan, their attorney.

On September 30, 1920, appellant filed a complaint seeking the rescission of this contract and the restoration to her of the initial payment of \$700. The ground of rescission was misrepresentation as to the condition of the property in two respects, viz.: It is alleged that the respondents represented that the floors in the houses were good when in truth they were bad, and that the property was connected with the city sewer when in fact it had cesspools, and no city sewer was available except at an expense of about \$1,000. At the time of commencing the action appellant also applied for and secured a writ of attachment against the property contracted to be conveyed.

On October 13, 1920, there was served the following instrument:

"In the Superior Court of the State of Washington in and for the County of Spokane.

"Lucy Barton, Plaintiff, v. Vito Tombari and Filomena Tombari, Defendants.

"Demand for Possession and Return of Property.

"To Lucy Barton, and to Rosenhaupt & Grant and Lucius G. Nash, Your Attorneys:

"The undersigned Vito Tombari and Filomena Tombari demand possession of the two houses heretofore bought by you from us, together with the furniture bought as a part of said property in said contract, with the keys to the premises, which you will forthwith deliver to the undersigned.

"Dated at Spokane, Washington, October 13th, 1920.

Vito Tombari,

Filomena Tombari,

"By Fred S. Duggan, Attorney and Agent.

"We hereby consent to the surrender of said property and possession thereof is hereby given to defendant.

"Personal service of the foregoing demand for possession is hereby admitted on us at Spokane, Washington, Oct. 13, 1920.

"Rosenhaupt & Grant.

"Lucius G. Nash."

Thereupon a meeting took place in the office of Mr. Nash, one of the attorneys for appellant, between the appellant, her attorneys, and Mr. Duggan, as attorney for the respondents. There is some controversy as to what was said at this meeting, but we do not deem the conflict as material, as it terminated in the following written instrument signed by the appellant, and accepted by Mr. Duggan:

"Spokane, Washington, October 13, 1920.

"Mr. Fred S. Duggan, Attorney for Vito Tombari, Spokane, Washington—Dear Sir: Pursuant to the cancellation of the contract between Lucy Barton and Vito Tombari for purchase by said Lucy Barton of lot fourteen (14), block seventy-two (72), subdivision of school section sixteen (16), township twenty-five (25), range forty-three (43), city of Spokane, and in compliance with the demand made by you for the surrender of said premises and to effectuate the cancellation of the contract made between said parties, you are authorized to take immediate possession of said premises and this is your authority to present to Mrs. Cady, now in possession of the small house on the premises. I am

"Yours truly,

Mrs. Lucy Barton."

The agreement as prepared used the word "rescission," but at the request of Mr. Duggan this was changed to "cancellation."

The testimony on behalf of appellant is that after Mr. Duggan returned to his office a telephone conversation took place, in which the attorney for appellant asked for the return of the \$700 and called attention to the decision of this court in Jones v. Grove, 76 Wash. 19, 135 Pac. 488. It is not disputed that later in the same day Mr. Duggan served upon the attorneys for appellant the following:

"Oct. 13, 1920.

"Mrs. Lucy Barton, Milwood, Wash.; Rosenhaupt & Grant, Attorneys—Dear Madam and Gentlemen: I desire to make plain to you that the letter you handed to me today regarding the property sold by Vito Tombari to Lucy Barton, and for the payment of which she is in default, is not accepted as a cancellation of the contract.

"In your complaint in this action you tendered back possession of the property, but upon conditions. I thereafter on Oct. 13th demanded the possession which you tendered, and you by writing consented to surrender it back, and promised to get the keys for me. Today you said you were ready to complete redelivery of the property, and when I went to your office you delivered instead the letter of the 18th in which you purport to cancel the contract between Tombari and Barton.

"Possession is demanded, but cancellation is not. We mean to have possession and enforce the terms of the contract. I have no authority from my client to cancel his contract, but have authority to take possession of the property and foreclose upon the same to enforce his contract.

"Please advise me promptly whether you mean to give me possession under these circumstances, which are the circumstances in mind when we had our former talk, or whether you decline to give possession. I want possession without any string to it, and if I cannot have it from you will apply to the court for it.

"Yours truly,

Fred S. Duggan."

On October 19 respondents served an answer denying the allegations of misrepresentation and praying for the foreclosure of their contract. Thereafter appellant replied setting up the facts we have referred to which

had occurred since the commencement of the action, and alleging that respondents were then in possession of the premises, and demanding relief as prayed in her complaint. The case was duly tried before the court, who made an examination of the premises, and found against appellant upon the charge of fraud, refused to treat the contract as canceled, but entered a decree of foreclosure subject to a provision for reinstatement of the contract upon the payment of certain damages.

The personal judgment was for the sum of \$837.63, being the amount of the installments then past due and unpaid. The decree provides that the interest of the appellant in the property shall be sold on execution and the proceeds applied upon the judgment, and the respondents were given judgment against the appellant for any deficiency.

[1] There is a sharp conflict in the testimony as to the misrepresentations, and the trial court was in the best position to judge the facts.

The first point made by the appellant is that the acts of the attorney for the respondent, together with the acts of the appellant as set out in the exhibits, amounted to a rescission of the contract, and, under the authority of *Jones v. Grove*, supra, entitled the appellant to recover the sum which she had paid on the contract. Respondents were not present when these acts took place, and there is nothing in the record to indicate that they ever authorized or ratified the conduct of Mr. Duggan.

[2, 3] The authority of an attorney in dealing with the affairs of his client is limited to conducting litigation except in so far as he may be expressly authorized; while he "may adopt any course which seems to him best calculated to secure the object for which he was employed and has implied power to use all the usual and ordinary means to that end, yet he cannot, by virtue of his general authority, bind his client by any act which amounts to a surrender in whole or in part of any substantial right." 6 C. J. 660, note A. Of the cases cited the following are in point in this case: *Pomeroy v. Prescott*, 106 Me. 401, 76 Atl. 898, 138 Am. St. Rep. 347, 21 Ann. Cas. 574; *Dickerson v. Hodges*, 43 N. J. Eq. 45, 10 Atl. 111; *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322. We have adopted the same principle in *Timm v. Timm*, 34 Wash. 228, 75 Pac. 879; *Budlong v. Budlong*, 31 Wash. 228, 71 Pac. 751. The point is not covered in the syllabus of the last case, but is treated on page 236 of 31 Wash., on page 753 of 71 Pac.

[4] If we adopt the contention of appellant, the attorney for respondents would be held to sacrifice practically the entire subject-matter, and at best it would be such a compromise as is beyond the power of an attorney to make in the absence of express authority. *Weeks on Attorneys at Law* (2d

Ed.) 471. We conclude that the trial court was right in refusing relief to the appellant.

[5] The question of the relief to be awarded to the respondents is more difficult of solution. The principle of foreclosure on behalf of the vendor has been sustained in the following cases: *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061; *Roy v. Vaughan*, 100 Wash. 345, 170 Pac. 1019; *Taylor v. Interstate Investment Co.*, 75 Wash. 490, 135 Pac. 240. In none of these cases, however, was the right to a deficiency judgment passed upon. In *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272, it is stated:

"We know of no authority for entering a deficiency decree in actions to enforce vendor's liens. As we understand it, the rule of procedure in giving deficiency decrees does not belong to a court of equity, unless specifically conferred by statute or a rule of court."

In a note to this case in 13 L. R. A. (N. S.) 874, there is cited in support of the same doctrine *Cobb v. Duke*, 38 Miss. 60, 72 Am. Dec. 157, but it is there stated that in most of the states a deficiency judgment may be secured. In nearly all of the cases cited, however, the decision provides only for a personal judgment, and in some of the states the specific right to a deficiency is given by statute. In 39 Cyc. 1876, it is stated:

"But this right to a deficiency decree does not exist unless specifically conferred by statute or a rule of court."

Two cases from Alabama are cited from which it appears that this was the law in Alabama until changed by statute.

By the cross-complaint in this action no personal judgment was demanded; there was a general prayer for such relief as the court might consider equitable, but the relief specified was the foreclosure of the contract, the sale of appellant's interest in the real estate, and the cancellation of the record evidence of the contract.

The positions of the parties on the sale of land on contract have been likened to that of mortgagor and mortgagee, and theoretically some such relation is established, but practically the transactions are quite different; in the case of a mortgage the purpose of the lender is to make a profit on his money by way of interest and to keep rates of interest moderate his protection must be liberal, both as to the margin of security and as to the obligation of the borrower. In the sale of land on contract the profit of the creditor is in the price he secures, and to obtain this he carries the risk of the margin between the loan value and the selling value of the property to the extent that he is not covered by his initial payment.

In the case of mortgage foreclosures we have express statutory direction by section 1119, Rem. Code, but we do not have any statute relative to contracts of this character; and, as the contract itself makes no provision for

this remedy, the respondent should be confined to the foreclosure of all equity redemption of the appellant in and to the property for the amount now due upon the contract.

The decree appealed from will be modified as herein indicated.

PARKER, C. J., and MAIN, J., concur.

HOLCOMB, J. I dissent. Mr. Duggan was not only attorney for respondents, but he was their agent to handle not only their lawsuit, but their property. He subscribed himself as "agent" and "attorney." The absence of respondents from the city and state, and other circumstances, show his agency. As agent for respondents he had other and greater powers than as attorney. The authorities relied upon limiting his powers as an attorney at law are not in point. Appellants, upon the mutual rescission or "cancellation" of the contract, were not entitled to anything more, or to the return of the money paid, and not then demanded or settled; but they were entitled to the cessation of the lawsuit and of the controversy.

(188 Cal. 727)

HIGHFIELD v. BOZIO et al (S. F. 10244.)

(Supreme Court of California. May 16, 1922.)

Executors and administrators §97—Executor not bound to employ attorney designated in will.

Amendment to Code Civ. Proc. § 1616, providing that an attorney for an administrator or executor on notice to the interested parties may apply for and obtain an order that his compensation be paid by the executor or administrator out of the estate in his hands, does not prevent the executor of an estate from employing an attorney other than the one designated in the will, since the executor is liable for acts of the attorney.

In Bank.

Application by Frank Highfield for a writ of mandamus to compel the Superior Court of San Francisco County to direct the executor of the estate of Orlando E. Bozio, Sr., to employ the petitioner as attorney in the business of the estate. Writ denied.

Russell P. Tyler, of San Francisco, for petitioner.

SHAW, C. J. This is a petition for a writ of mandate, to compel the superior court to direct the executor of the estate of Orlando Bozio, Sr., to employ the petitioner as attorney for the said executor, in the administration of the said estate.

The petition is based on the fact that the will of the decedent, which has been admitted to probate, contained the following specific provision:

"I direct and specially request that my friend of many years Frank Highfield be the attorney of record and for the estate in the matter of the probating of my estate."

A similar provision was considered by this court in the case of Estate of Ogier, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61. In that case the executor, after his appointment, employed other attorneys, and the attorney designated in the will applied to the court for a revocation of the appointment and for an order that he be entered as attorney of record in the place of the other attorneys. The court below denied the application. This court affirmed this ruling and held that the direction in the will—

"did not constitute a selection which was binding on the executor but was simply an advisory provision which she could disregard if she chose to do so."

Among the reasons for this conclusion, the court said that—

"if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator."

This decision is conclusive as to the right of the petitioner to the writ of mandate petitioned for, unless the rule is changed by reason of an amendment to section 1616 of the Code of Civil Procedure, which has been enacted since the decision in the Ogier Case. One of the reasons given in the Ogier Case for the conclusion of the court in that case was that, although the executor would be allowed as a part of his expenses the reasonable fees paid to the attorney and approved by the court, "still such allowance can be made only to him, and not to the attorney." The amendment to section 1616 provides that the attorney for the executor or administrator, upon notice to the interested parties, may apply for and obtain an order that his compensation be paid by the executor or administrator out of the estate in his hands. The petitioner claims that this removes the reasons given in the Estate of Ogier for this decision. We do not agree with this contention.

The amendment does not purport to take away the authority or power of the executor or administrator to select and employ an attorney to advise and assist him in the administration of the estate, nor does it purport to regulate, or affect in any manner, the exercise of that authority or power. It does not affect the principal reasons upon which the decision in the Ogier Case was predicated, nor change the sound policy on which it rests. It still remains true that the

executor is responsible for the misconduct, negligence, or want of skill of the attorney. Hence the executor, notwithstanding that amendment, should be allowed to make his own selection of attorney, and should not be bound by any direction contained in the will of the testator.

The petition for a writ of mandate is denied.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

(188 Cal. 722)

NEFF v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 9430.)

(Supreme Court of California. May 15, 1922.)

1. Street railroads ⇨117(10)—Negligence in failing to ring bell held for jury.

In an action for injuries to the driver of a wagon, struck by a street car at a street intersection, an instruction that the motorman's failure to ring the bell, was negligence in and of itself held erroneous, the question of negligence, under the circumstances, being for the jury.

2. Street railroads ⇨85(3), 117(5)—Care required; negligence for jury.

The duty owed by a street railroad and persons otherwise using the streets is mutual, and each is held only to the exercise of ordinary care, and the question whether each performed his duty, under the circumstances presented, is ordinarily one for the jury.

3. Negligence ⇨136(14)—Question for jury.

It is within the province of the trial court to declare that a certain state of facts constitutes negligence per se, only when the sole conclusion that can be drawn is that there was negligence on the part of one or both of the parties.

4. Street railroads ⇨81(5)—Failure to ring bell not excused by excessive speed.

An emergency created by the negligence of a motorman, such as the operation of a car at an excessive rate of speed, does not excuse him from ringing the bell.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by John Neff against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley Cannon, all of San Francisco, for appellant.

Jay Monroe Latimer, of San Francisco (J. E. Pemberton and Frank M. Ayer, both of San Francisco, of counsel), for respondent.

LAWLOR, J. The defendant, United Railroads of San Francisco, appeals from a judgment in the sum of \$1,000 against it and in favor of plaintiff, John Neff, in an action tried by jury for damages for personal injuries, resulting from a collision between a bakery wagon, which Neff, as an employee of Langendorff Baking Company, was driving, and a street car of the defendant, which collision is alleged to have been caused by the negligence of defendant's servant in the operation of the car. Defendant denied the allegations of negligence on its part, and, in turn, alleged plaintiff to have been guilty of contributory negligence.

The accident, out of which the action arose, occurred at the intersection of Baker and Sutter streets, in San Francisco, on February 11, 1918. At this point Baker street is practically level, and Sutter street slopes toward the east. Respondent was driving north on the east side of Baker street, in a covered wagon drawn by a team of horses. Upon arriving at the Sutter street junction, he stopped the wagon to allow a west-bound Sutter street car to pass. At that time the horses' heads were about even with the southerly property line of Sutter street. Just before starting the team, after the west-bound car had passed, respondent looked to the west for approaching east-bound cars. His view in that direction was obstructed by a building on the southwest corner of the intersection, and was limited to about half a block. He saw no cars approaching and heard no bell or other warning, so he started north across Sutter street, driving his team at a walk or slow trot. When the team and wagon were upon the tracks, he discovered an oncoming east-bound car. He attempted to avert the collision by increasing the gait of the team, but was unsuccessful, and the car struck the left wheel of the wagon, upsetting it, and throwing the horses to the ground. Respondent sustained injuries from the impact and from being kicked by the horses.

There was evidence that the car was going 30 or 35 miles an hour, although the motorman testified it was not exceeding 8. The estimates of witnesses as to how far the car went after the collision before it could be stopped varied from 60 feet to half a block.

Appellant contends the trial court erred in refusing to direct a verdict in its favor, upon the ground that the evidence was insufficient to establish negligence on its part, but conclusively established contributory negligence on the part of respondent; in instructing the jury on the subject of "last clear chance," which doctrine, according to appellant, is not applicable to this case, and in giving an erroneous instruction on the subject of appellant's negligence, which it

is insisted constituted a charge on a question of fact.

[1] We are of the opinion that the charge on the subject of appellant's negligence was erroneous. The instruction complained of is as follows:

"The jury are instructed that if, from the evidence in this case, the jury believe that the defendant company, through its motorman or employee operating its street car, which collided with the bakery wagon driven by the plaintiff, Neff, as testified to in this case, operated its said street car on Sutter street when approaching and close to Baker street and about to cross said street, without ringing or sounding the bell or gong of said car, such a failure to ring or sound the bell or gong would be negligence in and of itself."

[2, 3] The duty owed by a street railway company and persons otherwise using the streets is mutual, and each is held only to the exercise of ordinary care, and, as in other cases, the question whether each performed his duty under the circumstances presented, is ordinarily one for the jury. It is within the province of the trial court to declare that a certain state of facts constitutes negligence per se, only when the sole conclusion that can be drawn is that there was negligence on the part of one or both of the parties. Appellant earnestly contends that the accident occurred so suddenly that it constituted such an emergency as would justify the motorman in devoting his entire energy and attention to stopping the car, and that, even if it were found the bell was not rung, such a failure would be excused under the circumstances.

The evidence as to the conduct of the motorman and the respondent at the time of the accident presents a sharp conflict. One of respondent's witnesses stated that the car was going 30, another 30 to 35 miles an hour, and a third that it was "coming at a most terrific rate of speed." These three witnesses and respondent stated they heard no warning from the car. On the other hand, the motorman testified the car was not traveling over 8 miles an hour, and that he rang the bell while the car was coming down the hill, the latter statement being corroborated by the testimony of one of the passengers on the car. The motorman also testified he discovered the team just before the car arrived at the crossing; that respondent's appearance indicated he intended to stop and let the car pass; that the motorman supposed he would do so, and that, when respondent, apparently oblivious of the car's approach, drove on the track, the motorman did all he could to stop the car.

From this state of the evidence, it cannot be said, as matter of law, that the motorman either was or was not negligent, or that any one act on his part, such as failing to ring the bell, constituted negligence per se. The case is therefore clearly one where the jury should have been allowed, from all the evidence, to find whether or not appellant was negligent. It may have been, as argued by appellant, that an emergency existed in which the exercise of ordinary care demanded an immediate stopping of the car, and not the sounding of a warning. The jury might have so found, if they concluded respondent was free from negligence, in determining whether any act of the motorman, which was a contributing cause of the injury, constituted negligence. Such a situation might also have been found to have existed, assuming, as claimed by appellant, that respondent was guilty of contributory negligence, in deciding whether or not the motorman exercised ordinary care to avail himself of a possible last clear chance to avoid the accident. In neither case was the jury given an opportunity to determine whether such an emergency existed, for they were in effect told by this instruction that, no matter what the circumstances were, a failure to ring the bell was in and of itself negligence. It was therefore a charge on a question of fact. Inasmuch as the jury may have relied on this instruction in reaching the verdict, it cannot be said appellant was not prejudiced by it.

[4] Since there must be a new trial of the action it may be well to call attention to certain other matters. No attempt was made to prove any local ordinances covering either the lawful rate of speed or of the ringing of the bell on street cars. As the evidentiary situation may be different upon the retrial, it will not be necessary to pass upon the contentions of appellant that the trial court erred in refusing to direct a verdict in its favor, upon the ground of the insufficiency of the evidence, and in charging the jury on the doctrine of the last clear chance. Appellant argues that, because of the emergency of the situation with which the motorman was confronted, he was excused from ringing the bell. But this would have no force if it was found the emergency was created by the negligence of the motorman, such, for instance, as the operation of the car at an excessive rate of speed. *Davis v. Durham Traction Co.*, 141 N. C. 134, 53 S. E. 677, 53 S. E. 617.

Judgment reversed.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

(188 Cal. 739)

Ex parte Y. AKADO. (Cr. 2443.)

(Supreme Court of California. May 16, 1922.)

1. Aliens ⇐13—Treaty held not to permit acquisition of agricultural land by foreign-born Japanese.

Under Initiative Alien Land Act 1920, §§ 1, 2, declaring that no alien who is not eligible to citizenship may acquire real property except as provided by the treaty between the United States and the country of which such alien is a citizen, and the treaty between the United States and Japan providing that citizens of Japan residing in the United States may lease land for residential and commercial purposes only, but containing no provisions authorizing an alien to lease or acquire land for agricultural purposes, a native-born subject of Japan cannot acquire agricultural land in the state.

2. Conspiracy ⇐23—An agreement that, if carried out, would effect a transfer in violation of Alien Land Act is a conspiracy.

An agreement between two persons which, if it were valid, and if it were carried out, would effect a transfer of land in violation of the provisions of Initiative Alien Land Act 1920, § 10, would be a conspiracy, and would be a violation of the act.

3. Conspiracy ⇐23—That Alien Land Act did not punish acquisition of land by alien immaterial in prosecution for conspiracy to effect transfer.

The acquisition of land by an alien ineligible to citizenship being forbidden by Initiative Alien Land Act, 1920, it is immaterial, in a prosecution for conspiracy forbidden by section 10, that each acquisition was not made a punishable offense, it being reasonable and proper to provide that an act to make a transfer or an agreement to conspire to do so should be punishable as a crime, regardless of the question whether the transfer would be valid or effective if the intention of the persons were actually carried to the point of execution by a conveyance.

4. Conspiracy ⇐23 — In indictment under Alien Land Act, immaterial that arrangement for alien's use of land would create an unenforceable trust.

The purpose of Initiative Alien Land Act 1920, § 10, prohibiting conspiracies to violate the act, was to prevent attempts to create relations between ineligible aliens and other persons whereby the title to land would be taken by any other person and the use enjoyed by the alien; and, in a prosecution under such section, it was immaterial that the agreement on which the indictment was based created a trust in favor of the alien which could not be enforced.

5. Aliens ⇐10—States can forbid holding of land by aliens ineligible to citizenship.

Const. art. 1, § 17, leaves to the Legislature the power to forbid the taking or holding of property by aliens ineligible to citizenship within the state's limits; and Initiative Alien Land Act 1920, in terms allowing aliens to take and hold agricultural land to the extent that such

taking or holding is prescribed by treaty with the country of which the alien is subject, is valid.

6. Conspiracy ⇐23—Alien Land Act declares a public offense enforceable in the courts.

Initiative Alien Land Act 1920, § 10, punishing conspiracy to violate other sections of the act, declares a public offense which may be enforced by the courts.

In Bank.

Original application of Y. Akado, also known as S. Ikada, for writ of habeas corpus against the Sheriff of Sonoma County. Writ denied.

Algernon Crofton, of San Francisco, Charles A. Wetmore, Jr., of Marysville, and J. C. Meyerstein and Gillogley, Grofton & Payne, all of San Francisco, for petitioner.

G. W. Hoyle and Ross Campbell, both of Santa Rosa, and U. S. Webb and Frank English, both of San Francisco, for respondent.

SHAW, C. J. The petitioner is in custody upon a warrant of arrest issued upon an indictment charging him with a violation of section 10 of the act adopted by initiative at the November election of 1920 (St. 1921, p. lxxxiii), forbidding the acquisition of agricultural lands in this state by any alien who is not eligible to become a citizen of the United States. Claiming that section 10 of the act is invalid, and that the indictment states no public offense, he seeks release by a writ of habeas corpus.

Section 1 of the act provides that all aliens eligible to citizenship under the laws of the United States may acquire real property in the same manner as citizens of the United States.

Section 2 provides that all aliens other than those mentioned in section 1 may acquire, possess, enjoy and transfer real property "in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

[1] This, in effect, declares that no alien who is not eligible to citizenship under the laws of the United States may acquire real property, except as provided by the treaty existing between the United States and the country of which such alien is a citizen or subject. 37 Stat. 1504. Persons of the Japanese race who are native-born subjects of Japan cannot become citizens of the United States. The result is that the acquisition by such an alien of land situated in this state is unlawful, unless the treaty between his government and the United States allows such acquisition. The treaty between the United States and Japan provides that citizens of Japan residing in the United States

may lease land for residential and commercial purposes, but it contains no provision authorizing an alien of the Japanese race to lease or acquire land for agricultural purposes. Consequently the Initiative Alien Law aforesaid prohibits the acquisition by such alien of any agricultural land situated in this state.

[2] Section 10 of the act is as follows:

"If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both."

The indictment charges that on September 19, 1921, in Sonoma county, Cal., the petitioner and one W. A. Cockrill did "willfully, unlawfully, and feloniously conspire together to effect a transfer of agricultural and farming real estate, land and property, in the county of Sonoma, state of California, and an interest therein, and did so willfully, unlawfully, and feloniously take and enter into an agreement to purchase certain agricultural and farming real estate, land and property, from Bartholomeu C. Souza and Mary O. Souza, in the name of said defendant, W. A. Cockrill, for the use, benefit, enjoyment, possession, occupation and control of said Y. Akado, also known as S. Ikada, and paid thereon, on the purchase price thereof, the sum of \$150," which said money was paid by said Akado, who was then and there an alien subject of Japan and not eligible to citizenship in the United States, and that said land was and is not acquired in the enforcement or satisfaction of any lien thereon, and said agreement to purchase the same was taken in the name of Cockrill for the use of Akado with the intent and purpose to prevent, evade and avoid the escheating of said land to the state of California, said Cockrill not having then and there any interest in said lands in fee or otherwise.

It is clear that the indictment charges an agreement between the two persons charged, which, if it were valid, and if it were carried out, would effect a transfer of land in violation of the provisions of the Alien Land Act. Such an agreement would be a conspiracy and would be a violation of section 10 aforesaid.

[3] The petitioner contends that, because of the fact that no provision of the Alien Land Law makes it a crime or public offense for any person to transfer land to an alien ineligible to citizenship, therefore, for some reason, the cogency of which we are not able to perceive, the section declaring it to be a crime for two or more persons to conspire to bring about such a transfer is ineffective for any purpose. This result would not follow. The act forbids such transfer, and this makes it impossible for any person to convey land to an alien ineligible to citizenship

by any transfer that would be valid as against the state of California, although it might be valid with respect to all other persons. We must assume that the people in adopting this statute believed that the state of California could protect itself against the alien who had received a conveyance of such land whenever its officers became advised of the fact, without any provision making the execution of the conveyance itself a crime. But it is entirely reasonable to suppose that in many cases the state might not obtain information of such fact. Furthermore, it is to the interest of the state that all persons owning land should be effectively deterred from attempting to evade or frustrate the provisions of the act forbidding the acquisition of such land by such alien, by means of colorable conveyances and unrecorded trusts. It was therefore reasonable and proper to provide that the attempt to make such transfer, or an agreement or conspiracy to do so, should be punishable as a crime, regardless of the question whether the transfer would be valid or effective if the intention of such persons were actually carried to the point of execution by a conveyance. We can perceive nothing in the conditions which would make such penal statute ineffective. The acquisition of such land by an alien ineligible to citizenship is positively forbidden by the act. It is immaterial that such acquisition is not made a punishable offense. The framers of the act deemed it a sufficient protection to the state to make it a public offense for any person to conspire to effect such a transfer. The fact that the act creates no other crime does not affect the validity of the section which defines the offense charged against the petitioner.

[4] For like reasons it is immaterial whether the arrangement between Akado and Cockrill that the price should be paid by Akado and that the title should be taken by Cockrill would operate to create a valid trust in Cockrill in favor of Akado with respect to the land and the use thereof or not. The purpose of the section was to prevent any attempts to create relations between such aliens and other persons whereby the title to land would be taken by any other person and the use thereof would be enjoyed by the alien. Such purpose is sufficient to uphold the penal statute, and the fact that the trust could not be enforced is not material to the effectiveness of the provision forbidding a conspiracy to make a formal attempt to create such invalid trust.

[5] It is not claimed that the Alien Land Act is contrary to the state or federal Constitution in respect to the provision forbidding the acquisition of agricultural land. It is well settled that, in the absence of a treaty to the contrary, a state may forbid the taking or holding of property within its limits by aliens. *Blythe v. Hinckley*, 127 Cal. 436, 59 Pac. 787. Our Constitution leaves to the

Legislature this power with regard to all aliens ineligible to citizenship. Article 1, § 17. The provisions of the act in terms allow such aliens to take and hold agricultural land to the extent that such taking or holding is prescribed by any treaty with the country of which such alien is subject. The treaty with Japan does not prescribe or secure to its citizens the right to take or hold agricultural land situated in this state. Hence the act does not violate the treaty in that respect. In the recent case of *Estate of Yano* (Cal. Sup.) 206 Pac. 995, the court held that the provision of the law preventing the appointment of such aliens as guardians of their minor children born in this country was not a violation of the treaty, but that it was discriminative, and therefore violative of the Constitutions of this state and of the United States. That case is not at all inconsistent with the case at bar. There the child was born here, and is a citizen of this country, with the same right to take and hold property that any other citizen possesses. Here the persons forbidden to take and hold property are aliens who have not become citizens, and who are ineligible to become such. Since the statute makes it unlawful for such aliens to acquire agricultural land within this state, it is clear that there is also power to make it a crime to conspire to bring about such acquisition.

[8] We are therefore of the opinion that section 10 of the act declares a public offense which may be enforced by our courts, and that the indictment sufficiently states the offense described in that section.

The petition for a writ of habeas corpus is denied.

We concur: SLOANE, J.; WILBUR, J.; SHURTLEFF, J.; LENNON, J.; RICHARDS, Justice pro tem.

LAWLOR, J. I concur, but adhere to the views I expressed in *Estate and Guardianship of Yano* as to the constitutionality of the provision of the Alien Land Law relating to guardianship.

(38 Cal. 729)

WEILER et al. v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

KAVANAUGH et al. v. SAME.

(S. F. 10182, 10195.)

(Supreme Court of California. May 16, 1922.)

1. Eminent domain §70 — Constitution providing for compensation on taking private property must be strictly followed.

Const. art. 1, § 14, providing for compensation for property taken, must be strictly followed.

2. Eminent domain §76—Deposits for damages for taking highway by county must secure owners separately.

While Code Civ. Proc. § 1244, subd. 5, provides that all parcels of land sought to be condemned for public use may be included in the same action, under Const. art. 1, § 14, providing that a county may take immediate possession of rights of way for public use by first commencing eminent domain proceedings, and thereupon giving security for adequate compensation to the owners and incidental damages, an order for a separate deposit for each owner must be made.

In Bank.

Applications of Jacob Weller and another and of Moses F. X. Kavanaugh and another, each against the Superior Court in and for the County of San Mateo and George H. Buck, Judge thereof, for writs of certiorari to review orders of the Superior Court condemning certain land for highway purposes. Order annulled.

Tum Suden & Tum Suden, of San Francisco, for petitioners.

Franklin Swart and John H. Machado, both of Redwood City, for respondents.

SHAW, C. J. Each cause above entitled is a proceeding by the plaintiffs therein to review and annul an order of the superior court of San Mateo county on the ground that it is in excess of the jurisdiction of the court.

The two proceedings involve the same order and the same proposition of law. The order affects the respective rights of the parties in the same manner. They will therefore be considered together.

On November 14, 1921, the county of San Mateo began an action in said court to condemn for a highway a strip of land through and over three separate tracts of land in said county, belonging to different parties. The first tract belonged to William Weller and Jacob Weller, the plaintiffs in case S. F. No. 10182, and the third tract belonged to the plaintiffs in case S. F. No. 10195. The second tract is owned by Madaline Zanone and six other persons as tenants in common, none of whom is a party to either of these two proceedings.

Thereafter, on February 8, 1922, and prior to the service of any summons on any of the parties to these two proceedings, the affidavit of Joseph J. Phillips was filed in said action, wherein he states that he is acting as agent to secure rights of way for the proposed highway; that he is familiar with the property sought to be acquired in said action, and "is informed as to the value thereof, and as to the extent of the damage that will accrue to the defendants by reason of such condemnation and taking," and that "in his judgment the total value of all the property

sought to be acquired, together with all the damage by reason of the severance thereof, and all other damage of whatsoever kind and nature, to accrue to all of the defendants herein will not exceed \$1,720."

Thereupon, on the same day, and without notice of any kind to any party to said action, or the taking of any evidence other than said affidavit, and in the absence of said parties, the court made the following order:

"It appearing to the satisfaction of the court that plaintiff herein, County of San Mateo, a political subdivision of the state of California, has filed an action in eminent domain:

"It is therefore ordered that the plaintiff take immediate possession and use of the property sought to be condemned, and that the sum of \$1,720 be, and is hereby, fixed as the amount reasonably adequate to secure to the owners of the property sought to be condemned immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property as soon as the same can be ascertained; that such possession be taken upon deposit by said plaintiff with the clerk of this court of said sum."

The defendant herein claims that such order is authorized by the provisions of section 14, art. 1, of the Constitution, as amended on November 5, 1918.

The material provisions of the section, as amended, are as follows:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation.

* * * Provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use, whether the fee thereof or an easement therefor, be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

The plaintiffs herein claim that this amendment is in violation of the provisions of the Constitution of the United States that no state shall deprive any person of property without due process of law. Article 14, § 1.

[1] We do not find it necessary to consider this proposition, for we are of the opinion that the order in question does not conform to the requirements of the aforesaid amendment to section 14 of article 1 of our Constitution. Inasmuch as the provision authorizes an invasion of private property—that is, the taking possession thereof without the consent of the owner—it is obvious that the general principle that such provisions in a statute or Constitution must be strictly followed applies to and governs its interpretation and effect.

[2] The plaintiffs urge that by the order attacked in this case they do not receive the protection against injury which the first clause of section 14 entitles them to. We think this must be admitted. The language of the section with respect to the security to be given, and with respect to the owner thereof, is in the singular number throughout with one significant exception. The court may make the order in question provided the political subdivision which is maintaining the condemnation suit shall give such security in the way of money deposits as the court may direct, "and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incidental thereto." Also, that, "upon motion of any party" to the cause, and "after such notice to the other parties as the court may prescribe," the court may "alter the amount of such security so required in such proceedings." In a case such as the present, where the property sought to be condemned consists of a highway running through many parcels of land belonging to different persons, the damages and the value of their respective parcels of property sought to be taken may, and often will, differ widely. The damage to one will in no particular depend upon the damage to the others. Neither party will be interested in any allowance for damages except his own. The Code provides that all the parcels of land sought to be condemned and required for the same public use may be included in the same action at the option of the plaintiff, and that the court may consolidate or separate them to suit the convenience of the parties. Code Civ. Proc. § 1244, subd. 5. The action with respect to each party is of the same character as if he was the sole defendant.

The constitutional provision recognizes the separate interests of the several parties, and therefore declares that the "money deposits" shall be "in such amounts" as may be found adequate "to secure to the owner" payment of his compensation and damages. The word

"amounts" is in the plural, and the word "owner" in the singular, thus implying that a different amount may be necessary for each owner. It is also significant that the provision for a subsequent change of amount runs to "any party," and provides that the court, on his motion, may "alter the amount"; the words being in the singular number. This implies the fixing of a separate amount for the security of each party. We think, under these circumstances, the true construction of the amendment of the Constitution is that, where several parcels of land belonging to different owners are sought to be condemned in the action, the security to the owner of the property to be required to be given to authorize an order for the taking of immediate possession thereof must consist of a separate and distinct sum of money deposited for the security of each owner. If this were not the case, it is easy to perceive that the development of the case might have the effect of depriving some of the parties of any security whatever. The method pursued in this action is a good illustration of this proposition. The order was made on the affidavit of one person stating that in his judgment \$1,720 will be sufficient security for the total damage that may accrue to all the parties. Upon the deposit of this sum the plaintiff in the action, under the order, will be entitled to immediate possession, and the defendants will thereupon, and at that moment, be deprived of all future use of their property. In effect the property is then taken from them if the action proceeds to a successful conclusion. Opinions in regard to values vary more, perhaps, than upon any other subject. Each party is entitled to a trial by jury. The court may in the subsequent progress of the case order that separate trials be had with respect to each party, or some of them. It is not improbable that the total damage may far exceed the estimate of the single witness who fixed the amount without a hearing or notice to either of the parties. It may happen that the damage to the person whose case is first tried may exceed that amount. In any case, whenever the amount deposited is exceeded by any verdict, and the person who obtains such verdict receives his damage out of the deposit, as he has the right to do, the other parties to the action will have no security whatever. In view of these circumstances it is our opinion that the deposit of a single sum of money as security for each separate owner of property sought to be condemned is a condition precedent to the authority and power of the court to make any order for the delivery of immediate possession, and that an order made without such separate security is in excess of the jurisdiction of the court, and void.

The order of the court above set forth is

annulled. This order shall be made in each of said proceedings.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

(188 Cal. 717)

Ex parte DREW. (Cr. 2470.)

(Supreme Court of California. May 13, 1922.)

1. Habeas corpus §92(1)—Inquiry is limited to question of jurisdiction.

The scope of inquiry upon habeas corpus is precisely the same as upon a writ of review, and cannot go beyond the question of jurisdiction.

2. Habeas corpus §94—Decision on writ of review court had jurisdiction to commit for contempt is conclusive.

A decision on writ of review that the court had jurisdiction to commit for contempt is an adjudication of a question of jurisdiction which is conclusive in habeas corpus.

3. Execution §393—Court can appoint non-resident referee for hearing in supplementary proceedings.

Code of Civ. Proc. §§ 714, 715, providing that in proceedings supplementary to execution the debtor cannot be required to attend before a referee out of the county in which he resides, creates an exception to section 640, providing for the appointment of referees generally, and requiring them to reside in the county in which the action is triable, so that in supplementary proceedings the court could appoint a referee who resided in another county in which county the debtor also resided.

4. Habeas corpus §3—Decision as to jurisdiction on former writ of review is conclusive as to objections which might have been raised.

A decision on writ of review that the court had jurisdiction to commit for contempt is conclusive in subsequent proceedings for habeas corpus against objections to the jurisdiction which might have been raised, but were not, on writ of review.

In Bank.

Application by Frank C. Drew for a writ of habeas corpus, prayed to be directed to the Sheriff of Mendocino County, to secure the release of petitioner from custody on commitment for contempt. Writ denied.

Lewis F. Byington and Maxwell McNutt, both of San Francisco, for petitioner.

SHAW, C. J. The petitioner applies for a writ of habeas corpus to discharge him from custody under an order of arrest issued by the superior court of Mendocino county upon a judgment of that court declaring him guilty of contempt of court, and imposing a penalty of five days' imprisonment and \$500 fine.

The judgment of contempt was based on an affidavit showing that in an action entitled *Phil Lobree v. L. E. White Lumber Co. et al.* (Cal. App.) 199 Pac. 821, judgment had been duly rendered and entered against said lumber company; that thereupon proceedings supplementary to execution had been duly instituted and an examination had been ordered before one Ornbaum, who was appointed referee for that purpose; that Drew had been ordered to appear before said Ornbaum in the city and county of San Francisco, at a specified time and place, for the purpose of being examined in pursuance of said proceeding, and that he had failed to appear in obedience of the order of the court. The judgment of contempt recites the facts upon which it was based.

In his present petition for a writ of habeas corpus the petitioner claims that there are many technical defects in the affidavit and proceedings upon which he was adjudged guilty of contempt and in the proceeding supplementary to execution upon the judgment aforesaid. None of these, except those hereinafter mentioned, is of any consequence, as they do not go to the jurisdiction of the court to institute the proceedings in contempt and render the judgment thereon. The main points of the petition are: (1) That the order of examination before the referee was void because the examination was to be held in San Francisco, and the judgment was rendered in Mendocino county, and also because the referee, Ornbaum, resided in San Francisco county, that not being the county in which the judgment was rendered; (2) because prior to the beginning of the action in which the judgment against the L. E. White Lumber Company was rendered the said lumber company had ceased to exist as a corporation by reason of its having failed to pay its annual license tax as required by law, and that in consequence of that fact no valid judgment could be rendered against it.

This matter has been before the courts many times. The order of commitment for contempt was made on January 9, 1920. Up to this time the petitioner has succeeded in avoiding the imprisonment adjudged. Prior to the proceeding in contempt here attacked the petitioner had been adjudged guilty of contempt for refusing to obey a previous order of the court directing him to appear for examination in a previous proceeding supplementary to execution. In May, 1919, he applied to this court for a writ of certiorari to review and annul said order. The application was duly heard, and this court on July 8, 1919, duly rendered its judgment, declaring that the petitioner was in contempt of court for refusing to obey the order, and affirming the judgment punishing him for contempt. *Drew v. Superior Court*, 180 Cal. 711, 182 Pac. 417. In that proceeding he did not claim that the defendant corporation had

ceased to exist before the action was begun. Thereafter another supplementary proceeding was begun in the same action, and in that proceeding the judgment of imprisonment here attacked was made. An order of examination was duly made therein, and again the petitioner refused to appear for examination. He was again cited to appear upon a charge of contempt for such refusal, whereupon, before the hearing, he applied to the District Court of Appeal of the Third District for a writ of prohibition on the general grounds that the superior court had no jurisdiction to hear and decide the charge of contempt. The cause was decided against him by the District Court of Appeal on October 18, 1919, and upon petition to this court a rehearing was denied. *Drew v. Superior Court*, 43 Cal. App. 651, 185 Pac. 680. In his petition he made some claim that the judgment in the main case was void by reason of some extrinsic circumstances, but the opinion of the district court does not show the precise ground. The contempt proceeding in the superior court of Mendocino county then proceeded to a hearing, and on January 9, 1920, the judgment in contempt here involved was made. Thereupon the petitioner herein filed his petition in the District Court of Appeal of the Third District for a writ of review to annul said judgment of contempt. One of the grounds of this petition was that the judgment against the L. E. White Lumber Company upon which the proceedings supplementary and in contempt were based was void, because of the fact that prior to the beginning of said action said corporation had ceased to exist because of the forfeiture of its charter aforesaid. Thus the same contention which he makes now to this court was presented to that court for adjudication, and the record of the judgment was presented to that court for review. It was there held on April 19, 1920, that the judgment was valid; that the finding therein that the corporation was in existence is final and conclusive and not open to attack in a proceeding in certiorari. *Drew v. Superior Court* (Cal. App.) 190 Pac. 374. Its existence was not legally impossible, for it may have been a corporation de facto, or it may have had its corporate charter restored as provided in section 14 of the act. Stats. 1915, p. 427. A petition to the Supreme Court for rehearing was denied, and that judgment thereupon became final. It declared, in effect, that the judgment on the charge of contempt was valid.

[1, 2] The scope of inquiry upon a writ of review extends only to the question of the jurisdiction of the court which rendered the judgment sought to be reviewed. The scope of inquiry on habeas corpus is precisely the same. It cannot go beyond the question of jurisdiction. The decision of the district court in that case was therefore an adjudication by that court, and also by this court on

petition for rehearing, of the precise matter upon which the petitioner here claims that the contempt judgment is void. Even if we were of the opinion that the decision in that case was erroneous, it would now be conclusive. It follows that there is no merit in the contention that the contempt judgment is void because of the alleged nonexistence of the L. E. White Lumber Company as a corporation.

[3] Upon the second point, section 714 of the Code of Civil Procedure provides that in a proceeding supplementary to execution the judgment debtor cannot be required to attend before a judge or referee out of the county in which he resides or in which he has a place of business. There is no other provision of the Code limiting the power of the court to appoint a referee in supplementary proceedings. Section 640, providing for the appointment of referees generally, provides that if the parties fail to agree the judge must appoint one or more referees "who reside in the county in which the action or proceeding is triable." We think the provision of section 714 must be considered as an enlargement of the power, if section 640 may be considered as requiring the appointment of a referee residing in the county in which the cause is tried. Section 714 authorizes the court to appoint a referee in supplementary proceeding, and at the same time does not authorize the party to be examined except in the county where he resides or has a place of business. This necessarily implies that where the party resides in another county the examination may be held in that county, since otherwise there could be no examination of such party. Section 715 authorizes an examination before a referee "at a specified time and place." It does not limit the place at which the examination may be had in proceeding under that section. It appears from the record that the petitioner was the president of the L. E. White Lumber Company; that he resided in San Francisco and had a place of business there, and that the said company also had its place of business there. In view of these provisions of the statutes we are of the opinion that the court had power to order an examination in San Francisco.

[4] We are also of the opinion that the point that the referee was not a resident of Mendocino county, and therefore, as it is claimed, not eligible to appointment as referee, does not affect the jurisdiction of the court, and therefore that it is not a ground for habeas corpus, certiorari, or prohibition, but that if it is material to any right of the party and is well taken, it must be presented on appeal. Furthermore, it may be said that this point also has been adjudicated against the petitioner. He sought to review the order before the District Court of Appeal, and

if he had other reasons for alleging the want of jurisdiction by the court he should have presented it there. The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose. He has not only had his day in court to attack the validity of this judgment, but has had several such days, on each of which he could have urged this objection, but did not do so, and he is therefore barred as to that and all other objections to its validity. Code Civ. Proc. § 1908.

The petition for a writ of habeas corpus is denied.

We concur: WILBUR, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.

(188 Cal. 734)

**MARIN MUNICIPAL WATER DIST. v.
CHENU, Chief of Division of Motor
Vehicles. (S. F. 10210.)**

(Supreme Court of California. May 16, 1922.)

1. Licenses \S 1—License fees for automobiles are in nature of tax.

Moneys collected under provisions of Motor Vehicle Act, § 3, and sections 7, 8, as amended by St. 1919, pp. 198, 199, are to be used for public purposes, and the license fees for automobiles therein provided are in the nature of a tax.

2. Licenses \S 11(1)—Statute providing for payment of fees not applicable to state agencies, unless such intent expressed.

Words in a statute providing for the payment of fees are not deemed to apply to public agencies unless such intent is clearly expressed.

3. Statutes \S 228—Exceptions in statute imposing burdens liberally construed in favor of public.

Exceptions in a statute imposing burdens are to be liberally construed in favor of the public.

4. Licenses \S 14(1)—Motor vehicle used by municipal water district not subject to license as "engaged in business."

Motor vehicle used by municipal water district in collecting and distributing water to the public without profit is not subject to license as being "engaged in business," under Motor Vehicle Act, § 2; the term being used therein in the narrower meaning applicable to occupations or employment for livelihood or gain, and to mercantile or commercial enterprises.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Engage.]

In Bank.

Application of the Marin Municipal Water District for writ of mandate directed to Charles J. Chenu, as Chief of the Division

of Motor Vehicles, requiring the issuance to petitioner of automobile plates and certificates without payment of the fees. Writ granted.

George H. Harlan, of San Rafael, for petitioner.

U. S. Webb, Atty. Gen., for respondent.

SHAW, O. J. The plaintiff applies to this court for a writ of mandate directing the defendant as chief of the division of motor vehicles of the department of finance of the state of California to issue to the plaintiff certain license plates, with the accompanying certificates, such license plates to be attached to certain automobiles owned by the plaintiff, as required by the Motor Vehicle Act. The plaintiff is a municipal water district, organized under the act of May 1, 1911, and amendments thereto. Stats. 1911, p. 1290; Stats. Ex. Sess. 1911, p. 92. By the act of April 16, 1915, the organization of said district was declared valid, and it was declared to be duly created as a public corporation. Stats. 1915, p. 84. The plaintiff has constructed and completed a large water collecting, storing, and distributing system, and is operating the same in accordance with said act by collecting, selling, and distributing water to the inhabitants of the district and others. In carrying out its public duties and obligations under the act, as required, it is necessary for it to use 13 motor vehicles, all of which are used exclusively by it in the discharge of its public duties. It applied to the defendant for the necessary licenses certificates, and license plates, as required by the Motor Vehicle Act from persons operating and owning motor vehicles. The defendant refused to issue the licenses, certificates, or plates except upon the payment of the license fees prescribed by the Motor Vehicle Act, amounting to \$133.60, whereupon the plaintiff began this proceeding in mandamus.

[1] Section 3 of the Motor Vehicle Act (Stats. 1915, p. 400) provides that "every owner of a motor vehicle which shall be operated or driven upon the public highways shall" cause the same to be registered with the motor vehicle department and shall deposit with his application for a certificate "the proper registration fee as provided in section 7 of this act." Section 7 of the act as amended (Stats. 1919, p. 198) specifies the fees to be paid to the motor vehicle department upon the registration of such motor vehicle. It is conceded that the amount demanded by the defendant was the proper amount for the vehicles belonging to the plaintiff if the plaintiff is liable therefor. The section also provides that a number plate shall be given to the person registering the vehicle upon the payment of such fees. Section 8 as amended (Stats. 1919, p. 199) provides that a certificate of registration shall also be

issued by the motor vehicle department showing the name of the registered owner and other particulars.

The act further provides that all moneys received by the department from such license fees shall be paid into the state treasury to the credit of a fund designated as the motor vehicle fund; that one-half of said fund shall be paid to the counties from which the moneys were received, as determined by the residence of the persons paying the same, for the benefit of the road funds of such counties; that the other one-half, after deducting certain moneys for the expenses of the department, shall be expended by the state department of engineering for the maintenance of roads, highways, and parks in this state. It will be seen, therefore, that the moneys are to be used for public purposes, and that the license fees are in the nature of a tax. *Madera v. Black*, 181 Cal. 310, 184 Pac. 397.

[2] The claim of the plaintiff is that it is a public corporation, municipal in character, established and organized for the purpose of carrying on within the district the public service of furnishing water to the public; that it is a state agency for that purpose, and that, under the well-established rule that words in a statute providing for the payment of fees or imposing burdens on property shall not be deemed to apply to public agencies or public property, unless such intent is clearly expressed, the language of this act providing for the payment of license fees cannot be considered as having been intended to include or apply to water districts organized under the act first referred to. This doctrine has been frequently expounded and applied in this state (*Balthasar v. Pac. Elec. Ry. Co.* [Cal. Sup.] 202 Pac. 37), where it was held that the provisions of the Motor Vehicle Act did not apply to or include motor vehicles belonging to the fire and police departments of municipalities of the state. Other illustrations of the rule are found in the citations and quotations made in that case.

[3, 4] The defendant claims that the rule is inapplicable in this case because of the provisions of section 2 of the Motor Vehicle Act. This section provides that:

"All motor vehicles owned and used in the transaction of official business by the representatives of foreign powers or by officers, boards or departments of the government of the United States, and all motor vehicles owned by and used in the operative work of such corporations as are taxed solely for state purposes under the provisions of the Constitution of this state, and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business, nor for the transportation of freight, are hereby exempted from the payment of the fees in this act prescribed. The department shall furnish, free of charge, distinguishing plates for motor vehicles thus exempt."

The claim is that by this specification of vehicles which are to be exempt the statute evinces an intention to exclude all other vehicles and persons from the exemption.

We think that section 2, instead of justifying the position of the defendant, is positive evidence against the same. It excludes specifically all motor vehicles that are not used for the conveyance of persons for hire, for pleasure, or for business. There is a companion rule of construction to that above mentioned, to the effect that exceptions in a statute imposing burdens are to be liberally construed in favor of the public. Even without the aid of this rule, however, we think a motor vehicle owned and used by a municipal water district organized under the law for the purpose of collecting and distributing water to the public, and for the management of its works and system in discharging its public duties, is not used in "business" as that term is used in section 2 aforesaid. The municipal water district is not a commercial corporation. It does not operate for profit. It is not intended that it shall earn any money in excess of the necessary operating expenses of the plant devoted to the public use and for the acquisition of property necessary thereto. While the operations of such a public corporation are sometimes referred to as its "business," it is nevertheless true that the context indicates that the word was used in a narrower meaning in this section. The general definition of the word is "that which busies, or engages time, attention, or labor, as a principal serious concern or interest," but the word has a narrower meaning applicable to occupation or employment for livelihood or gain, and to mercantile or commercial enterprises or transactions. It is not to be presumed that the Legislature undertook to place public corporations of this character in the same class as private corporations engaged in ordinary business. The rule of construction we have already referred to forbids it. The passage evidently refers to ordinary business, and not to the operations of the public corporations of the state. The phrase "for the conveyance of persons for hire, pleasure, or business, nor for the transportation of freight," clearly indicates an intention to describe ordinary occupations engaged in by private persons or private corporations, either for business or pleasure, and, so far as it refers to business it would include private business, and not public business. If the word "business" was given the broader meaning contended for by the defendant, it would require the imposition of the license fees upon every municipality in the state, and even the state itself, as a condition precedent to the issuance of license plates and certificates for the operation of all the motor vehicles used by any of them in the public business of the state.

For these reasons we are of the opinion that the motor vehicle department must issue these license plates and certificates to the petitioner for the motor vehicles in question without charging the statutory fee therefor.

Let the writ issue as prayed for.

We concur: LENNON, J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; RICHARDS, Justice pro tem.

(189 Cal. 52)

TOWN OF MILL VALLEY v. MASSACHUSETTS BONDING & INS. CO.
(S. F. 10213.)

(Supreme Court of California. May 31, 1922.)

On Rehearing.

1. Appeal and error \S 621(1)—Statute limiting time for relief from judgments inapplicable to delay in preparing transcript.

Code Civ. Proc. \S 478, authorizing courts to relieve parties from judgments, etc., taken through mistake, inadvertence, etc., provided application is made within six months, has no application to delay in the preparation of the transcript on appeal under section 953a, so as to prevent filing of the transcript more than six months after the expiration of twenty days from the filing of notice therefor.

2. Appeal and error \S 627(2)—Diligence in preparing transcript is matter for lower court, and not for Supreme Court, on motion to dismiss.

Under Supreme Court rule 2 (176 Pac. vii), providing that, when a notice for a transcript under Code Civ. Proc. \S 953a, is filed, the time for filing the transcript shall not run until the transcript is approved and certified, or the proceeding to obtain it has been dismissed, or otherwise terminated, the proceeding may be dismissed for lack of diligence in preparing the transcript, but this is a matter for investigation and determination in the superior court; and not in the Supreme Court, on motion to dismiss.

3. Appeal and error \S 622—Time for filing transcript does not run until approved and certified if appellant diligent and proceeding not terminated below.

Under Supreme Court rule 2 (176 Pac. vii), where the record shows no lack of diligence by appellant in procuring a transcript, and no termination below of the proceeding to procure it, the time for filing does not run, so far as a motion to dismiss the appeal is concerned, until the transcript is approved and certified by the judge of the lower court.

4. Appeal and error \S 627(2)—Question on motion to dismiss for failure to file transcript is one of diligence as to which court has large discretion.

The primary question on a motion to dismiss for failure to file transcript within the

time prescribed by a rule of the Supreme Court is whether the appeal has been diligently prosecuted, and in the decision of such question the court has a very large discretion.

In Bank.

Appeal from Superior Court, Alameda County; J. S. Koford, Judge.

Action by the Town of Mill Valley against the Massachusetts Bonding & Insurance Company. From a judgment for plaintiff, defendant appeals. On motion to dismiss appeal. Motion denied.

Kirkbride & Gordon, of San Mateo, and Thomas, Beedy & Lanagan, of San Francisco, for appellant.

H. C. Symonds, of San Francisco, for respondent.

PER CURIAM. Motion to dismiss appeal denied.

On Rehearing.

PER CURIAM. The respondent has applied for a rehearing of the order denying its motion to dismiss the appeal in this case. The rehearing is asked on the ground that the default of the appellant occurred on October 2, 1921, which was the expiration of 20 days after he had filed his notice under section 953a, Code of Civil Procedure, requesting a transcript of the record and proceedings in the cause for use on appeal; that the transcript was not filed in pursuance of said notice until April 27, 1922; that no extensions of time had been granted by the court; and that after April 2, 1922, no relief from such default could be granted under the provisions of section 473, Code of Civil Procedure. The facts shown by the affidavit of the appellant are that the delay was caused by the extreme length of the transcript, which made it impossible for the reporter, although diligently at work thereon, to complete its preparation until April 27, 1922. This was not the default of the appellant, even if it had been shown that the official reporter was negligent in the preparation of the transcript.

[1] When proceeding under section 953a the appellant must rely on the official conduct of the officers of the court. Their delay or default is not his delay or default. It is not a case for the application of section 473.

[2] There is no provision of the Code which fixes the time, after the taking of an appeal, within which the transcript must be filed. That matter is regulated by the rules of this

court. Rule 2 (176 Pac. vii) requires a transcript to be filed within 40 days after the appeal is perfected—that is, after the filing of notice of appeal—except among other things, that when a notice requesting a transcript under section 953a is filed, the time to file a transcript in the Supreme Court shall not begin to run “until such transcript is approved and certified as required by law,” or until the proceeding to obtain it “has been terminated in the court below by dismissal or otherwise.” If there is lack of diligence on the part of the officers of the lower court in preparing the transcript, the respondent may obtain a dismissal of that proceeding, where it is proper to do so, by applying to that court. It is not the theory upon which rule 2 was adopted that the matter of such diligence in the preparation of the record on appeal should ordinarily be subject to investigation and determination in this court on a motion to dismiss the appeal. Such matters can more properly be adjudicated in the superior court. There has been no termination of the proceeding to obtain a typewritten transcript in the court below, by dismissal or otherwise. The transcript was not filed with the clerk as required by section 953a until April 27, 1922, and the time for settlement thereof was then fixed for May 2, 1922, of which notice was duly given.

[3] Hence, for the purposes of the consideration of this court on a motion to dismiss, where the record shows no lack of diligence by appellant on his own part and no termination below, the time for filing the transcript will not begin to run until such transcript is approved and certified by the judge of the court below. At the time of the hearing, therefore, the time for filing a transcript had not yet begun to run. The motion was denied for these reasons.

[4] The primary subject of investigation upon a motion to dismiss for failure to file a transcript within the time prescribed by our rule, whatever the technical aspect of the case may be, is always the question whether the appeal has been diligently prosecuted. In the decision of that question the court has a very large discretion. It is seldom that the facts of any case will form a precedent for the determination of another upon a question of that character.

The petition for a rehearing is denied.

SHAW, C. J., LAWLOR, WILBUR, SLOANE, LENNON, and SHURTLEFF, JJ., and RICHARDS, Justice pro tem., concur.

(57 Cal. App. 287)

PEOPLE v. WILLIAMS. (Cr. 613.)

(District Court of Appeal, Third District, California. April 7, 1922.)

1. Burglary —41(6)—Evidence held sufficient to warrant finding that defendant committed the burglary.

In a prosecution for burglary in the first degree, evidence held sufficient to warrant the jury in finding that the defendant committed the burglary.

2. Burglary —41(5)—Evidence held sufficient to warrant finding the burglary was committed in the nighttime.

In a prosecution for burglary in the first degree, evidence that the building burglarized was in a densely populated section, and that the burglary was committed between the hours of 8:30 in the evening and 8:30 the next morning, held sufficient to warrant the jury in finding the burglary was committed in the nighttime.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

George Williams was convicted of burglary in the first degree, and appeals. Affirmed.

Charles F. Metteer, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of burglary of the first degree and appeals from the judgment of conviction and from the order denying his motion for a new trial.

The building burglarized is on Fourth street, between L and M, in the city of Sacramento, in what the appellant describes in his closing brief as "the densely populated oriental section of the city." The owner left the building on Saturday evening, October 1, 1921, at 8:30, and on his return the next morning at 8:30 he discovered that the place had been entered from the rear and 15 pairs of trousers, 8 or 9 coats, and between 50 and 60 shirts stolen. The defendant was arrested October 5. Prior to his arrest the defendant sold two of the stolen shirts to a man on the street and a pair of the stolen trousers at a secondhand store, signing the name "Harry Wilson" instead of his own at the latter place. At the trial he denied having sold the two shirts, but admitted that he sold the trousers. He denied having signed the name "Harry Wilson." In explaining his possession of the trousers, he testified that on the 4th day of October there were 10 or 12 men gambling under the Yolo end of the M street bridge, and that one of them "went broke in the game, and he asked several fellows if—who wanted to buy the pants; by me being a little ahead of the game, he asked

me, and I paid him a dollar and a half for the pants." W. M. Hallahan, detective sergeant of the police department of Sacramento, testified that he interviewed the defendant prior to his arrest, and that the defendant at first denied having sold any trousers at a secondhand store, but later admitted that he had sold a pair, not involved apparently in this case, at a secondhand store October 3; that witness "asked him where he got them. He says he was shooting crap or playing cards with a bunch of fellows down along the river front there. A fellow sold them to him for a dollar and a half."

[1, 2] A reversal of the case is asked on two grounds: (1) That there is no evidence connecting the defendant with the commission of the crime. (2) That there is no evidence tending to show that the burglary was committed in the nighttime. There can be no doubt that the evidence is sufficient to warrant the jury in finding that the defendant committed the burglary. The only evidence, other than that stated, tending to show that the burglary was committed in the nighttime, is that of a witness who saw two men in the alley near the place where the entry was made at 10:30 in the evening. One of them was about the height of the defendant, and the other was small. The witness was within about 12 feet of them but could not tell whether they were white or colored. The defendant is a colored man. The witness did not testify to any suspicious or unusual conduct on the part of these men and his testimony must be treated as of slight value.

Appellant correctly states that the burden is on the prosecution to prove beyond a reasonable doubt that the burglary was committed in the nighttime, and he contends that this burden has not been sustained. In support of his contention he cites a number of cases. In some of them the circumstances proved are less convincing than those of the instant case. In others the surrounding facts and circumstances are not stated. That of *People v. Griffin*, 19 Cal. 578, was tried prior to the enactment of the statutory definition of the term "nighttime." The court said that at the time of the entry "there was light enough out of doors to discern a man's features across the street. * * * The presence of sufficient daylight to discern a man's features has long been adopted as a criterion to determine whether or not the act was done in the nighttime within * * * the law applicable to burglary." In *State v. Gunderson*, 56 Wash. 672, 106 Pac. 194, 21 Ann. Cas. 350, the ship burglarized was in sole charge of a keeper who was absent all day and returned in the evening. On arising the next morning he for the first time discovered that a burglary had been committed. In *Waters v. State*, 53 Ga. 567, the burglary "was com-

mitted within a period of about 40 or 45 minutes, one-half of which was day, and one-half was night." In *State v. Gray*, 23 Nev. 301, 46 Pac. 801, the defendant entered a barn and took a saddle therefrom between the hours of 8 o'clock in the evening of June 4 and 7 o'clock the next morning. The defendant left town early in the morning of June 5—how early does not appear—starting from the residence of a woman who lived in the same block in which the barn was situated. The opinion does not disclose whether the vicinity was thickly or sparsely settled. In *Lelsenberg v. State*, 60 Neb. 628, 84 N. W. 6, the burglary was committed March 29th between 6:30 p. m. and 9 o'clock of the same evening, the surrounding circumstances not appearing from the decision. In *Ashford v. State*, 36 Neb. 38, 53 N. W. 1036, the evidence showed that the burglary was committed between the hours of 2 a. m. and 9 a. m. of the same day. The court said:

"There is also a lack of evidence as to the location of the Reynolds house [the place burglarized], as to whether it was situated in the quiet or busy portion of the city and as to whether there were other residences or houses in the same vicinity. If located in the heart of the city, the probabilities that the entry was made before daylight would be greater than if situated in a more sparsely settled portion."

In all of the cases thus far considered the evidence was held insufficient to show an entry in the nighttime.

In this case the burglary was committed in a densely populated part of the city and the articles stolen were of considerable bulk. It is highly improbable that the defendant would take the risk of breaking into the building and carrying away these bulky articles in broad daylight in a populous section of the city. In *People v. Dupree*, 98 Mich. 28, 56 N. W. 1047, the court said:

"When a merchant enters his store in a city at the usual hour in the morning, though it be after daylight, and finds that it has been broken open and entered from the front door or window, it is contrary to good sense to say that the crime might have been committed after daylight, and therefore the court must direct an acquittal. Such crimes are not committed in broad daylight, but in the nighttime. The question was one for the jury, and not for the court."

In *People v. Tracy*, 121 Mich. 318, 80 N. W. 21, a barn was burglarized. The court said:

"The property stolen consisted of two large horse blankets, a set of single harness, a bridle, and a pair of hoppers. * * * The owner of

the property was a farmer. Another farmer lived within 20 rods on one side, and another within 40 rods upon the other side. * * * The property was bulky, and it is not probable that one would run the risk of breaking into a building situated as these were, in daylight, and of carrying away property of this character. The chance of detection would be too great. The question was for the jury."

In *Simon v. State*, 125 Wis. 439, 103 N. W. 1100, the burglary was committed between twilight of August 22 and the afternoon of August 25, the owner of the house being absent in the meantime. The court said:

"The entry of the house was through a basement window, which, except for darkness, was in plain sight from the street and other residential grounds and residences in the vicinity. * * * The house was located in a residence locality. Other houses were close by. In the daytime people were accustomed to frequently pass by on the sidewalk and street in front thereof. * * * The place where the entry was effected, as regards opportunity for seeing the offender in the act, and the disturbance of things in the house were such as to render it highly unreasonable to suppose that the event could have occurred in the daytime without attracting the attention of some one while it was in progress; and highly unreasonable that any one would attempt such a thing, under the circumstances, except under cover of darkness, since opportunity for choosing such an occasion was ample. The verdict on this point is well supported by the evidence."

See, also, *State v. Bancroft*, 10 N. H. 105.

In the case of *People v. McCarty*, 117 Cal. 65, 48 Pac. 984, where the burglary was committed June 18, the court said:

"The defendant and others constructed a tunnel some 120 feet in length from the cellar of a certain saloon to a point immediately beneath the floor of a certain bank building in the city of Los Angeles, for the purpose of committing larceny. Upon the day set for the actual entry through the floor into the building the defendant and his confederates, some time during the afternoon, entered the cellar, one of them emerging therefrom at 7 o'clock p. m. * * * The others came out of the cellar at 12 o'clock that night. The burglary was committed by these men at some time during these hours. The finding of the jury on this question was a matter peculiarly within its province; and upon this evidence the court will not disturb the verdict in this regard."

Under the foregoing authorities, there can be no doubt that the evidence is sufficient to sustain the verdict.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 271)

PEOPLE v. JOHNSON. (Cr. 593.)

(District Court of Appeal, Third District, California. April 7, 1922.)

1. Robbery §19—Information held to sufficiently express intent.

An information, charging that defendant made an assault to steal, necessarily carries the implication that his purpose or intent was to steal, etc., though the word "intent" is not used.

2. Robbery §19—Information not defective in omitting "against his will."

An information for assault with intent to commit robbery was not defective in omitting the words "against his will" as contained in Pen. Code, § 211, the terms "force and fear" entirely covering the situation.

3. Criminal law §1186(4)—Defects in information held not reversible error.

Where the evidence was sufficient to establish every element of the offense charged, and the hearing proceeded as though the allegations of the information were complete, the cause should not be reversed on account of omissions from the information, in view of Const. art. 6, § 4½.

4. Criminal law §822(1)—Instruction must be considered in connection with entire charge.

In determining whether or not an instruction was erroneous, it must be considered in connection with the entire charge.

5. Criminal law §822(4)—Instruction, invading province of jury, cured by remainder of charge.

An instruction: "The defendant is charged with assault with intent to rob. This charge includes the smaller offense of simple assault, and he may be found guilty of either of said offenses"—if invading the province of the jury, was not ground for reversal, where, considering the instructions together, the jury could not fail to understand that, unless convinced by the evidence beyond a reasonable doubt of the guilt of the defendant, they could not convict him of any crime.

6. Criminal law §996(2)—Permitting correction of record after certification held not error.

It was not error for the trial court on motion of the district attorney, after the trial was completed and the record on appeal was certified, to permit the record to be corrected by adding averments to the information, which averments had been a part of the information as originally filed, but had been stricken on motion of the people and by consent of the defendant; correction being made to show a complete history of the trial.

7. Criminal law §1185(1)—Correction of record without prejudice.

If it was error for the trial court to permit a correction of the record after its certification on appeal, it was entirely without prejudice to the accused, where the correction

was made only to show a complete history of the trial and proceedings.

8. Criminal law §695(6)—Objection to reading statement of accused held not to raise objection to certain questions and answers therein.

Where accused's attorney, when the court assented to the reading by the district attorney of a statement made by accused, objected that: "If the court please, we object to this procedure. The witness has a right to see the entire paper before counsel reads anything from it at all. Then he can ask him as to it"—was not a sufficient objection that some of the questions and answers contained in the statement were objectionable.

9. Criminal law §693—Objection to reading of statement of accused held not opportune.

Where with the consent of the court prosecuting attorney read a statement made by accused, and then asked the defendant if it was not a correct copy of the statements made by him, an objection of accused's attorney, "It is incompetent, irrelevant, and immaterial, and I assign now the reading of the document as misconduct on the part of the district attorney, and I ask the court to strike it from the record and to request this jury to disregard every question and answer read to the defendant," was not opportunely presented.

10. Criminal law §695(2), 696(4)—Objections to reading of statement of accused should specify objectionable matter therein.

An objection to the reading of a statement of the accused and a motion to strike it from the record should specify the particular portions of the statement deemed objectionable.

11. Criminal law §730(9)—Injury of remark of district attorney obviated by instruction.

Any possible injury from a remark of the district attorney, "I suppose the district attorney and all of the officers, including the reporter, are all crooks and only the defendant is innocent," was obviated by an instruction of the court for the jury to disregard it.

12. Witnesses §329—Cross-examination of defendant as to details of his visit to a certain place held proper to test his veracity.

In a prosecution for an assault with intent to commit robbery, where accused on direct examination testified that he came to the city for the purpose of buying wine for a certain third party, it was entirely proper to test his veracity for the district attorney to ask on cross-examination as to whether he was being paid by such third person for buying the wine.

13. Witnesses §337(5)—Proper to ask accused if ever convicted of felony.

Under Code Civ. Proc. § 2051, it was not improper to ask defendant on cross-examination if he had been convicted of a felony.

14. Robbery §24(6)—Evidence held to warrant conviction of assault with intent to commit robbery.

Evidence held sufficient to warrant conviction of an assault with intent to commit robbery.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Orville Johnson was convicted of assault with intent to commit robbery, and appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was convicted of assault with intent to commit robbery and the appeal is from the judgment and the order denying his motion for a new trial.

The first point made is that the information states no offense against the defendant, or at least no offense of which the superior court has jurisdiction. The particular criticism is that there is no allegation of the intent with which the "assault" was made. The charging part of the information, as certified by the clerk, is as follows:

"That said Orville Johnson on the 16th day of April, A. D. 1921, at the said county of Napa, and before the filing of this information, did willfully, unlawfully, and feloniously, violently, and forcibly make an assault upon the person of one H. R. Hill, with the felonious then and thereby to steal, take, and carry away from the person, possession, and immediate presence of said H. R. Hill the goods and personal property of the said H. R. Hill, and to accomplish the said stealing, taking, and carrying away by means of force then and there used upon and against the said H. R. Hill by the said defendant, and by then and there putting the said H. R. Hill in fear."

[1] The omission of the word "intent" was probably an inadvertence in the preparation of the transcript, as in the reporter's transcript certified by the trial judge the word appears. But, be that as it may, it is quite apparent that if the intent with which the assault was made was not directly expressed it was clearly implied by the use of the terms which were employed. To charge that a defendant made an assault to steal, take, and carry away certain goods necessarily carries the implication that his purpose or intent in making the assault was to steal, etc. If it were stated that A. went to Washington to see the President, it would not be open to dispute that his purpose in going to the capital was to see Mr. Harding.

[2] It is also suggested that the information was defective in omitting from the definition of robbery the element "against his will," as contained in section 211 of the Penal Code. The terms "force and fear," however, entirely cover this consideration. *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796.

[3] Moreover, after trial, wherein the evidence was sufficient to establish every element of the offense of assault with intent to

commit robbery, and wherein the hearing proceeded as though the allegations of the information were complete, in contemplation of section 4½ of article 6 of the state Constitution, the cause should not be reversed on account of any such alleged defect. *People v. Bonfanti*, 40 Cal. App. 614, 181 Pac. 80.

[4, 5] The next asserted error relates to the action of the court in giving this instruction:

"The defendant is charged with assault with intent to rob. This charge includes the smaller offense of simple assault, and he may be found guilty of either of said offenses."

This instruction must be considered in connection with the entire charge, and, as thus viewed, it is not to be condemned. The court thereby did not attempt to define fully the crime with which the defendant was charged, but the offense was characterized in general terms to indicate that it embraced two separate offenses. Standing alone, it possibly might be subject to the criticism that it invaded the province of the jury in suggesting that they should convict the defendant of one or the other of these offenses, but it was immediately followed by these plain directions:

"If you find to a moral certainty and beyond all reasonable doubt that the defendant committed an assault on H. R. Hill with the intent of robbing said Hill, as charged in the information, you should find defendant guilty of assault with intent to rob.

"If you entertain a reasonable doubt as to the defendant's intent in the matter, but find to a moral certainty and beyond all reasonable doubt that he assaulted said Hill, as charged in the information, you should find defendant guilty of assault.

"And if you entertain a reasonable doubt as to whether defendant assaulted said Hill, you should find the defendant not guilty."

And in the beginning of the charge the court stated:

"I instruct you that in considering this case you must not act upon any outside influences or reports, if any have come to your notice. If the defendant is guilty such guilt must be determined by you from the evidence which has been introduced before you at this trial, and upon that evidence alone you must be guided in rendering your verdict."

Again:

"I instruct you that the law raises no presumption whatever against the defendant, but, on the contrary, every presumption of the law is in favor of his innocence; and in order to convict him of the crime alleged in the information, or of any lesser crime which may be included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and, if you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is

your duty to give the defendant the benefit of such doubt and acquit him."

Considering these instructions together, the jury could not fail to understand that, unless convinced by the evidence beyond a reasonable doubt of the guilt of the defendant, they could not convict him of any crime.

[8,7] After the trial was completed and the record on appeal was certified the trial court permitted, on motion of the district attorney, the record to be corrected by having added to the information the following averment:

"That the defendant, before the commission of the offense charged in this information, was in a general court-martial of the United States army convicted of a felony."

It is not questioned that this was a part of the information as filed by the district attorney, but, when the cause was called for trial, on motion of the people and by consent of the defendant that part was withdrawn, and it was not read to the jury. If the record is to show a complete history of the trial and proceedings it is entirely proper for it to exhibit the information as it was filed. That a portion of it was afterward stricken out or withdrawn is no reason why the actual condition at the time it was filed with the clerk may not be shown. Moreover, if the action of the court in correcting the record was irregular, of course it is entirely without prejudice as far as this appeal is concerned. It has no effect upon the judgment and does not concern at all the merits of the verdict of conviction.

[8-10] Complaint is made of the action of the court in permitting the district attorney to read what purported to be a statement of appellant made to the officers after his arrest. It seems that on direct examination he was interrogated about the statement, and the record shows the following on cross-examination:

"Q. Was the reporter present in the sheriff's office when you made your statement there? A. Sir? Q. Was the reporter present in the sheriff's office when you made your statement? A. Statement to you? Q. Yes, sir. A. Yes, sir. Q. The reporter was taking it down in shorthand? A. Yes, sir. Q. I will show you what purports to be a transcript made by the shorthand reporter, as to what transpired in the sheriff's office, and I will ask you if that is the statement you made? A. No, sir; this is not a correct statement of what I done in the sheriff's office. Q. Wait a minute, let me have an answer 'Yes' or 'No' to the question, if you will.

"Mr. Riggins: I am going to read to him the statement; I am going to ask him now the questions and answers as I have them here. I might take a short cut and take this statement as a whole; of course, I am going to ask him separate questions.

"The Court: Go ahead and do it.

"Mr. Cavitt: One moment, if the court please,

we object to this procedure. The witness has a right to see the entire paper before counsel reads anything from it at all. Then he can ask him as to it."

The court permitted the district attorney to proceed with the questions and answers. We can see no merit in appellant's objection to the proceeding. It was the right of appellant to see the statement, which had been reduced to writing, before he was questioned concerning it (section 2052, Code Civ. Proc.), but that is the exact course which was pursued. The district attorney showed him the statement, and we must presume that he examined it sufficiently to satisfy himself as to its contents. Nothing appears to indicate that he was not allowed ample time to do so. It is apparent therefore that the only objection made by appellant to this line of examination is entirely untenable. No doubt some of the questions and answers contained in said statement were objectionable, but appellant did not direct specific attention to them, and it is now too late to complain. After reading the document the district attorney asked this question:

"I ask you now, if that is not a correct copy of the statement you made that night in the presence of the people you have already mentioned?"

To which counsel for appellant responded:

"Don't answer that question. If the court please, I object to that on the ground it is incompetent, irrelevant, and immaterial, and I assign now the reading of the document as misconduct on the part of the district attorney, and I ask the court to strike it from the record and to request this jury to disregard every question and answer read to the defendant."

The court overruled the objection and denied the motion. The ruling was correct. If there was any merit in the objection, the matter was not opportunely presented to the court. Besides, the objection and motion were addressed to the statement in its entirety rather than to certain particular portions which alone might be deemed objectionable.

[11] Fault is found with the following remark of the district attorney made in response to a provocative statement of counsel for appellant:

"I suppose the district attorney and all of the officers, including the reporter, are all crooks, and only the defendant is innocent."

It is altogether improbable that such statement would have any effect upon the verdict, but any possible injury was obviated by the instruction of the court for the jury to disregard it.

[12,13] The district attorney on cross-examination of the defendant asked this question: "Were you to be paid anything by Mr. Dozier for buying the wine?" On the direct

examination he had testified that he came from Vallejo to Napa for the purpose of buying wine for Mr. Dozier, and it was entirely proper to test his veracity for the district attorney to probe the surrounding circumstances of that asserted engagement. We may add that it was not improper to ask the witness if he had been convicted of a felony. Section 2051, Code Civ. Proc.

[14] We think there is no merit in the contention that the evidence did not warrant the conviction. The argument of appellant is apparently grounded upon the assumption that the jury should have accepted his statement of the affair, and that it was little less than an outrage for them to believe the prosecuting witness and other witnesses for the people. Giving full credit, as we must, to the testimony of H. R. Hill, we cannot escape the conclusion that appellant was justly convicted. The former was walking after dark in a certain alley in the city of Napa, and, in his own language:

"I felt somebody put his hand on my shoulder, and I looked around on this side (illustrating), and I saw something come around this way; somebody put something in my face. * * * It was the defendant. * * * He had a pistol. He stuck it up in my face, and told me not to holler. Then he grabbed me, and we went down, and as we were going down he kicked me in the mouth. * * * He kicked me hard enough that he pretty near come getting me, and he was going to try to do it again, and I kept him from doing it."

It further appears that the witness called for help while struggling with the defendant, and an officer and others came and appellant was taken into custody.

Other circumstances appear in the record indicating that the purpose of the defendant was to rob Mr. Hill, but we need go no further.

We are satisfied that no reason has been shown for disturbing the verdict, and the judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 329)

TETER v. THOMPSON. (Civ. 3709.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922.)

1. Sales §479(6)—Transfer by defendant of possession lawfully acquired before claim and delivery is begun does not defeat action.

Where the property for which an action of claim and delivery was begun was lawfully acquired by defendant under a conditional contract of sale so that the common-law action would have been detainue and not replevin, the fact that defendant had transferred possession of the property to another before the action

was begun does not bar plaintiff's right to maintain the action and have a judgment for return of the property or its value, though such an action could not be maintained if the original taking were tortious and the property was not in defendant's possession when the action was begun.

2. Sales §479(4)—Demand for possession and action to recover is sufficient notice of election to rescind conditional sale.

Where a conditional sale contract authorized the seller to retake possession of the property upon the exercise of his right to declare the agreement null and void, it was not necessary for plaintiff to make a declaration of intention in the language of the contract, but his demand of possession of the property after default in making a payment thereon and his institution of an action to recover the property was a sufficient manifestation of his election to rescind.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by F. M. Teter, doing business under the fictitious name of Teter Motor Car Company, against L. R. Thompson, for claim and delivery of personal property. Judgment for defendant, and plaintiff appeals. Reversed.

O. E. McDowell, of Los Angeles, for appellant.

James W. Miller and John E. Carson, both of Los Angeles, for respondent.

CONREY, P. J. Action to recover possession of personal property, or the reasonable value thereof in case delivery of the property cannot be had, together with damages for the unlawful detention of the property. The plaintiff appeals from the judgment entered in favor of defendant.

On the 8th day of June, 1918, pursuant to the terms of a contract of conditional sale, plaintiff delivered to the defendant a certain truck described in the contract. The purchaser paid \$500, and agreed to pay the further sum of \$200 on the 5th day of July, 1918. By the terms of the contract, the purchaser agreed:

"That if he fails to make any of the above payments when due, or within ten days thereafter, or violates any of the terms of this contract, then the seller at his option and without notice may elect to declare the whole purchase price due and payable, or the seller may declare this agreement null and void, and in that event the seller may take possession of said automobile, and the purchaser agrees to forfeit all payments made thereon and also forfeit all right and interest in said automobile, time being of the essence of this agreement. * * * The second party acquires no interest in or title to said property until all payments as agreed shall be made; when the first party agrees to execute to the second party a bill of sale to said property. * * * Time is expressly made of the essence of this contract."

[1] Nothing was paid by the purchaser on account of this contract after the initial payment. In August, 1919, plaintiff made demand on the defendant for possession of the truck, but the defendant refused to comply with that demand. The fact was that prior to that time the defendant had sold and delivered the truck to a third party; since which time it never has been in possession of or under control of the defendant. By reason of these proved facts it was found by the court (contrary to the allegations of the complaint) that the defendant did not have possession of the truck either at the time of commencement of this action or thereafter. Counsel for appellant and counsel for respondent seem to agree that the judgment in favor of defendant rests upon the proposition that the plaintiff cannot maintain this action because the personal property sought to be recovered was not in defendant's possession at the time of commencement of the action. This presents the question upon which the appeal may be determined.

The principal decisions relied upon by respondent are *Richards v. Morey*, 133 Cal. 437, 65 Pac. 886, and *Ricciotto v. Clement*, 94 Cal. 105, 29 Pac. 414. In *Richards v. Morey*, the court said:

"This is an action to recover possession of personal property which, it is alleged, the defendant took against the will of the plaintiffs, and now detains from their possession. But the finding shows that the property sought to be recovered was not in the possession of the defendant when the action was commenced, nor within his power to deliver, and therefore said finding would not have sustained a judgment in favor of the plaintiffs for the delivery of the buildings, or for the value of them in case a delivery could not be had."

Ricciotto v. Clement was an action to recover possession of personal property belonging to the plaintiff, which had been seized by the defendant as constable acting under a writ of attachment against one Smith. At the time of commencement of this possessory action against the constable the goods had passed out of his possession. The court held that the action was one brought to obtain the benefit of a statutory remedy, the action being designated by the court as "an action of claim and delivery." The court held that neither "the action of replevin in the detinue," nor "the action of claim and delivery," can be supported against a defendant not in possession at the time of commencement of the action.

It should be noted that in the cases mentioned above the cause of action had its origin in a wrongful taking, or tortious seizure of property by the defendant. In *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463, it was held that where the defendant obtained possession lawfully under a contract of bailment, but detained the property unlawfully, an action may be maintained to

recover possession of the property or its value from the bailee, even though prior to the commencement of the action the bailee has wrongfully transferred the property to other persons. The court said that this was just the kind of wrong for which at common law the action of detinue was especially appropriate; and that it was no defense to an action of detinue to plead that the defendant before the commencement of the action had wrongfully disposed of the property and therefore was not in possession of it. After citing sundry authorities, the court said:

"The principles declared in the foregoing authorities are eminently just, and are founded on the maxim that no one can take advantage of his own wrong; and they are as applicable now to an action based on a contract of bailment as they were to such an action when it had to be brought under the special form of detinue. The usual judgment in such action is in the alternative—that is, that the plaintiff recover possession of the property, or its value in case delivery cannot be had; but where it appears that the property cannot be delivered the defendant is in no way prejudiced by a judgment for the value only; and the fact that the judgment is not in the alternative is no ground for reversal."

The court also sustained the plaintiff's right of action in that case for another reason:

"There is another feature of the case, however, which disposes of this technical point adversely to appellant. The averments in the complaint of the demand by respondent of the appellant that it deliver to her the property, and appellant's refusal to do so, are sufficient averments of conversion; and the action may therefore be considered in the nature of trover, and thus considered there can be no objection to the form of the judgment."

The judgment was for recovery of the value of the property wrongfully detained.

In *New Liverpool, etc., Co. v. Western, etc., Co.*, 151 Cal. 479, 91 Pac. 152, it appeared that the defendant was in possession of a quantity of salt as bailee; that prior to the commencement of the action the plaintiff had become entitled to possession upon demand. Demand was made by plaintiff and delivery of possession was refused by defendant. The action was brought to recover possession of the property, or its value if possession could not be obtained. Following the decision in *Faulkner v. Bank*, supra, the court held that the fact that a defendant had before the demand or before the action was begun parted with the possession of the salt was no defense, and approved the declaration that such an action is of the character formerly known as an action in detinue, and that the rights of the parties are to be determined by the principles of the common law applicable to that form of action. We are of the opinion that the fact that defendant had transferred the truck to

a third person, and did not have it in possession at the time of commencement of this action, does not deprive the plaintiff of the right to maintain this action.

[2] Finding III states:

"That it is not true that the plaintiff herein subsequent to the 15th day of July, 1918, or at any other time or at all declared said agreement null and void or null or void, or became at such time entitled to the possession of said automobile; that it is not true that at all the times since this plaintiff has been and now is, or has been or now is, the owner and entitled or the owner or entitled to the possession of said automobile."

Since the defendant was in default by reason of nonpayment of the amount due from him under the contract, and also by reason of his transfer of the property contrary to the terms of the contract, the plaintiff became entitled to possession of the property, upon the exercise of his right to "declare this agreement null and void." Such declaration need not have been made in the very terms of the contract. When the plaintiff demanded possession and (upon defendant's refusal to comply with that demand) commenced this action to recover the property or its value, he thereby elected to put an end to the contract and waive his claim for the unpaid balance of the purchase price as definitely as if he had used the formula, "I hereby declare said contract null and void."

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(67 Cal. App. 281)

MORRIS et al. v. SIERRA & SAN FRANCISCO POWER CO. (Civ. 2422.)

(District Court of Appeal, Third District, California. April 8, 1922. Hearing Denied by Supreme Court June 5, 1922.)

1. Electricity ⇨19(2)—Complaint for burning plaintiff's building held sufficient, though not mentioning intervening wire strung through which current was transmitted.

In an action against an electric power company for the burning of plaintiff's building, a complaint alleging the cause of the damage to be the negligent construction and maintenance of defendant's high-tension line was sufficient to sustain recovery on the theory that the power from the high-tension line was negligently permitted to enter a telephone wire strung under the high-tension wire, and that the telephone wire came in contact with plaintiff's wire, causing the fire, though the complaint did not mention the telephone wire.

2. Pleading ⇨428(3) — Failure to object to evidence held to cure omission of issue from complaint.

The failure of defendant to object at the trial to evidence showing how the accident occurred is sufficient to cure the deficiency in the

allegations in the complaint as to the manner in which it occurred.

3. Telegraphs and telephones ⇨14—Regulation by State Railroad Commission as to distance between crossing lines held valid.

The regulation of the State Railroad Commission fixing the clearance between telegraph and telephone lines at crossings with similar lines was not unreasonable and was within the power of the Commission granted by St. 1911 (Ex. Sess.) p. 18, § 30, which was authorized by Const. art. 12, §§ 22, 23.

4. Electricity ⇨18(1)—Violation by plaintiff of order fixing distance between crossing wires is contributory negligence in law.

Where plaintiff maintained a telegraph wire crossing under a telephone wire of a power company with a clearance less than that prescribed by the Railroad Commission, he was contributorily negligent as a matter of law, and cannot recover for a fire started by a high-tension current entering his wire through the telephone wire which had been short-circuited with the high-tension line.

5. Electricity ⇨19(5)—Extension of time for complying with requirements of Railroad Commission held not to disprove prior negligence.

In an action against a power company for a fire caused by its negligence, proof that after the fire the Railroad Commission extended the time within which the defendant should reconstruct its lines to comply with St. 1911, p. 1037, as amended by St. 1915, p. 1058, without proof as to the date of the order originally fixing the time for such compliance, does not show that the maintenance of the company's lines prior to the time of the fire in violation of the statutes and regulations was not negligence as a matter of law.

6. Electricity ⇨16(1)—Extension of time to reconstruct power lines does not excuse failure to maintain proper distance between telephone lines.

An extension of time granted to a power company within which to reconstruct its power lines to comply with the statutory requirements does not excuse the maintenance by the power company of a telephone line on the same poles as its power line, in violation of regulations of the commission prescribing the clearance between telephone and telegraph lines at crossings.

7. Electricity ⇨16(7)—Negligent construction of telephone line held cause of damage.

The maintenance by a power company of a telephone wire on its power poles without the clearance required by the Railroad Commission at a crossing above a telegraph wire of plaintiff was the proximate cause of damage to plaintiff resulting from a high-tension current transmitted to his telegraph wire through the telephone wire, regardless of the cause of the short-circuiting elsewhere of the telephone wire with the defendant's high-tension line.

8. Electricity ⇨19(13)—Negligence of both plaintiff and defendant maintaining illegal crossing of lines proximately causes injury by fire.

Where plaintiff's telegraph wire and defendant's telephone wire were maintained at a

crossing without the clearance required by the Railroad Commission, the negligence of both plaintiff and defendant concurred in proximately causing the damage resulting to plaintiff from contact between the wires, and a verdict for plaintiff cannot be sustained as a finding by the jury that plaintiff's negligence was not the proximate cause of the injury.

9. Electricity ⇨18(1)—Prior construction of plaintiff's line does not relieve it of negligence in maintaining illegal construction at crossing of other lines.

The fact that plaintiff's telegraph line was constructed before defendant's telephone line which crossed it does not relieve plaintiff from the imputation of negligence as a matter of law in maintaining his telegraph wire at the crossing without the clearance between it and the telephone wire required by the Railroad Commission.

10. Electricity ⇨18(1) — Interference with highway does not excuse maintenance of illegal crossing of telegraph over telephone wire.

The fact that plaintiff's telegraph wire could not be lowered at the point where defendant's telephone line crossed above it without interference with the highway does not excuse plaintiff's maintenance of his line with insufficient clearance between it and the telephone line overhead.

11. Electricity ⇨19(4)—Evidence of repairs after accident is incompetent.

In an action against a power company for damage caused when its telephone wire, which had become short-circuited with its power line, came in contact with plaintiff's telegraph wire, evidence as to repairs and improvements made by defendant upon its wires subsequent to the date of the accident was incompetent.

12. Trial ⇨84(2)—Objection question called for opinion does not raise objection it was incompetent as subsequent repair after injury sued for.

An objection that questions asked by plaintiff called for the opinion of the witness was insufficient to raise the question of the competency of the evidence called for, because it related to repairs and improvements made by defendant since the accident.

13. Trial ⇨91—Motion to strike unavailable where proper objection to question was not made.

Where the objection was insufficient to raise the question that the evidence called for was incompetent as evidence of improvements after the accident, a motion to strike the testimony on that ground was unavailable to defendant.

Appeal from Superior Court, Tuolumne County; George W. Nicol, Judge.

Action by Saul Morris and another against the Sierra & San Francisco Power Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Chickering & Gregory, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, and John B. Curtin, of Sonora, for respondents.

HART, J. This is an action in tort, and the appeal is by the defendant from a judgment entered upon the verdict of a jury in favor of the plaintiffs for the sum of \$8,564.38, as compensatory reimbursement to the plaintiff Morris for damage alleged to have been sustained by him through the alleged negligent act of the defendant in causing the store building and its contents of said Morris at Chinese Camp, Tuolumne county, to be destroyed by fire.

The general facts are: It appears that in the year 1885 Morris constructed, and down to the time of the fire causing the destruction of the property in question continuously maintained and operated, a telegraph line, extending from his store at Chinese Camp to the city of Sonora, via the town of Jamestown, in Tuolumne county, the latter town being situated a short distance only from the town of Chinese Camp. This telegraph line was dedicated to the public service and consisted of one line of poles and a single wire. A number of years (some of the witnesses approximate the number at about 15 years) after said telegraph line had been established and in operation, the defendant power company, or rather, its predecessor in interest and grantor, installed in Tuolumne county an electric power line carrying 16,500 volts of electricity. This high-power line extended from what is known as Phoenix dam, "down past Jamestown, passing through the outskirts" of the last-named place and on to the Rawhide mine, in said county. The power line crossed the state highway at Jamestown, or on the outskirts thereof, and for a distance of several hundred feet passed through or over the bottom of a ravine to a point very near to a small body of water known as "Leland's fishpond." Said line, between the highway and said pond, was supported by three poles, the distance between which was from 125 to 150 feet. The high-power wires were on cross-arms located at the tops of the poles, and thereunder there had been placed smaller cross-arms, carrying two wires (one at each end thereof) used by appellant as a telephone system. At a point between the highway and the "fishpond," and about 200 feet distant from the highway, the Morris telegraph line, which, as seen, consisted of but one wire, crossed or passed underneath the power company's wires; and at this point the wire of the Morris line was held by two poles, so placed that one was at the top of each side of the ravine at about the same elevation, and the span of said line where it crossed underneath the power line was between 250 and 300 feet, being much longer than the span of the power company lines at that point.

On the morning of July 12, 1918, the general merchandise store of the plaintiff Morris at Chinese Camp caught fire, which partially destroyed the building and completely destroyed the stock of merchandise and fixtures contained in said building. Morris carried insurance on the building and stock of goods with his coplaintiff, three different policies, aggregating the sum of \$3,200, having been at some time previously to the fire so issued to the said Morris. At this point it may be stated that the plaintiff Fireman's Fund Insurance Company, upon adjusting the loss, paid to Morris the total amount called for by the three several policies referred to, and that said company is in the case here claiming subrogation to such proportion of any rights established herein by the plaintiff Morris as is represented by the amount paid by it to Morris under said policies of insurance.

The building in which Morris carried on the merchandise business and which was in part destroyed by the fire in question was made of brick, with iron doors, and of the dimensions of 25 feet in width by 50 feet in length. The walls of the building were 18 inches in thickness. The height of the building was 12 feet, with a 4-foot fire wall. The roof was made of dirt and bricks with a tin covering, and the windows and the doors had iron shutters. Early in the evening preceding the morning of the fire Morris personally closed the store by locking the doors. On the morning of the fire, while he was still in bed, his attention in some manner was called to the fact that a fire had broken out in his store, and he immediately arose and hastened thereto. He found the doors and windows closed and locked as he had left them the previous evening. He looked through a hole in one of the walls of the building through which letters and other mail were deposited in the store and discovered that the fire was in the north end of the building, in close proximity to the point where the telegraph instrument was located. There was considerable smoke in the building, and it was apparent that the fire had already obtained considerable headway. He, with others, attempted to arrest the progress of the fire, but to no purpose.

After the building and contents had been destroyed, Morris, believing that the fire had been caused by the emission of electric sparks from his telegraph instrument and that this was in turn caused by the surcharge of his wire with an unusual voltage of electricity by reason of its contact with some high-power wire, proceeded, with others, to make an inspection of his line. They reached the point where the lines of the defendant and his line crossed each other as above described, and there he found that one of the telephone lines of the defendant had been broken, the end of said line falling to the ground and setting the dry weeds there-

abouts on fire, burning a space of about 30 or 40 feet. His own line had been loosened from its insulation and dropped against a cottonwood tree and there grounded. The theory is that the telephone line of the defendant had, through some cause, come in contact with its high-power line, became overcharged with electrical energy, and was thereby caused to sever and fall on the line of the plaintiff Morris and so charge it with an unusual voltage, sufficient to cause the trouble at his store which resulted in the fire.

[1] The first point urged by the defendant is that the verdict cannot be supported by any of the alleged negligent acts set forth in the complaint. This point grows out of the proposition that the complaint nowhere mentions the telephone line, and alleges that the cause of the fire was through the negligent construction and maintenance of the defendant's high-power wire, by reason whereof electricity of high and dangerous voltage escaped from the said line and into the telegraph line, thereby causing the fire, etc.

[2] We think the complaint sufficiently alleges negligence against the defendant to meet the test of a general demurrer and even the demurrer upon the special grounds urged against it by the defendant. At any rate, there was no objection at the trial to evidence showing how the accident occurred, and this is itself sufficient to cure the deficiency of the complaint, even if it be conceded that there was any such deficiency in the particular referred to. *Boyle v. Coast Improvement Co.*, 27 Cal. App. 714, 720, 151 Pac. 25; *Slaughter, Adm'r, etc., v. Goldberg, Bowen & Co. et al.*, 26 Cal. App. 318, 147 Pac. 90; *Ruth v. Krone*, 10 Cal. App. 770, 779, 103 Pac. 960.

There is no controversy between the parties as to how the fire was caused. Counsel for the defendant, both in their briefs and in their oral argument before this court, expressly admitted that the fire in the Morris store was due to the fact that the indirect contact of the high-power wire of the defendant with the wire of the Morris telegraph line overcharged the latter wire with such a high voltage of electricity as to produce the disastrous result of which complaint is here made. In the oral argument by the attorney for the defendant it was stated:

"The fire occurred in this manner: About three or four miles distant from the point of this crossing at a place known as Sullivan's creek a crane flew into the high-power wires of the Sierra & San Francisco Power Company. That caused a short circuit in the high-power system, allowing the wires to drop, or at least one, which brought the high-power wire into contact with the telephone wires. By means of the telephone wires the electricity was conducted to the particular crossing where the telephone wires of the Sierra & San Francisco Power Company and the Morris telegraph line came in contact, burning off the telephone

wires of the Sierra & San Francisco Power Company, due to the short circuit, and thereby shunting the electricity over the Morris line into the store at Chinese Camp."

But, while the defendant, through its counsel, makes this admission, and, indeed, has not denied that the fire was caused in the manner indicated by the foregoing statement, nevertheless contends that the plaintiff Morris was guilty of negligence which directly contributed to the commission of the alleged wrong for which he here seeks redress. In support of this position the appellant calls attention to the fact that the evidence disclosed that both the poles supporting the telegraph line over the ravine and at the point where the lines of the defendant crossed the former line were in an oblique position in the ground, and slanting in an opposite direction from each other. As to this, the theory of the appellant was and is that the poles had been driven or moved from a vertical position in which they were originally erected to the slanting position by some external cause, as by a heavy wind or contact of some heavy object therewith, and that the effect of the falling over of the poles was to take up the slack of the telegraph line and raise it nearer to or within a very short distance of the telephone line. It is claimed that this theory is sustained by evidence which tended to show that at the time that the telephone wire of the defendant had been repaired and thus placed in its original condition immediately after the fire occurred the space between the said wire and the telegraph wire of the plaintiff Morris was approximately an inch only. It is hence argued that, the telephone wire being restored to exactly the same condition in which it had always been maintained down to and at the time of the contact which produced the trouble, and the evidence failing to show that the telegraph wire was in any other condition than that in which it was at the time the telephone wire was repaired and restored to its original condition, the conclusion is irresistible that at some time prior to the fire the slanting of the poles upon which the telegraph wire was strung had caused the slack in said wire to be taken up or the wire itself to be stretched so as to become tense, thereby bringing said wire within the distance of an inch from the telephone wire. There was, however, evidence to the effect that the telegraph poles at the time of the inspection immediately following the fire were in a solid position in the ground, as though they were in the same condition as when originally placed there, and therefore, if the fact of the slanting position of the poles was to be regarded as significant in the determination of the question whether the plaintiff Morris was by reason thereof guilty of contributory negligence in the maintenance of his line, we would perhaps be required to say that the jury impliedly found,

and were justified in so doing, that the poles were erected in slanting positions in the first instance, and that the condition as to said wire at the time of the collision between the two wires which caused the damage was no different from what it had always been.

As to the contact between the wires, the theory of the defendant is, as we have seen, that a crane, while in flight, at a point some three or four miles distant from where the wires in question crossed, attempted to pass between the telephone and the high-power wires, collided therewith, and so at the same time came in contact with both, and that thus the voltage from the power line was conducted into the telephone wire, causing a short circuit on the former wire, the result of which was to cause the telephone wire to fall upon and overcharge the telegraph wire of plaintiff and so produce the fire. The testimony of two of the witnesses for the plaintiffs supports this theory, and, upon the hypothesis that the cause of the contact between the wires is thus accounted for, counsel for defendant vigorously maintain that the damage resulted from a cause or an act beyond the control of human agency; that is to say, that the damage was entirely due to an act of God.

The plaintiffs contend, however, that, it having been shown that the fire was caused by the contact between the telegraph wire and the high-voltage wire through the telephone wire, the latter two wires belonging to the defendant, a prima facie case of negligence was thus established against the latter, and that thus a sufficient case was made to entitle them to a recovery, in the absence of a showing by the defendant that it was not guilty of negligence in the maintenance of its wires which contributed proximately to the damage (*res ipsa loquitur*), and that the verdict is conclusive against the defendant upon any matter of defense it set up or attempted to sustain.

But we may waive further consideration of all the above-stated propositions, since we are of the opinion that the contention of the appellant that the plaintiff was guilty of negligence as a matter of law must be sustained. Indeed, we think it is clear that both the plaintiff Morris and the defendant, in the maintenance of their said wires at the point indicated, were equally culpable and likewise guilty of negligence as a matter of law, and that such concurring negligence constituted the efficient or proximate cause of the fire and its disastrous results. It appears that there were at the time of the commission of the damage complained of herein and had been for a long time prior thereto authoritative regulations fixing or prescribing the distance which should exist between crossing wires carrying electricity, and which regulations it incontrovertibly appears from the evidence—indeed, it is admitted—were violated by both said plaintiff and the de-

defendant in the maintenance of their respective wires at the point where the same crossed and where the direct cause of the destruction of the Morris building by fire occurred.

[3] On the 14th of December, 1912, the State Railroad Commission, in the exercise of the powers conferred upon it by several acts of the Legislature, adopted what said body designated as its "general order No. 26," entitled, "Regulations governing clearances and construction at crossings of railroads, street railroads, telegraph, telephone, signal, trolley and power lines, with each other and with streets and public highways; also other overhead and side clearances of railroads, street railroads and wire lines." Section 3 of said order is under the subhead "Telegraph, Telephone and signal lines," and provides, among other things, that—

"Telegraph, telephone and signal lines, at crossings with other telegraph, telephone or signal lines, shall have a minimum clearance, above or below such lines, of 2 feet, unless suitably supported to prevent contact."

We presume it will not be questioned that the Legislature, in the exercise of the power conferred upon it by the provisions of sections 22 and 23 of article 12 of the Constitution, may rightfully invest the Railroad Commission with plenary power to regulate the manner in which railroad corporations and other public utilities shall maintain and conduct their business and the essential appliances thereof, and that said Commission may prescribe such regulations with respect to the carrying on of such utilities as may be necessary to safeguard and protect any rights of the public which may be affected thereby. And it will not be doubted that, upon the adoption of such regulations as it is within the legal competence of the Railroad Commission to promulgate with respect to public utilities and the maintenance of the essential equipments thereof, such regulations immediately acquire the force of law. Indeed, it is so declared by the Legislature itself in section 30 of an act of the extra sessions of the Legislature of 1911 (page 18), entitled, in part:

"An act to provide for the organization of the Railroad Commission, to define its powers and duties and the rights, remedies, powers and duties of public utilities," etc.

Said section reads:

"Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees."

Nor can it justly be said that the regulations contained in order No. 26 with respect to telegraph, telephone, and power lines and the clearances which must be maintained between them where they cross each other are unreasonable or not in completa harmony with the powers with respect to such utilities with which the Constitution and the statutes passed in pursuance thereof have invested the Railroad Commission.

[4] Order 26 of the Railroad Commission became effective January 1, 1913, and it was served upon the plaintiff Morris, according to his own admission, a short time after it was adopted. Morris testified that continuously for some four or five years before the 12th day of July, 1918, when the fire occurred, there was a distance between his wire and the telephone wire of the defendant at the point where the two wires crossed and where the contact occurred of approximately one foot only. It is true that Morris stated that his measurement of the space between the two wires was not actual, but was based upon his judgment founded on his observation of the wires as he frequently passed along the highway near which the two wires crossed: but there is absolutely no other testimony in the record contradicting this statement or that is inconsistent with it. It is, in fact, the only testimony received which tended to show the distance which was maintained between the telegraph and the telephone wires, and, since it comes from the plaintiff himself, it must be accepted as the established fact in the case that the two wires mentioned were maintained continuously for several years down to and including the time at which the fire occurred at a distance only of one foot apart. Obviously this was in violation of order 26, above referred to, prescribing the minimum clearances between telegraph and telephone wires where the same cross each other, in the absence of the equipment of the line with such support as would prevent contact between it and the other wire. That neither the telegraph nor the telephone wire was furnished with such support is indubitably evidenced by the fact that a contact between the two wires actually occurred.

[5] As to the defendant, it is contended by its counsel that the corporation cannot be held to have been negligent as a matter of law, in that it violated the provision of order No. 26 of the Railroad Commission with respect to the clearances between telegraph and telephone lines, for this reason: That on the 20th day of November, 1918, said Commission adopted and issued an order extending the time allowed by a previous order within which the defendant should reconstruct its overhead electric lines so as to comply with the requirements of chapter 499, Laws of 1911 (Stats. 1911, p. 1037), as amended by chapter 600, Laws 1915 (Stats. 1915, p. 1058). There are, however, several an-

swers to this contention. The first is that it does not appear from the record when "decision 3701" referred to in the order purporting to extend the time to the defendant for the purpose stated was rendered or filed. It will be observed that the order purporting to extend the time and which is in the record before us was issued after the fire occurred, and, so far as this record discloses, the original order might have been made at some time subsequently to the date of the fire, to wit, July 12, 1918.

[6] But, assuming that the courts may take judicial notice of the orders or decisions of the Railroad Commission, and so ascertain and determine when decision No. 3701 was rendered by said Commission, there is still another reply to the contention, viz.: That the order purporting to extend the time within which the defendant was required to reconstruct its electric lines has reference to subdivision (c) of section 1 of the statute of 1915, which entirely deals with high-power lines, and not with telephone and telegraph lines. It follows, therefore, that even if the defendant has, by virtue of the order of extension referred to, until June 30, 1919, within which to reconstruct its power lines in conformity with the requirements of said order and the statute of 1915, it must, nevertheless, be held that it violated the regulation with respect to the clearance which should exist between telegraph and telephone lines crossing each other by maintaining its telephone wire a distance of one foot only from the telegraph wire of the plaintiff Morris, and that it was therefore, equally with said Morris, guilty of negligence as a matter of law. This being true, it also follows that it was the concurring negligence of Morris and the defendant which was the efficient, proximate cause of the damage complained of. It may be argued, though, that since the primary cause of the trouble was in the high-voltage wire, the determination of whether the defendant was negligent as a matter of law must rest upon the determination of the question of fact as to the distance between the high-power wire and the telegraph wire, and that, so determining the question whether the defendant was or was not negligent, we are required to fall back upon the order of the Railroad Commission extending to the defendant further time within which to reconstruct or readjust its power line, and that the conclusion therefrom must be that, although the power line was, in violation of the regulations above mentioned, within four feet of the telegraph line, the defendant is immune from the imputation of negligence as a matter of law because of said order.

[7] First, we may observe in this connection that, if the order purporting to give the defendant further time would have the effect, as probably it would, of relieving it of the imputation of negligence as a matter of law because of maintaining its high-power

wire nearer the telegraph wire than is allowed by the regulations of the Railroad Commission, we would not be prepared to say that said order, notwithstanding that it was not specifically granted to the plaintiff Morris, would not also have the effect of relieving Morris of the imputation of negligence as a matter of law, since it would be a very anomalous, if, indeed, not an unjust, rule which would in effect declare that one of the parties so maintaining wires carrying electricity would, because violating the rule as to clearances between such wires, be guilty of negligence as a matter of law while the other would not. But this question does not arise here. The proposition is this: That the defendant maintained its telephone wire, which, as we have seen, does not come within the purview of the order of extension, nearer in proximity to the telegraph line of Morris than is permitted by the regulations of the Railroad Commission with respect to such wires, and that the telephone wire of the defendant was the direct instrumentality through which the telegraph wire became surcharged with electricity, thus causing the fire, and that but for said telephone wire so situated, whatever might have been the remote cause of the fire—that is, the cause of the contact between the wires, even assuming that the cause of the contact was correctly explained upon the theory of the flying crane—no damage would probably have occurred.

[8] The contention that the finding of the jury in favor of the plaintiffs necessarily involved an implied finding that it was the negligence of the defendant which constituted the efficient, proximate cause of the damage, even though both were negligent as a matter of law, and that such finding is conclusive upon this court, is in effect answered by the foregoing views and the conclusion following therefrom. Obviously, if both were guilty of negligence as a matter of law, such negligence being concurrent, the one is equally culpable with the other as to any injury which might proximately result therefrom. In other words, it would be contrary to the plainest precepts of logic to hold that, where injury follows from the maintenance of two electric wires in nearer proximity to each other than the law permits, the efficient, proximate cause of such injury may be imputed to one of the parties alone while the other is to be held free from blame. This conclusion follows from the proposition that, as in ordinary cases, where two parties own independent electric lines, each is charged with the duty of so maintaining his line as that the danger to the public of injury flowing from its maintenance will be reduced to the lowest reasonable minimum, so, where the maintenance of such wires so owned is within a distance prescribed by the law, it is as much the duty of the one to see that his wire is removed and maintained beyond

the interdicted distance from the other wire as it is the duty of the other to do so. In other words, speaking concretely, the duty was no less upon Morris to see that his line was not within the inhibited distance from the defendant's telephone wire as it was the duty of the defendant to see that its telephone wire was not within such distance of the telegraph wire, and, as above suggested, if this duty was overlooked by either or both, necessarily any damage which may directly result from the contact of the two wires because of the fact of their being in too close proximity to each other under the law must be held to be proximately caused by the concurrent negligence of the owners of the two wires. *Dow v. Sunset Tel. & Tel. Co.*, 157 Cal. 182, 106 Pac. 587; *Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614. See, also, *Harrington v. L. A. Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Stein v. United Railroads*, 159 Cal. 363, 113 Pac. 663; *Cook v. Miller*, 175 Cal. 497, 166 Pac. 316. If a third party had suffered damage as the direct result of the contact between the two wires, maintained, as they were, at a distance from each other prohibited by law, no one would be found to say that the proximate cause of such injury was not the concurrent negligence of both the defendant and the plaintiff, Morris. In other words, if the Morris wire had not grounded in the cottonwood tree, but had sent the high voltage to the place in Jamestown or the place in the town of Sonora where the telegraph line ended, equipped with the usual telegraph instruments, and had set either of the buildings in which it was there maintained on fire, destroying the building, the property of another, it could not be doubted that both the defendant and Morris would be joint tort-feasors, and that the party so damaged could maintain an action against them jointly for the injury thus inflicted.

[9] The fact is also emphasized by the plaintiffs that the telegraph wire was the first in point of time to be installed where the two lines crossed; the contention in effect being that thus the negligence of the defendant in so placing its wires in dangerous proximity to the telegraph wire constituted the proximate cause of the damage. This proposition, however, is not only answered by the above considerations, but also by the authorities, among which may be noted *Dow v. Sunset Tel. & Tel. Co.*, supra. In that case, which involved an action against two distinct corporations for an injury occurring to the plaintiff by reason of a contact between the respective wires of said corporations, due to the nearness in proximity of said wires, the point here suggested was made. Replying thereto, the court said:

"It matters not that the telephone wire was the last placed, and that this company therefore became in the first instance directly re-

sponsible for the negligent work. With knowledge upon the part of the appellant that the wire was thus dangerously close and liable to sag, the continued maintenance of the wires in this position was negligence upon the part of both companies"—citing a large number of cases from foreign jurisdictions.

[10] In this case, as we have shown, the plaintiff Morris had actual knowledge of the existence of the regulations as to the distance between telephone and telegraph wires as prescribed by the Railroad Commission; and it may be, although it is not necessary so to decide here, that he was bound by the regulations, whether he had actual knowledge of their existence or not. As above stated, it was his duty, as it was also that of the defendant, to exercise such vigilant inspection of his wire as would enable him to keep it the legal distance from the wires of the defendant. It is stated, though, in the brief of the respondents that Morris testified that he could not have lowered his telegraph line below the point where it was strung on his poles without interfering with the use of the road which passed through the ravine and under the wires where they crossed each other, and upon this it is in effect contended that Morris cannot be charged with contributory negligence as a matter of law or at all where it was impossible for him to comply with the regulations or remove his wire below where it was stretched on the poles without interfering with the use of said road. In the first place, we remark that we have not been able to find any testimony in the record, either from Morris or any other witness, to the effect that the lowering of the telegraph wire would have materially or at all interfered with the traffic over the road running under said wires at the point where they crossed each other. In the second place, if it be true that such a condition existed and that the telegraph wire could not be lowered without interference with the use of the road, the duty would still be upon Morris to maintain the distance between his wire and that of the defendant in accordance with the regulations prescribed by the Railroad Commission.

[11] There are certain assignments of error involving the action of the court in admitting certain evidence over the objection of the defendant and in the giving of certain instructions and in refusing to allow another which was proposed by the defendant. Under the view that we have taken of this case, as indicated above, it is hardly necessary to consider these assignments. But we do not deem it amiss, since possibly there may be another trial of the cause, to express the opinion that the refusal to give defendant's proposed instruction No. 10 involved prejudicial error; also we think that the testimony which the court allowed the plaintiff Morris to give as to the repairs and improvements made by the defendant up-

on its wires subsequent to the date of the fire was incompetent. *Helling v. Schindler*, 145 Cal. 303, 311, 312, 78 Pac. 710; *Sappenfield v. Main St., etc., Co.*, 91 Cal. 48, 27 Pac. 590; *Hager v. Southern Pac. Co.*, 98 Cal. 309, 311, 33 Pac. 119; *Turner v. Hearst*, 115 Cal. 394, 401, 47 Pac. 129; *Limberg v. Glenwood*, 127 Cal. 598, 604, 60 Pac. 176, 49 L. R. A. 33; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

[12] But the ruling of the court permitting this evidence was not erroneous for the reason that the only objection urged by counsel for the defendant against it was that the questions eliciting said testimony called for the opinion of the witness.

[13] It is true that counsel for the defendant, after the testimony had been received against his objection upon the ground just stated, moved to strike out all the testimony on the ground that the facts and circumstances so testified to occurred after the happening of the fire, but his motion could not avail him, since it was not in accord with the ground upon which he made the objection. At any rate, the ruling denying the motion was not erroneous.

For the foregoing reasons, the judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

(57 Cal. App. 338)

PEOPLE v. RYAN. (Cr. 1021.)

(District Court of Appeal, First District, Division 2. California. April 12, 1922.)

Criminal law §1070½, New, vol. 11 Key-No. Series—Appeal by state from order dismissing prosecution, taken after order sustaining demurrer to information, was taken in time.

In prosecution for violation of Medical Practice Act, where a demurrer to an information was sustained, and later, on failure of district attorney to file an information according to form required by the court order sustaining the demurrer, the action was dismissed, pursuant to Pen. Code, § 1008, on announcement by the district attorney in open court, according to section 1240, that the state would appeal, the appeal was taken in time; an announcement of an appeal from an order sustaining a demurrer to the information being merely surplusage.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

In an appeal by the State from an order dismissing a prosecution against Al Ryan for violating the Medical Practice Act, defendant moves to dismiss the appeal. Motion denied.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

Lucas F. Smith, Lucas F. Smith, Jr., and

Stanford G. Smith, all of Santa Cruz, for respondent.

LANGDON, P. J. This matter comes before us upon a motion by respondent to dismiss the appeal.

The transcript shows that the district attorney for the county of Santa Cruz filed an information for misdemeanor, to wit, violation of Medical Practice Act (St. 1917, p. 93), against the defendant on September 23, 1921. Defendant demurred to the information. The demurrer was sustained on September 26, 1921, and the district attorney was granted one week's time within which to file an amended information. On September 29, 1921, the district attorney presented an amended information to the court, which was substantially the same as the original information, and did not amend said original information in the respect required by the previous court order sustaining the demurrer. The court, thereupon, denied the district attorney leave to file the amended information in the form presented and informed him that unless an information amended in the manner indicated be filed by October 3, 1921, the action would be dismissed pursuant to the provisions of section 1008, Penal Code. The district attorney then stated that the prosecution did not desire to amend and "that the prosecution gives notice of appeal from the judgment of the court sustaining the demurrer."

On October 3, 1921, the parties appeared in court and the district attorney again refused to amend, whereupon the court ordered the action dismissed, pursuant to the provisions of section 1008 of the Penal Code. The district attorney then announced, in open court, that the prosecution appealed from the order made on September 26, 1921, sustaining the demurrer to the information, and also from the order made dismissing the action. Respondent now makes a motion to dismiss this appeal, upon the ground that the same was not taken in the time provided by section 1240, Penal Code.

The recent case of *People v. Apple* (Cal. App.) 206 Pac. 487, is directly in point. It is there said:

"Since section 1008 of the Penal Code was amended, * * * there is no reason why the rule as to appeals in civil cases for the purpose of having the order of the court sustaining a demurrer reviewed, should not be applicable in criminal cases, and that the appeal in such instances should be from the judgment entered upon the order sustaining the demurrer and not from the order itself."

Under the ruling of this recent case, it was not necessary for the district attorney to appeal from the order of September 26, 1921, sustaining the demurrer. The judgment of dismissal which was entered under the provisions of section 1008, Penal Code,

upon the failure of the district attorney to amend within a reasonable time, was the judgment entered on the order sustaining the demurrer and was the order from which the appeal should have been taken by the district attorney.

The order that the action be dismissed, pursuant to section 1008, Penal Code, was not made until October 3, 1921. At that time, the district attorney announced in open court, in accordance with section 1240, Penal Code, that the prosecution appealed from the order dismissing said action. It is true, he also announced that he appealed from the order sustaining the demurrer, theretofore made on September 26, 1921, but that announcement was merely surplusage and of no effect. The controlling fact is that at the time the order dismissing the action was made, which was the judgment entered upon the order sustaining the demurrer, the district attorney did, in open court, announce that the people appealed from the same. The appeal was taken in time, therefore, and is properly before this court.

The motion to dismiss the appeal is denied.

We concur: NOURSE, J.; STURTEVANT, J.

(57 Cal. App. 377)

BEARDEN et al. v. BANK OF ITALY.
(Civ. 4210.)

(District Court of Appeal, First District, Division 1, California. April 18, 1922.)

Banks and banking — 143(7)—Bank held not liable for arrest of drawer of check wrongfully dishonored.

In an action by a drawer against a bank, for damages for wrongfully refusing to pay his check drawn upon it, after the payee of the check had informed the bank that the drawer would be arrested unless the check was paid, the subsequent arrest and incidental indignities suffered by the drawer was caused by an independent human agency, and hence was an intervening cause for which the bank was not liable.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Tempest Bearden and husband against the Bank of Italy. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

I. M. Peckham, of San Francisco, for appellants.

Louis Ferrari and Richard Fitzpatrick, both of San Francisco, for respondent.

KERRIGAN, J. Appeal from a judgment in favor of the defendant entered following

an order sustaining a demurrer to the complaint without leave to amend.

The action was for damages in the sum of \$25,000, the gravamen of the complaint being that the plaintiff, Tempest Bearden, as the result of the wrongful refusal of the defendant to honor a check drawn by her, was at the instance of the payees of the check arrested and imprisoned and subjected to indignities incidental to such arrest. The complaint contains an allegation to the effect that, after a first refusal of the defendant to pay said check, upon the ground of lack of funds to meet it, the payees "personally presented said check to said defendant and told said defendant that, unless said check was paid, they would cause the arrest of said plaintiff, Tempest Bearden, but notwithstanding said knowledge and in spite thereof the said defendant negligently willfully, and maliciously refused to honor said check, * * *" and the only question in the case, as is stated in the brief of the appellants is whether the quoted allegation takes the case out of the rule laid down in *Hartford v. All Day and All Night Bank*, 170 Cal. 538, 150 Pac. 356, L. R. A. 1916A, 1220.

That also was an action for damages for arrest and imprisonment upon the alleged wrongful refusal of a bank to pay a check drawn upon it, and it was held that the plaintiff could not recover, for the reason that the refusal to honor the check was not the proximate cause of the arrest. Upon this point the language of the court is as follows:

"The second legal principle which necessarily works a reversal of this judgment is that the damages claimed are in no legal sense the proximate result of the act of negligence complained of. It did not necessarily follow that the plaintiff would be arrested and charged with a felony because of the bank's act. There was no direct causal connection between the two things. There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency acting with an independent mind."

The same may be said of the case at bar; and the only difference in the two cases is that, in the one under consideration, a threat of arrest was communicated to the bank, thus bringing pointedly to its attention a probable consequence of its refusal to pay the check. That such a consequence might follow the refusal, however, was known to the bank official in the case of *Hartford v. All Day and All Night Bank*, supra, since the issuance of a check upon a bank without funds or credit to meet it is a public offense which notoriously frequently results in the arrest and imprisonment of the drawer of the check. The case cited emphasizes the factor present therein of the "independent human agency acting with an independent mind," which it

holds to be an intervening and separate cause, and to which the plaintiff's damage must be attributed rather than to the refusal of the bank to pay the check. We think the difference between the two cases is not of such a nature as to call for the application of a different rule of decision.

Several cases cited by the appellants strongly support their argument that the refusal to pay the check ought to be considered as the proximate cause of the arrest, but the argument was equally applicable to the Hartford Case, and was not there found to be of sufficient force to compel the adoption of the rule advocated by the appellants.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 297)

Ex parte CAREY. (Cr. 614.)

(District Court of Appeal, Third District, California. April 10, 1922.)

1. Criminal law §1218—Police court may commit offenders to reformatories.

Police and justice courts may commit offenders to reformatories.

2. Criminal law §1208(9)—Police court can commit offender to reformatory for indeterminate sentence.

Police courts can commit offenders to reformatories for indeterminate sentence.

3. Criminal law §1213—Commitment to California Industrial Farm for Women not punishment but for purposes of reformation.

The detention provided by St. 1919, p. 246, creating California Industrial Farm for Women, is not, within purview of the Constitution, punishment at all, but is for purposes of reformation, and does not constitute cruel and unusual punishment.

4. Constitutional law §205(2)—Criminal law §1206(1)—Statute giving right to confine fallen women not unconstitutional as denying privileges given men.

St. 1919, p. 246, creating a home for and confining fallen women for purposes of reformation, is not invalid as denying privileges and immunities under Const. U. S. Amend. 14, even though the act is directed only to women as a class.

5. Constitutional law §205(2)—Criminal law §1206(1)—Prostitution §1—There is no discrimination in confining women for "soliciting for prostitution"; men being punished for pandering.

"Soliciting for prostitution" is the act of a fallen woman in hailing passers-by and soliciting them to patronize her business; and, since under San Francisco county ordinance a woman only can be so charged, there is no discrimination in confining one found guilty in California Industrial Farm for Women (St.

1919, p. 246), the punishment for men for "pandering" being under Pen. Code, § 318.

Application of Betty Carey for a writ of habeas corpus directed to the superintendent of the California Industrial Farm for Women to secure release of petitioner. Writ discharged.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PREWETT, Justice pro tem. Betty Carey, in whose behalf this proceeding is instituted, was, by a judgment of the police court of the city and county of San Francisco, committed to the California Industrial Farm for Women in conformity with the provisions of section 8 of an act establishing said farm. Stats. 1919, p. 246. She will be referred to in this opinion as the petitioner.

An ordinance of said city and county provides as follows:

"Section 1. It shall be unlawful for any person on any public street or highway or elsewhere to solicit * * * for the purpose of prostitution.

"Sec. 2. Any person violating the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed \$100 or by imprisonment not more than fifty days, or by both such fine and imprisonment."

The petitioner was convicted of the offense denounced in said ordinance, and upon appearing for sentence the following judgment was entered:

"The court renders its judgment: That whereas, the said defendant having been duly convicted in this court of the crime of misdemeanor, to wit: Soliciting prostitution, * * * it is ordered and adjudged that the said defendant be committed to the California Industrial Farm for Women under section 8, chapter 165, Statutes 1919."

The petitioner is detained at said farm under said judgment on a commitment that amounts, in effect, to an indeterminate sentence. She claims that the judgment in question is void, and she assigns in support of this contention a number of reasons, among which are that it is beyond the jurisdiction of the police court to sentence a defendant to the farm upon an indeterminate sentence, which might amount to a detention for the period of five years; that the punishment is cruel and unusual; that the act is discriminatory, in that it applies only to women; and that the Legislature cannot, by general enactment, modify an ordinance of said city and county.

Those portions of the act that are material to the points under examination read as follows:

"Section 1. There shall be established within this state an institution for the confinement, care and reformation of delinquent women, to be known as the California Industrial Farm for Women.

"Sec. 2. The purpose of said institution shall be to provide custody, care, protection, industrial and other training and reformatory help for delinquent women."

"Sec. 8. When any woman, eighteen years of age or over is found guilty by any court within this state of prostitution, soliciting for prostitution, keeping a house of ill fame or residing in such house, frequenting any dance hall, hotel, rooming house, or other public place, for the purpose of prostitution, or of vagrancy because of being a common prostitute or a common drunkard, she shall, in lieu of any other sentence or disposition provided by law, be committed by the court in which she is so found guilty to said institution for an indeterminate period of not less than six months nor more than five years."

"Sec. 14. Every woman received by said institution shall be examined mentally and physically and shall, if retained by said institution, be given the care, treatment and training adapted to her particular condition. Such care, treatment and training shall be along the lines best suited to develop her mentality, character and industrial capacity to a point where she can be honorably discharged from the institution with reasonable safety and benefit to herself and to the public at large. Upon her reaching such point, in the judgment of the board of trustees, she shall be honorably discharged from the institution. * * *

Further provision is made that the person must, in any event, be discharged from the institution upon the expiration of the period for which she was committed.

The following provisions of the federal and state Constitutions are cited by petitioner in support of her writ:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws." Section 1, art. 14, Federal Const.

"Sec. 11, art. 1. All laws of a general nature shall have a uniform operation." Cal. Const.

"Sec. 13, art. 1. No person shall be * * * deprived of life, liberty or property without due process of law." Cal. Const.

"Sec. 25, art. 4. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Second—for the punishment of crimes and misdemeanors. * * * Thirty-third,—In all other cases where general laws can be made applicable." Cal. Const.

It is clear that the petitioner is held under a commitment for an indeterminate period. Such a commitment, after an extended exam-

ination of the question, was upheld by the Supreme Court in *Re Lee*, 177 Cal. 690, 171 Pac. 958, wherein the court says:

"It is generally recognized by the courts and by modern penalologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing. * * * It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term."

The Police Court Judgment.

[1] It is insisted that, although a superior court might commit a prisoner for an indeterminate period, such power is not vested in the police court. But the power of police and justices' courts to commit offenders to reformatories, in cases authorized by the Legislature, is upheld in the cases herein-after cited. This power is so clear that we would abandon further examination of the matter, if no other points were involved.

[2] It is further claimed, however, that, even though a commitment to a reformatory might be upheld, still the police court could not commit the offender for a longer period than the longest period for which she might be committed to the county jail. This claim is equally untenable. In truth, every point urged in support of this writ has been decided adversely to the contentions of the petitioner, save one. This point will be noticed further along.

In one case in which a minor was committed to the industrial school by the police court of said city and county, the Supreme Court, in commenting upon the case, says:

"The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law, in which the right of trial by jury is guaranteed. The purpose in view is not punishment for the offense done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. * * * The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves." *Ex parte Ah Peen*, 51 Cal. 280.

John Liddell, a minor, was found guilty of the crime of petit larceny and was sentenced by a justice's court to serve one year in the reform school. The court, in upholding the action of the justice's court, says:

"There can be no question as to the power of the Legislature to provide for the detention and education of juvenile offenders, as it has done in this act; and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true, the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the state prison for the same offense would be; but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is, not punishment, but reformation, discipline, and education. * * *

While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade, and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself, and those dependent upon him, without the odium which attaches to an ex-convict. * * * It is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship." *Ex parte Liddell*, 98 Cal. 633, 29 Pac. 251.

"Petitioner assails the constitutionality of said statute mainly upon the grounds that it is unequal in its operation, because under it an adult can be punished for petit larceny * * * for only six months, while a minor may, for the same offense, be sent to said school for a much longer period; that a justice's court has no jurisdiction in such a case to impose imprisonment for more than six months; that the statute is a special law regulating jurisdiction of a justice's court, etc. These and similar objections to the statute are answered against petitioner's contention by the case of *Ex parte Liddell*, 98 Cal. 633." *Ex parte Nichols*, 110 Cal. 651, 43 Pac. 9.

Ex parte Ah Peen, supra, was approved by this court in the Matter of O'Connor, 29 Cal. App. 234, 155 Pac. 115. In no case have we found any criticism of the foregoing authorities. They enunciate the principles that must govern this court in the disposition of this matter.

Cruel and Unusual Punishment.

[3] This claim may be dismissed with the statement that the detention provided for in the statute is not, within the purview of the Constitution, punishment at all. It is not a penalty. Indeed, it is wholly for purposes of assistance and reformation. Whether or not the detention is an unwarranted interference with personal liberty, it seems clear that it does not constitute cruel and unusual punishment. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *In re O'Shea*, 11 Cal. App. 568, 105 Pac. 776; *Wilkerson v. Utah*, 99 U. S. 130, 25 L. Ed. 345; *Ex parte*

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Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519.

Unequal Privileges and Immunities.

[4] Petitioner points out that the statute denies to women certain privileges and immunities granted to men, thereby violating the Fourteenth Amendment and other constitutional guaranties. It is quite certain that the statute is applicable only to women, and if, in fact, it makes discriminations against them in particulars not warranted by natural or other conditions, it violates the constitutional guaranties of equal protection to all. It should be noted that the state has never claimed that it does not discriminate with reference to women; though, happily, it is believed that these discriminations are enacted mainly in their own interest. It is accepted law that a state may discriminate in favor of women (or against them, according to the point of view) with reference to hours of labor. *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829. This case is found reported in 162 Cal. 687, 124 Pac. 427. It enunciates many important principles applicable to the case at bar. The following quotations are taken therefrom:

"Although this guaranty of the Constitution is apparently absolute and unqualified, yet it is well established that it is subject to the exercise, by the Legislature, of what are known as the police powers of the state. * * *

"The injury must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others, that is, to the community in general, or, as it is expressed, to the public health and general welfare. * * *

"(Quoting) 'If, therefore, a statute purporting to have been enacted to preserve public health, the public morals or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution.' * * *

"So, also, it has been recognized that some occupations followed by women, though less arduous than those generally followed by men, may have such a tendency to injure their health, if unduly prolonged, that laws may be enacted restricting their time of labor therein to ten hours per day. The application of these laws exclusively to women is justified on the ground that they are less robust in physical organization and structure than men, that they have the burden of child-bearing, and, consequently, that the health and strength of posterity and the public in general is presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare. [Citing many cases.] * * *

"We must take this statute as a law intended for a police regulation to preserve, protect, or promote the general health and welfare."

This case, as exemplified by the Supreme Court of this state and the Supreme Court

of the United States on writ of error, establishes two very important principles, namely, that legislation may be directed to women as a class and that they may be segregated into groups or subclasses in the interests of public health, safety, or morals. And these two principles lie at the foundation of the legislation attacked by the petitioner.

However, we are not driven to the necessity of determining whether the Legislature may, in the exercise of its power to protect the general health, morals, or safety, provide one punishment for a man and another punishment or remedy as against a woman; for, as we shall show further along, the crime committed by the petitioner is one that cannot be committed by a man.

The question is narrowed down to this: Does the state have the lawful right to seize its fallen women and confine them for purposes of reformation and assistance? That it may seize and confine minors, morons, lunatics, criminals, and persons addicted to the excessive use of drugs and liquors is not questioned. The first and last enumerated classes are confined solely for purposes of reformation and assistance. It is insisted that the state, if it confine its fallen women, for purposes of reformation, should make like provision for dealing with those of the opposite sex. But the difficulty is that men cannot commit the crime of carrying on the business of prostitution, except as accessories, and therefore no general rule on the subject could be made to apply to both sexes. The fallen woman alone carries on the traffic. If others prey upon her frailty, it is only with her co-operation—willing or unwilling.

The relation sustained by the fallen woman to her business and society at large is altogether unlike that sustained by her partner in crime. She follows a business that can be carried on only by women. The most casual observer cannot fail to see a vast difference between fallen women as a class and the balance of the human kind. They stand apart. No other body of malefactors constitute so distinctly a class as do the fallen women. They present a greater single element of economic, social, moral, and hygienic loss than is the case with any other single criminal class. Not only do they constitute a menace to the morals and social welfare of mankind, but they carry very unusually heavy pathological liabilities. In truth, from the standpoint of public health they are sometimes referred to as pestilential and their places of abode as pest houses. The law declares them to be a public nuisance. Altogether, they present the most perplexing problem with which modern penology and social legislation are called upon to deal. The fallen woman occupies a relation to society very analogous to that of the chronic typhoid carrier—a sort of clear-

ing house for the very worst forms of disease. The right to quarantine persons suspected of contact with infectious is uniformly upheld by both state and national governments. The right to quarantine at all implies the right to continue the isolation so long as the danger remains. That a woman carrying on the business denounced in the statute is a constant pathological danger no one would question. If this be true, the fact implies the right to seize the offender and detain her, not only for mere purposes of temporary quarantine, but for the laudable purpose of reclaiming her and destroying the probability of a subsequent renewal of the danger. Though her entry upon a life of shame may often be due to social maladjustments or to the abuse of her affections, still the statute in question does not purport to deal with her as an innocent person. On the contrary, the law appraises her as so steeped in crime and in so exceptional an environment that ordinary methods of reformation and escape are impossible. Every door is closed to her. Every avenue of escape is shut off. The state, realizing this, has undertaken to take forcible charge of this class of unfortunates and extend to them a home, education, assistance, and encouragement in an effort, otherwise hopeless, to restore them to lives of usefulness. The state combines both altruism and self-preservation. Of similar import, though devoid of the shocking features, are such measures as maternity bills and acts establishing houses of refuge for homeless women. The act is wholly identical in spirit with those provisions of law which authorize the detention and reformation of common drunkards, even though the latter, in terms, apply to all persons of either sex who are capable of becoming such. The statute assailed in this proceeding applies equally to every person who is capable of committing and who commits the offenses inhibited therein.

It is true that the statute provides that every woman carrying on the business of prostitution may be committed to the farm; but the statute would have meant exactly the same had it in terms applied to every person. The fact that the fallen woman carries on the business of commercialized vice justifies whatever discriminations may be found in the statute. The act of her partner in vice, while equally as nefarious, is neither commercialized nor continuous. It is proper enough to send him to jail for his offense, but it is doubtful if the scheme of impounding him for purposes of reformation would commend itself to the lawgiver. The conditions surrounding the two classes of offenders are so unlike that different methods of treatment are fully justified.

So superlative are the demands of civilization upon its women that discriminations in handling criminal cases may, as to them,

under some circumstances, be upheld without violation of the constitutional guaranties; especially where, as here, the discrimination, in her case, withholds the penal tax and affords a more humane and beneficial line of treatment. At least, it would seem that she cannot complain of such treatment.

The Charge in the Commitment.

[5] The specific charge against the petitioner is, not that of carrying on the business of prostitution, but of soliciting for prostitution. She insists that a man, as readily as a woman, may commit this offense, and that therefore no discrimination in punishment can be tolerated. Even if this premise were sound, we are far from conceding the soundness of her conclusion. But the premise is not sound. The ordinance, it is true, applies to "every person." For the offense, if he could commit it, he would be sent to jail. In her case she might be committed to the farm for purposes of reformation. But a man can no more commit the offense of soliciting for prostitution than that of carrying on the business of prostitution. In one sense, possibly, it may be said that a man who acts as a "capper" for a house of prostitution is guilty of the crime of soliciting for it. But the crime committed by others than the principal is known as "pandering" and the offender is known as a "panderer," "pimp," or "procurer." His punishment is provided for in section 318 of the Penal Code. The words "soliciting for prostitution" have a well-understood and distinct meaning. They are held to mean the act of a fallen woman in hailing passers-by and soliciting them to patronize her business. They are so understood by police officers and all others who are called upon to labor with this class of people. The various reasons which we have assigned for holding that the crime of carrying on the business of prostitution is confined to fallen women apply with equal force to the specific charge against the petitioner.

The charge is sufficient. The writ is discharged, and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

(56 Cal. App. 758)

CAVANAGH et al. v. SHAVER, Superintendent of Streets, et al. (Civ. 3972).*

(District Court of Appeal, First District, Division 2, California. March 8, 1922. Hearing Denied by Supreme Court May 4, 1922.)

1. Municipal corporations \S 581—Fifty per cent. redemption penalty on sale for taxes was not saved by repealing statute.

The provision of Pol. Code, \S 3779, requiring payment to the county treasurer, for redemption from a sale to the county for taxes,

of the purchase money and 50 per cent. thereof, which was made applicable to assessments for the opening of streets by St. 1889, p. 73, \S 16, was not saved as to the penalty from the repeal of that section by St. 1895, p. 19, \S 8, and by St. 1895, p. 328, \S 59, by the provision of St. 1895, p. 204, \S 1, which provided all sales and redemption should be made in the manner such sales and redemption were made before that act, since the saving clause makes no reference to penalties.

2. Municipal corporations \S 581—Fifty per cent. redemption penalty on sale for taxes not extended to street opening assessments.

In view of St. 1889, p. 73, \S 16, imposing a 5 per cent. penalty on delinquent assessments for street openings, the provision of Pol. Code, \S 3779, requiring payment of the purchase price of property sold for taxes to the county with 50 per cent. penalty in order to redeem, was not extended to street assessments by the provision in that section of the street assessment act extending to such assessments the provisions for the collection of delinquent state and county taxes not inconsistent with that act.

3. Pleading \S 403(3)—Defective averment of receipt of money held cured by answer and finding.

The defective averment, in a complaint for money had and received, that the money in controversy was actually received by defendants, was cured, where defendants alleged the money had never come into their possession, and at the trial the court found the money had been received by defendants, and there was no showing that they were prevented by the trial court from making full and complete proof on that issue, so that they were not prejudiced by the complaint within Code Civ. Proc. \S 475.

4. Appeal and error \S 1030—Premature commencement of action does not require reversal.

That an action for money had and received was commenced before the actual receipt of the money by defendants does not require reversal of a judgment rendered against defendants after they had received the money.

5. Money received \S 14—Judgment cannot be rendered against officer whose successor received the money.

A judgment cannot be rendered against a defendant either individually or as street commissioner for money had and received, where it was undisputed that the money was actually received by his successor in office, who was not made a party to the action.

6. Taxation \S 710—Deposit to redeem from tax sale was made under duress.

A deposit to redeem property of plaintiffs from a tax sale, which was necessary to prevent the permanent loss of plaintiffs' title, was made under duress, although plaintiffs' title had already been clouded when the deposit was made.

7. Pleading \S 347—Defendants in action for penalty erroneously deposited held not entitled to judgment on pleadings.

In an action by taxpayers to recover the amount of a penalty which they were errone-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*On rehearing superseding opinion 202 Pac. 470.

ously required to deposit to redeem from a tax sale, the defendants were not entitled to a judgment on the pleadings notwithstanding a defective allegation of receipt of the money by defendants, where the answer alleging the money had not been received was deemed denied under Code Civ. Proc. § 462.

8. New trial \Rightarrow 7—Court held to have jurisdiction to grant, after judgment for defendants who subsequently received money sued for.

Where the trial court had rendered a judgment for defendants in an action for money had and received after proceedings indicating a trial on the merits under Code Civ. Proc. § 582, because there was no showing at that time that defendants had ever received the money in controversy, the trial court had jurisdiction to grant a new trial after the defendants, before the judgment was signed or filed, had collected the money and had since retained it.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by J. E. Cavanagh and others against E. S. Shaver, individually and as Superintendent of Streets of the City of Petaluma, and against the City of Petaluma. Judgment for plaintiffs, and defendants appeal. Judgment reversed as to E. S. Shaver individually and as Superintendent of Streets, and affirmed as to the City.

See, also, 202 Pac. 470.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellants.

W. T. Mooney, of Petaluma, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover a judgment for money. Although the plaintiffs' complaint is out of the ordinary, it may be said to be a complaint as for money had and received. The plaintiffs had judgment in the trial court, and the defendants have appealed, bringing up papers which they claim to be a judgment roll and a bill of exceptions. No motion to dismiss has been made, neither has a suggestion of the diminution of the record been made, and we therefore treat the record as sufficient.

[1] It was the theory of the plaintiffs in the trial court that they were called upon to pay, and that they did pay, without authority of law, a penalty of 50 per cent, to redeem from a sale had in a street opening proceeding. The appellants claim the right to collect the penalty by reason of some language contained in section 16 of that act (St. 1889, p. 70) read in connection with section 3779 of the Political Code as that statute was formerly worded. That part of section 16 referred to reads as follows:

"All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes in force at any given

time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

Section 3779 of the Political Code at the same time was worded as follows:

"On filing the certificate with the county recorder, the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon."

But section 3779 of the Political Code was repealed by Statutes of 1895, c. 11, § 8, and by chapter 218, § 59. However, the appellants claim that the appellants' rights to the penalty were saved by Statutes of 1895, c. 177, which provides:

"Section 1. All sales, and redemptions after sale, of any real property upon which the assessment levied and assessed to pay the damages, costs, and expenses of or incident to laying out, * * * any street, * * * shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, A. D. 1895."

It will be noted that the saving statute does not mention penalties at all. It will also be noted that the language used by the Legislature is quite different from the language used in the street opening act of 1889. The appellants make the claim as though the saving statute were worded as follows:

"All provisions of the law in reference to the sale and redemption of property for delinquent state and county taxes in force January 1, 1895, shall, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments, etc."

[2] But there is a patent difference between the language used and meaning which the appellants would attach to the language. The saving statute saves the procedure as to "time and manner," but does not purport to save a penalty of 50 per cent. It must at all times be borne in mind that tax proceedings are in invitum and purely statutory and afford no opportunity for invoking any of the principles of equity. *City of Petaluma v. Hughes*, 37 Cal. App. 473, 475, 174 Pac. 336. In the instant case the penalty is not specifically mentioned in the statute under which the appellant claims. In the case of *Collier v. Shaffer*, 137 Cal. 319, 70 Pac. 177, the court construed the provisions of sections 3756 and 3817 of the Political Code as those sections stood in 1889. Section 3756 expressly provided a 5 per cent. penalty. Section 3817 referred to a "twenty-five per cent. penalty, which may have accrued by reason of such delinquency and sale. * * *" The court held that section 3756 was the declarative

law as to what penalties were imposed and that section 3817 misused the number 25 for the number 5. The case shows that the courts have not gone out of their way to adopt a construction imposing penalties. That we should not do so in the instant case is further strengthened by provisions of section 16 of chapter 76 of the Statutes of 1889, which we have not heretofore referred to. The greater part of that section is taken up in providing for a 5 per cent. penalty which is imposed by the terms of the statute on each delinquent assessment. If the Legislature had meant to impose other penalties certainly apt words would have been used to express that meaning. On the other hand, it used language excluding such an intention. Having provided a 5 per cent. penalty, it then adopted statutes concerning delinquent state and county taxes, " * * * so far as the same are not in conflict with the provisions of this act. * * * " The two expressions are not harmonious. The appellants were not entitled to charge a 50 per cent. penalty and are not entitled to retain the same.

[3] The appellants in this court take the position that, whether the judgment of the trial court was just or otherwise, it should be reversed for certain alleged errors. They claim that the plaintiffs' complaint did not state a cause of action, that they raised the question by demurrer, and that their demurrer was improperly overruled. Their point is this that the complaint does not flatly allege that the defendants received the money. The complaint is certainly not very clear in this behalf, but after the demurrer was overruled the defendants filed, an answer in which, among other things, they pleaded as follows:

"Defendants allege that the said sum of \$9,065.53 referred to in said amended complaint has never come to the possession of said defendants or to the possession of any official of said defendant, the city of Petaluma, or into the possession of any one for or on behalf of said defendants or either of them. * * * "

After the trial was had, the trial court made findings:

"That the said sum paid by plaintiffs to said defendant E. S. Shaver as such official, on said 22d day of October, 1915, to wit, the sum of \$9,065.53, was paid by them under protest and duress, and to prevent the clouding of their title to said lots; that all sums and amounts in excess of \$5,727.64 exacted by defendant E. S. Shaver as such official, of plaintiffs, and paid under protest by them to said defendant, were and are illegal."

And thereupon the trial court awarded judgment for the difference, to wit, \$3,337.85. In the bill of exceptions there is no showing or attempt to show that the trial court prevented the appellants from making a full and complete showing on the question of receiving or not receiving money. Conceding that

the plaintiffs' complaint was not as broad as it should have been, the defect was cured by the answer of the defendants, and the record shows that the defendants were not prejudiced. Code Civ. Proc. § 475.

[4] The record shows that the money was not received on October 22, 1915, but that it was received on July 6, 1918. The record does not show when the action was commenced; but it does show that the action was commenced before July 6, 1918. The appellants strenuously contend that the action was prematurely commenced, and that the judgment should be reversed. Conceding that the action was prematurely commenced, but examining the whole record, it is patent that the rights of the appellants were in no manner prejudiced because of that fact. We think that the judgment should not be reversed because of alleged errors which were not prejudicial. *Mahony v. Standard Gas Engine Co.* (Cal. Sup.) 202 Pac. 146.

[5] The appellants assert that the evidence does not show that the money alleged to have been deposited in bank ever came to the hands of the defendants, or either of them, or was ever claimed by them or either of them. In so far as E. S. Shaver, or E. S. Shaver, as superintendent of streets, is concerned, the contention is well founded. As to the city of Petaluma, the contention is not sustained by the record. The certificate of deposit was offered in evidence and on it appears the indorsement, "Paid 7/6/18," and also the indorsement, "James A. Potter, Superintendent of Streets and Street Superintendent of the City of Petaluma and Successor in Office to E. S. Shaver." During the second hearing the question of the payment of the certificate being under discussion, Mr. Hall, attorney for the appellants, admitted that the certificate of deposit had been paid after the judgment in the Hickey suit, which judgment held that the tender was good. It is therefore clear that the city of Petaluma received the money although it is equally clear that the defendant E. S. Shaver did not receive it. He had gone out of office and his successor in office received the money, but the successor in office has not been made a party to this litigation. As he has not been made a party, he has not had his day in court and no judgment should have been entered as against Potter. As the record does not show that Shaver received any part of the money, no judgment should have been entered as against him.

[6] The appellants claim that the deposit was not made under duress. We think they are mistaken. True, the title of the plaintiffs had already been clouded at the time of the tender. But in the absence of the payment, the plaintiffs' title would have been permanently lost.

[7, 8] The appellants claim that the trial court had no jurisdiction to grant a new trial. In making this contention we under-

stand them to rely upon the rule stated in *Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019, and *Stow v. Superior Court*, 178 Cal. 140, 172 Pac. 598. We think that this case is not controlled by either of said cases, but that the latter case is more nearly in point, and in that event the trial court did not exceed its jurisdiction in granting the so-called motion for a new trial. It might be better said that the trial court was merely remarking that it took a different view of the pleadings than it entertained on a previous date, and was hearing the case for the first time; or, to put it another way, that it had inadvertently exceeded its jurisdiction on the former occasion when the plaintiffs were not awarded a trial, and that the matter was being cured by having a formal trial on the latter date. The first step in the proceedings is, by one of defendants' attorneys, called a motion for judgment on the pleadings; by another of defendants' attorneys it is called a motion for a nonsuit. It is not clear that the first trial was not a trial on the merits. True, the plaintiffs had not alleged "that the defendants had and received" any money; but the defendants, in their answer, inserted an allegation that they had not "had and received the money." The averment of the answer was deemed denied by virtue of the provisions of section 462, Code of Civil Procedure. In the face of such a record the defendants had no right to move for judgment on the pleadings. *McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231. To avoid the rule in that case the defendants at the hearing on April 11, 1918, made certain statements to the trial court which were taken and acted on as evidence. The trial court so considered the record as appears from the record. These, and other matters, tend to show a trial of the case on its merits. Code Civ. Proc. § 582. Moreover, we are of the opinion that the appellants are not in a position to press this point. It is shown by the record that on April 11, 1918, the cause was called for trial. At that time the appellants took the position as stated by the judge of the trial court:

"Shaver has never gotten it and he says he has never gotten it, does not want it, would not have it. It appearing that the defendants each and all disclaimed any interest whatever in the fund," etc.

Judgment was thereupon ordered in favor of the defendants. Before the judgment was signed or filed, to wit, on July 6, 1918, the city officials proceeded to collect the money and have ever since retained it. In view of the acceptance of the moneys by the defendant city, we think the city is not prejudiced when it is denied permission to change its position back to where it originally stood.

The foundation was very imperfectly laid for the introduction in evidence of the certificate of deposit, but the objection to its in-

troduction was equally faulty. The proceedings were as follows:

"Mr. Mooney: I have also here a certificate of deposit which was made by the plaintiffs in this action and which has since been cashed in by the city. Is there any objection to that? Mr. Dole: That is objected to as incompetent, irrelevant, immaterial and hearsay. * * * The Court: I do not think it is hearsay."

We find nothing in the record as to the proof of signatures on the certificate, but such objection was never made nor called to the attention of the trial court. The appellants therefore are not entitled to have this court consider matters which were never before the trial court.

No other points are made which call for our consideration. The judgment as to E. S. Shaver and E. S. Shaver as superintendent of streets is reversed, and the judgment as to the city of Petaluma is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. Hearing denied.

WILBUR, J. (dissenting). I dissent from the order denying a transfer, on the ground that the 50 per cent. penalty provided by section 3779 of the Political Code is still applicable to sales for delinquent assessments for the opening of streets under the street opening act of 1889 (Stats. 1889, p. 70). Section 16 of that act provides for the sale of the assessed property in the same manner as is or may be provided for the collection of state and county taxes. It is also provided:

"All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the superintendent of streets may collect for each certificate fifty cents, and for each deed one dollar. All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

Section 3779 of the Political Code as it existed at the time of the enactment of the street opening act, *supra*, provided:

"On filing the certificate with the county recorder, the lien of the state vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and fifty per cent. thereon."

Section 3780 of the Political Code fixed the time for redemption as 12 months from the date of purchase "or at any time prior to the giving of the notice and the application for a deed, as provided for in section thirty-seven hundred and eighty-five of this Code."

Section 3785 provided that in order to terminate the right of redemption the purchaser must give 30 days' notice before he applies for a deed, in which he was required to state, among other things, the amount then due. This amount included the 50 per cent. authorized by statute. *Reed v. Lyon*, 96 Cal. 501, 502, 31 Pac. 619. The redemption must be made in gold or silver coin. Pol. Code, § 3781. "The redemption is effected by the payment of the money, and the taking of the receipt." *Cooper v. Shepardson*, 51 Cal. 298.

It would seem clear that the manner of making a redemption is by payment to or for the purchaser of the amount for which the property was sold, plus 50 per cent. and such costs as were authorized by law. Assuming for a moment that the statute of 1895 revising the whole system of sales and tax redemptions (Stats. 1895, p. 19), containing the express repeal of section 3779, Political Code, so affected the street opening act of 1889, that the law of 1895 (page 204), intending in part at least to make the new system of collecting taxes inapplicable to the collection of delinquent assessments under the street opening act of 1889, is the only basis for charging the 50 per cent. penalty, the question is whether this and the saying statute of 1895 (Stats. 1895, p. 204) still required the payment of the 50 per cent. penalty for redemption. That statute provides (Stats. 1895, p. 204):

"All sales, and redemptions after sale, of any real property upon which the assessment levied and assessed to pay the damages, costs, and expense for or incident to laying out, opening, extending, widening, straightening, diverging, curving, constructing, or closing up, in whole or in part, any street, square, lane, alley, court, or place within municipalities in this state, shall remain unpaid and become delinquent under the provisions of any act or law regulating such matters, shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, Anno Domini eighteen hundred and ninety-five."

Thus, as applied to redemptions the statute provides that all redemptions "shall be made and had in the same time and manner as such sales and redemption were required by law to be made and had on the first day of January, Anno Domini eighteen hundred and ninety-five." The question then is whether the manner of redemption included the payment of the 50 per cent. penalty. It would seem fairly clear that, as the redemption was affected by the payment of the amount due to the purchaser, if the manner of redemption was to be the same, both before and after the amendments to the law relating to collection of state and county taxes, such payment would still be required notwithstanding the repeal and amendments to the various sections of the Code involved in the new scheme of tax sales.

We have so far assumed that the statute

of 1895, repealing section 3779, Political Code, affected the right of the purchaser under a sale made for an assessment for the opening of a street; but the logical result of the decision of this court in *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920, is that the statute of 1895 did not affect the street opening act of 1889 in so far as it adopted the provisions of the general system for the sale for delinquent taxes. It will be observed that the statute of 1889 adopts and makes a part of that statute the general scheme for the collection of delinquent state and county taxes. The exact language of the provision will be considered later. The case of *Ramish v. Hartwell*, supra, dealt with a similar provision of the bond act of 1893 (Stats. 1893, p. 33), which statute provided in section 5 for the adoption of the general plan for the collection of delinquent bonds "in all respects the same as are provided by law for the collection of delinquent state and county taxes." Thereafter the general law was amended by the statute of 1895 (page 19), now under consideration, and the city treasurer refused to proceed in accordance with the provisions of the Code concerning the collection of state and county taxes in effect before the amendments of 1895. The court held that the amendments of 1895 were inapplicable to the proposed sale for delinquent bonds and for that reason the revised statute with reference to the collection of state and county taxes did not apply to the collection of delinquent street bonds. In that regard the court stated:

"In 1895 (Stats. 1895, p. 327), section 3771 of the Political Code was amended by providing that, instead of selling the land at auction, the property upon which the taxes are delinquent 'shall by operation of law and the declaration of the tax collector be sold to the state, and said tax collector shall make an entry "Sold to the state" on the delinquent assessment list opposite the tax.' It is contended by the appellants that by this amendment to the Political Code its provisions are ipso facto incorporated into the act of February 27, 1893, and that the city treasurer can proceed only in accordance with the provisions of the Political Code, as thus amended.

"It is a rule of statutory construction that the adoption in one statute, for the purpose of carrying its provisions into effect, of the provisions of another statute by reference thereto, does not include subsequent modifications of these provisions in the statute referred to, unless a clear intent to do so is expressed. This rule is subject to a qualified exception in cases of the adoption into a special act of the provisions of law then in force by virtue of general laws. In such cases, subsequent modifications of the general law will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act. (See *Kirk v. Rhoads*, 46 Cal. 403.) A repeal of the adopted statute will not take from the adopting statute the operative force of these provisions, so far as they may be necessary to carry the later statute into effect, but these provisions

will be regarded as if they had been originally incorporated therein at length. (Spring Valley v. W. v. San Francisco, 22 Cal. 434; People v. Clunie, 70 Cal. 504; Collins v. Blake, 79 Me. 218; Darmstaetter v. Moloney, 45 Mich. 621; Sutherland on Statutory Construction, § 257.) Under the same principles, any amendment of these provisions of the statute thus adopted, whether it be a particular act or a general law, which so far modifies them as to subvert the purpose of the statute by which they were adopted, will be regarded in the same light as a repeal. The main object of all statutory construction is to ascertain the legislative will, and, as it is to be assumed that the legislature intends its acts to have effective operation, such amendments will not be construed as depriving the adopting statute of all effect, unless there is a clear necessity for such construction.

"A comparison of the act of 1893 with the provisions of the Political Code, as amended in 1895, shows that the provisions in the latter as thus amended are entirely inapplicable to the former, and ineffective to carry its objects into effect. The provision in section 5 above quoted was to enable the contractors to receive the amount of the assessment as the several installments should mature, and to provide means for enforcing its collection in case of delinquency. The provision for a sale of the land at public auction to any one who would pay the assessment, with the right in the contractor to become such purchaser, was an efficient mode of securing such payment, but if, instead thereof, the land should be struck off to the state with no power for its sale within five years, and no fund from which to pay the amount for which the sale was made, there would be no means by which the contractor could receive his payment, and the entire purpose of the act would be frustrated. We hold, therefore, that the above amendments to the Political Code in 1895 are inapplicable to the provisions of the act of February 27, 1893, and that the sale of land for delinquency in the payment of the bond is to be made according to the provisions of the law for the collection and enforcement of taxes at the date of the act." (Italics ours.)

It follows then that the express repeal of section 3779, Political Code, imposing a penalty of 50 per cent., if theretofore applicable to the proceedings for the sale of property for delinquent street opening assessments by reason of the incorporation by reference of such Political Code provisions in the street opening act of 1889, did not operate upon or render inapplicable its provisions as affecting sales for delinquent street opening assessments. It seems to be conceded that section 16 of the street opening act of 1895 as originally enacted (St. 1889, p. 73), provided for the penalty of fifty per cent. in cases of redemption. If so, the authority for its imposition is contained in the following sentences of section 16:

"All property sold shall be subject to redemption in the same time and manner as in sales for delinquent state and county taxes; and the superintendent of streets may collect for each

certificate fifty cents, and for each deed one dollar. All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable to the sale and redemption of property for delinquent assessments hereunder, including the issuance of certificates and execution of deeds."

If the first sentence requires the payment of the penalty it is because the "manner" of redemption incorporates the idea of the fifty per cent. penalty, and if that is true there is no difficulty in concluding that the penalty is still imposed, because, as already stated, the saving act of 1895 (Stats. 1895, p. 204) expressly provides that as to the manner of redemption the statute in force January 1, 1895, remains in force with relation to the street opening assessments.

If the requirement for the payment of the 50 per cent. penalty is found in the next sentence, "All provisions of the law, in reference to the sale and redemption of property for delinquent state and county taxes in force at any given time," etc., incorporated by reference section 3779, Political Code, we have to determine whether upon the principle stated in *Ramish v. Hartwell*, supra, the amendment of 1895 renders inapplicable the 50 per cent. penalty. It is true that the street opening act (section 16), above quoted, differs in the terms by which it makes applicable to the street opening assessment sales the general scheme for sales for delinquent state and county taxes, and that interpreted in the case of *Ramish v. Hartwell*, supra, for the reason that the provision for the sale for the street opening assessments provides that the scheme for "the sale and redemption of property for delinquent state and county taxes in force at any given time, shall also then, so far as the same are not in conflict with the provisions of this act, be applicable," etc. (Italics ours.)

It would follow that the new scheme for the collection of state and county taxes would apply "so far as the same are not in conflict with the provisions of this act"; but, as stated in *Ramish v. Hartwell*, supra, the new scheme for the collection of delinquent state and county taxes by a sale to the state is thoroughly inconsistent with the system of sales at public auction to the highest private bidder for cash. In the one case the entire property is sold to the state for the tax, subject to a five-year redemption, in the other case only so much of the property as is necessary to pay the delinquent assessment is sold and then to the private bidder who accepts the smallest part of the property and pays the assessment. The new scheme of tax sales in its entirety is inapplicable to and inconsistent with the scheme of sales to private individuals provided by the street opening act (*Ramish v. Hartwell*, supra), and for that reason under the express terms of the statute

of 1889 is not applicable to the sale and redemption of the property for delinquent street opening assessments.

I concur: RICHARDS, Justice pro tem.

(57 Cal. App. 391)

PEOPLE v. JOHNSON. (Cr. 1025.)

(District Court of Appeal, First District, Division 2, California. April 19, 1922.)

1. Burglary § 41(5)—Evidence held to sustain finding offense was committed in nighttime.

Evidence that the burglary was committed while the occupants of the house were absent for several days, and that on the night before the door of their apartment was discovered to have been broken open, a neighbor heard sounds as of some one pounding, held sufficient to sustain the jury's finding that the burglary was committed in the nighttime.

2. Criminal law § 1035(3)—Remark of trial court which could have been corrected is not reversible, in absence of assignment made at time.

Where defendant's counsel, in objecting to a statement by a witness for the prosecution on cross-examination, said that what the witness stated was not an identification, a remark by the court that the court did not say it was an identification, but it was the fact, was not of such a character as to preclude the possibility of obviating a harmful result if an assignment of misconduct had been made at the time, and therefore the remark does not require reversal of the conviction, where it was not assigned at the time as misconduct.

3. Criminal law § 1044—Answers made before objection to question cannot be reviewed without motion to strike.

Answers, made by witnesses before objections were made to questions asked them, cannot be reviewed on appeal from a conviction, where there was no motion to strike out the answers.

4. Criminal law § 1166½(8)—Unless some objectionable juror sat, prejudice in disallowing challenge for cause if juror subsequently peremptorily challenged not shown.

Accused was not prejudiced by the disallowance of his challenge for cause, directed against a juror whom he subsequently excused on peremptory challenge, where he exercised all his peremptory challenges, but did not show that any one of the jurors who sat at the trial of the case was objectionable to him.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Frank Johnson was convicted of burglary in the first degree, and he appeals. Affirmed.

Edmond H. Lomasney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rordan, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was convicted of burglary in the first degree and appeals from the judgment. It is contended that the evidence is insufficient to support the verdict of burglary in the first degree under the provisions of section 1097 of the Penal Code that—

"When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

Mr. and Mrs. Clifton, the occupants of the residence in San Francisco from which the silverware, jewelry, and clothing were taken, were away from home from August 5, 1921, until after August 11th, and the house was unoccupied. Before leaving they had carefully closed and locked the doors and windows. On the morning of August 11th a neighbor discovered that the kitchen door in the rear of the house was open. An examination disclosed that entrance had been gained by chopping a panel out of the kitchen door and removing a bolt which fastened the door on the inside, and that silverware, jewelry, and clothing of the approximate value of \$2,500 had been taken from the house. Shortly after 12 o'clock noon of the same day defendant was arrested by police officers, who saw him come out of a certain San Francisco hotel, in which he was registered. His room was searched and in a closet thereof were found eight suit cases containing the articles in question. There appears to be no question raised on appeal as to the sufficiency of the evidence to show that defendant committed the burglary. Therefore a particular recital of the evidence on this phase of the case is unnecessary.

[1] Regarding the time when the crime was committed, the evidence shows that appellant rented the room in which the stolen articles were located about noon on August 9th, and that at the time he had with him two or three suit cases or grips. At about half past 3 in the afternoon of that day he was seen by one of the witnesses standing on the corner of Broderick and Green streets looking towards Union street, the Clifton residence being on Broderick between Green and Union streets. One Mrs. Ernst testified that she lived on Union street right below Broderick; that her house stood on the key lot, and her yard and the Cliftons' yard met in the rear; that on the night of August 10th she was sleeping in a room in the back part of her house on the second floor with the windows wide open; that she was awakened from a sound sleep by a noise as if some one was pounding—that it sounded like a rock pounding, as if some one was grinding something and pounding; that she thought it was in her place; that she listened, and then pulled

the window up and down and the noise stopped; that she went back to bed, and almost immediately she again heard the noise; that she got up again and opened the window screen and looked around and just then she heard a door, and somebody said, "Sh!"; that it was a very dark night, and she did not see any one; that she then went to bed and thought no more about the occurrence until the next day. As heretofore stated, the evidence showed that the kitchen door was found open the following morning, and that a panel had been chopped therefrom in order to reach within and withdraw a bolt which had been placed on the inside of the door. The burglary was committed some time between the 5th of August and the morning of the 11th, and whether in the daytime or the nighttime was a matter for the determination of the jury. *People v. McCarty*, 117 Cal. 65, 48 Pac. 984. A disturbance of its verdict in that respect does not appear to be justified in view of the evidence here.

[2] During the cross-examination by appellant's counsel of the witness who testified he saw appellant in the vicinity of the Clifton residence on August 9th, the following occurred:

"Q. Did you ever identify this man? A. I identified him after I saw his picture in the paper.

"Mr. Lomasney: I ask it go out.

"The Court: That is what you asked him.

"Mr. Lomasney: That is not an identification.

"The Court: I am not saying it is an identification, but it is the fact."

Appellant now complains that this remark constituted prejudicial misconduct on the part of the trial court. The remark was not assigned as misconduct at the time it was made, and the trial court's attention was not in any manner directed to its alleged impropriety. Neither does it appear that the remark was of such a character as to preclude the possibility of obviating a harmful result had an assignment of misconduct been made at the time. Under these circumstances, the rule is that a claim of misconduct will not be considered on appeal. *People v. MacDonald*, 167 Cal. 545, 551, 140 Pac. 256.

[3] Appellant next contends that the admission of certain alleged hearsay evidence constituted prejudicial error. The answers to certain questions went into the record before objection was interposed, and no motion was made to strike out. This point, therefore, requires no consideration.

[4] Appellant also complains that the trial court erred in disallowing his challenge for cause interposed to one of the jurors on the ground of bias. The juror was not sworn and did not serve as such on the trial, having been subsequently excused by appellant on a

peremptory challenge. It appears from the record that appellant exhausted his 10 peremptory challenges, but it does not appear that he had occasion or desired to exercise an additional peremptory challenge. There is nothing to indicate that any of the jurors who served were objectionable to appellant, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. Under these circumstances it is unnecessary to determine whether or not the ruling was erroneous, as it did not amount to prejudicial error and would not warrant a reversal. *People v. Kromphold*, 172 Cal. 512, 519, 520, 157 Pac. 599; *People v. Schafer*, 161 Cal. 573, 576, 119 Pac. 920. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(57 Cal. App. 310)

DE CARLI v. ASSOCIATED OIL CO. et al.
(Civ. 4203.)

(District Court of Appeal, First District, Division 1, California. April 11, 1922.)

Jury \S 19(1)—Master and servant \S 347—*Workmen's Compensation Act* constitutional as applied to injuries due to willful disregard of duty.

Const. art. 20, \S 21, authorizing the Legislature to create a complete system of workmen's compensation irrespective of fault, does not limit the Legislature to injuries caused by negligence as distinguished from willful disregard of duty, and St. 1917, p. 834, \S 6b, providing for compensation for serious and willful misconduct of the employer, is not unconstitutional as denying the constitutional right of trial by jury.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Joe P. De Carli against the Associated Oil Company and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

Jay Monroe Latimer, of San Francisco, for appellant.

Redman & Alexander, of San Francisco, for respondents.

TYLER, P. J. Action for damages for personal injuries. Plaintiff alleges that he was employed by defendant Associated Oil Company and that, while engaged in his duties as such employee, he received severe personal injuries through the gross and willful carelessness and negligence of defendant company. Defendant Ocean Life Insurance Company was the insurance carrier of defendant oil company and was made a party defendant solely for that reason. Both defendants demurred generally to the complaint

upon the ground that it did not state a cause of action, and upon the further grounds of lack of jurisdiction of the court, misjoinder, and uncertainty.

The ground relied upon below was that the superior court had no jurisdiction, it being claimed that the matter of employers' legal liability for injuries to employees was vested in the Industrial Accident Commission, which body had sole power to determine and assess any compensation to which a plaintiff might be found to be entitled. It appears from the record that plaintiff was paid \$730 pursuant to the terms of the compensation act. After collecting this amount, he brought this present action. The demurrers of the different defendants were sustained without leave to amend. Plaintiff appeals from the judgment, and in support of his appeal contends in substance that article 20, § 21, of the Constitution as amended in 1918 does not by its terms justify the provisions of section 6(b) of the Workmen's Compensation Act in so far as said section 6(b) seeks to deny the right of trial by jury in a court of law granted to one by the Constitution. It is argued that article 20, § 21, merely vests the Legislature with plenary, unlimited power to create a complete system of workmen's compensation for injury, disability, or death incurred or sustained by workmen in the course of employment "irrespective of the fault of the party"; that, giving to the word "fault" the meaning attributed to it by the decisions, it is merely synonymous with "negligence"; and that, this being so, a workman is, by the Constitution, impliedly left his common-law right to trial by jury, in that different class of cases where injury results from a willful disregard of duty by the employer. This question has been put to rest in this state by the Supreme Court through numerous decisions.

The Workmen's Compensation Act as originally enacted provided for an election of remedies by an injured employee where such injuries were caused through the gross or willful misconduct of the employer. Section 12(b), c. 176, Laws 1913. In 1917 the act was amended, and this election was eliminated, and in lieu thereof it was provided that when an employee was injured through "the serious and willful misconduct of the employer, etc.," that the amount of compensation should be increased one-half. Section 6(b), Laws 1917, p. 834. The remedy here provided for has been held to be exclusive of all other statutory or common-law remedies, and the constitutionality of the provision has been upheld in numerous cases. *E. Clemens Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 193 Pac. 105, 16 A. L. R. 611. See, also, *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; *San Francisco Stevedoring Co. v. Pillsbury*, 170 Cal. 321, 149 Pac. 586; *Do-*

minguez v. Pendola (Cal. App.) 188 Pac. 1025; *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 Pac. 510. As pointed out in these cases, the Constitution authorizes a complete system of workmen's compensation, and the language employed is comprehensive enough and was intended to include all injuries, irrespective of the manner in which they might occur. The contention of appellant, therefore, that the language employed in the Constitution is a limitation on the power of the Legislature, is without merit.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(57 Cal. App. 408)

HESSE v. MERCED SECURITY SAV. BANK.
(Civ. 2414.)

(District Court of Appeal, Third District, California. April 20, 1922.)

Banks and banking §227(3)—Evidence held insufficient to prove bank's agreement to pay depositor's creditor certain sum on bank's receipt of certain fund.

In action by assignee of installments due on trucks sold highway contractor against a bank, which was supplying the contractor with the money to enable him to perform the contract and had taken assignment of moneys to become due under the contract as security, for breach of the bank's agreement to pay certain amount due on the trucks on contractor's deposit in bank of amount then due from the state under the contract in consideration of assignor's agreement not to retake possession of trucks, evidence held to sustain finding that the bank did not make the alleged promise to pay such sum.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. E. S. Hesse against the Merced Security Savings Bank, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Earl A. Bagby, of Visalia, for appellant.

F. W. Henderson, of Merced, for respondent.

FINCH, P. J. The complaint alleges that the defendant agreed to pay plaintiff's assignor \$1,500 "from a special fund, then and there being by said defendant and one J. E. Lee provided for that purpose, said payment to be made by the said defendant immediately upon receipt by defendant of said fund which said fund was * * * in the amount of \$7,000 or thereabouts"; that the defendant thereafter received such fund but refused to pay plaintiff the sum promised and converted the fund to its own use; "that the said special fund consisted of moneys then

due and payable by the California State Highway Commission on account of the contract of said J. E. Lee with said commission for the construction" of a certain highway. The answer denies the allegations of the complaint. The court found the foregoing allegations of the complaint to be untrue and rendered judgment for the defendant.

The defendant was supplying Lee with money to carry on his highway contract and had furnished him large sums for that purpose, taking as security a mortgage on his personal property, tools, and equipment and an assignment of moneys due and to become due under the contract. Lee had purchased two trucks from plaintiff's assignor on the monthly payment plan, and several installments were due and unpaid on May 22, 1920. On that day A. Woods, representing the seller, indicated to the officers of defendant that it would be necessary to take the trucks, which were being used on the work, from Lee's possession unless arrangements were made for payment of part of the overdue installments. Certain payments were then due on the highway contract, and Woods called up the state engineering department to ascertain the amount thereof and the time when payment would be made. From this point forward the evidence is conflicting.

Woods testified that he informed the bank officials that he had received information from the state engineering department that checks would be mailed to Lee that afternoon for payments due. He further testified:

"I asked Mr. Stoddard if he would pay a check on Mr. Lee of \$1,500 on the arrival of the money * * * coming from the state at that time, and he said he would pay it and that would not put Mr. Lee's overdraft any higher than it was at that time, and I * * * did secure a check of Mr. Lee. * * * They (the bank officials) informed me, in those estimates, I think they called them, there was approximately \$7,000. * * * Stoddard made the statement at that time that he did not wish to carry Mr. Lee for any more money at that particular time, but would pay a check of \$1,500 or pay the amount of \$1,500 when these estimates that were presumably coming from Sacramento arrived."

H. B. Stoddard, defendant's cashier, testified:

"He (Lee) was overdrawn on May 22d, \$3,345.26. * * * Mr. Woods assured us that a check was being mailed from Sacramento for \$7,000; at one meeting he said the check had been mailed. * * * We agreed to pay that check if we got the money from the state that he said had been mailed to us at that time. * * * The promise was conditional, that if we received that money from the state that he said was being mailed to us, that would put Mr. Lee's account in such shape we could pay his check."

M. D. Wood, vice president and manager of defendant, testified:

"I stated to him at that time that we would recognize a check of Lee in his favor or his firm's favor when Lee had the money to his credit to pay it. * * * At the time Mr. Woods was there, he said the money was coming from the state right away, which would take up the overdrafts. * * * I did not tell him anything except what I have already stated, that we could not recognize any checks against Lee's account until he had the money to pay outside of the labor proposition. * * * I mean preferred claims, anything that was a preferred claim. * * * Such claims as can be filed against the job, before the labor commissioner, for instance. * * * I did not know, as a matter of fact, what money was coming from the state to Mr. Lee, because the money always went to Lee; it did not come to the bank."

The anticipated payment by the highway commission was not received and deposited with the bank until May 28, and then only in the sum of \$3,565.33. In the meantime the bank had continued to pay Lee's checks for labor and material, so that on May 28, after crediting Lee's account with the \$3,565.33, it showed an overdraft of \$1,068.02. The \$1,500 check was not presented to the bank for payment till about the middle of June, and at that time Lee's account was overdrawn. While Lee later deposited other sums with defendant, at no time after May 22d did he have sufficient funds to the credit of his account to pay the check.

From the foregoing evidence it is clear that the court was justified in finding that the defendant did not make the alleged promise to pay plaintiff's assignor \$1,500 or any sum.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 400)

PEOPLE v. LEE MON. (Cr. 618.)

(District Court of Appeal, Third District, California. April 20, 1922.)

Prisons \S 17½, New, vol. 19 Key-No. Series —Statute prohibiting taking of opium into prison is valid.

Pen. Code, \S 171a, making it a felony for any person not authorized by law to bring into any prison, jail, or reformatory any opium or other narcotic, is valid.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Lee Mon, sometimes called Ah Fong, pleaded guilty to taking opium into a county jail. From a judgment sentencing him to the penitentiary, he appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The charging part of the information against defendant is as follows:

"The said Lee Mon (sometimes called Ah Fong) did on or about the 29th day of December, A. D. 1921, prior to the filing of this information, at and in the county and state aforesaid, wilfully, unlawfully, and feloniously bring, take, and convey into the county jail of the county of San Joaquin, state of California, a quantity of opium, and at the time of so bringing, taking, and conveying said opium into said county jail as aforesaid, the said Lee Mon (sometimes called Ah Fong) was not then and there authorized by law so to do."

The defendant was duly arraigned and pleaded guilty. He was thereupon sentenced to the penitentiary in accordance with the requirement of the statute.

We find nothing erroneous or irregular in the proceedings. The information was based upon the provisions of section 171a of the Penal Code, and is in proper form. The only reason urged in the court below why judgment should not be pronounced against the defendant was that "the statute is invalid." But there seems to have been no argument upon the question, and there has been no appearance in this court on behalf of appellant.

No reason occurs to us why such statute should not be upheld, or why the judgment should not stand.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 359)

WILLIAMS v. MACONDRAY & CO.
(Civ. 4116.)

(District Court of Appeal, First District, Division 2, California. April 17, 1922. Hearing Denied by Supreme Court June 15, 1922.)

1. Master and servant §80(5)—Complaint held to warrant recovery of commissions on transaction proved.

A complaint, alleging that plaintiff was employed to solicit orders for the purchase through defendant of merchandise for the account of the purchasers, and that defendant promised to pay him 25 per cent. of the gross profits on all business received from persons in plaintiff's territory, was broad enough to support a recovery of commissions on a transaction, though defendant contracted to furnish the goods and then purchased them on its own account, instead of purchasing for the customer's account.

2. Pleading §398—Variance as to nature of transaction on which commissions sought held immaterial.

In an action for commissions on an order for goods obtained through plaintiff's solicitation, a variance between an allegation that the goods were purchased by defendant for the

account of the customer and proof that it contracted to furnish them to the customer and then purchased them on its own account was immaterial under Code Civ. Proc. §§ 469 and 470.

3. Contracts §176(1)—Construction is for court.

The interpretation of a contract is a question of law for the court.

4. Corporations §432(12)—Evidence held to support finding of authority to employ one to solicit orders for share of profits.

Evidence held to support a finding that the president of a corporation, who was ostensibly manager of its export department and with its vice president owned all of its stock, had authority to employ plaintiff to solicit orders for the purchase through defendant of goods for a share of the profits on such orders.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by H. R. Williams, Jr., against Macondray & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas H. Breeze, of San Francisco, for appellant.

Wilson & Wilson, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for \$5,000 in favor of plaintiff entered upon a verdict of a jury.

The complaint alleges that on or about January 10, 1918, plaintiff and defendant entered into an agreement whereby plaintiff was employed by defendant to solicit trade with, and if possible obtain orders from, persons, firms, and corporations doing business in or residing in the republic of China (excepting Manchuria) Hongkong, Philippine Islands, Dutch Indies, Straits Settlements, Australia, and New Zealand for the purchase through defendant of goods and merchandise in the United States for the account of such persons, firms, and corporations, and that in and by said agreement it was understood and agreed that plaintiff should solicit said orders and promote said trade by communicating by mail or cablegram or otherwise with such persons, firms, and corporations, and it was agreed by and between plaintiff and defendant that in consideration of the performance of such services by plaintiff, the defendant would on demand, pay the plaintiff a commission of 25 per cent. of the gross profits made or earned by defendant on all business received by defendant from persons, firms, or corporations so residing or doing business in the said countries, or any of them, regardless of whether or not said business was received by defendant as the result of solicitation or

efforts by plaintiff; that immediately after the making of said contract, plaintiff entered upon the performance thereof, and that plaintiff thereafter continued to fully carry out and perform the said contract until the 30th day of April, 1919, at which latter time defendant wrongfully and unlawfully, and without any cause or reason whatever, refused to allow plaintiff further to carry out and perform said contract, and that defendant has ever since refused, and still refuses, to allow plaintiff further to carry out and perform said contract, and that plaintiff has at all times since the said refusal of defendant been, and he still is, ready, able, and willing to carry out and perform said contract on his part; that while plaintiff was, as aforesaid, carrying out and performing said contract, defendant received orders from persons, firms, and corporations, residing and doing business in said countries for the purchase by the defendant in the United States of goods for the account of said persons, firms, and corporations and for the shipment of said goods to said persons, firms, and corporations, and that all of the goods called for by the said orders were purchased by defendant in the United States for the account of the persons, firms, and corporations giving such orders, and have been shipped by defendant to said persons, firms, and corporations.

It is further alleged that defendant has paid plaintiff the commissions that became due on certain of said orders, but that defendant has made and earned gross profits on others of the said orders, amounting to the sum of \$45,600, and that plaintiff is entitled to 25 per cent. thereof.

Appellant's first contention is that there is a material variance between the proof and the allegations of the complaint. The argument is based upon the following facts: The profit made by defendant upon which it refused to pay plaintiff a commission was made upon one transaction with the Kailan Mining Administration of Tientsin, North China. There is no dispute about the fact that this business came from the territory covered by the contract between the parties. The record shows that the materials called for by this order were steel rails, and that these rails were not purchased by the defendant "for the account" of the customer, but a quotation of price or a "firm offer" was made to the customer by the defendant after defendant had secured quotations of price from the manufacturers. This offer to the customer was for a price 8 per cent. in excess of the price asked at that time by the manufacturers. The customer accepted, by cable, defendant's offer to furnish the rails. Deliveries were to be made at different times in the future. At the time of the offer and acceptance steel prices were unusually high because of the World War. Defendant, how-

ever, did not place its orders with the manufacturers at this time, but waited for several months, during which time a great reduction in the price of steel occurred, due to the signing of the armistice. Defendant thereupon purchased the rails at the greatly reduced prices, but held the customer to its acceptance of the offer at the higher price, thus making a large profit.

Defendant now seeks to escape liability to plaintiff, urging that he has pleaded that he was "employed * * * to solicit orders * * * for the purchase through defendant of * * * merchandise * * * for the account of such persons, firms, and corporations"; also, that the complaint alleges that "all of the goods called for by the said orders were purchased by defendant in the United States for the account of the persons, firms, and corporations giving such orders. * * *" It is asserted that such allegations do not warrant a recovery on the facts shown.

[1] With reference to the allegations of the complaint regarding the terms of the contract between the parties, we are of the opinion that such allegations are sufficiently broad to cover the facts proven. Aside from the allegation above quoted and referred to by appellant as being insufficient to include the facts proven, there is, as previously stated, an allegation that defendant promised to pay the plaintiff a commission of 25 per cent. of the gross profits made or earned by defendant on *all business* received by defendant from persons, firms, or corporations so residing or doing business in the said countries. This allegation is sustained by the testimony of plaintiff, and is sufficient to include the transaction admitted to have taken place between the defendant and the Kailan Mining Administration.

[2] While there is some variance between the allegation that the indebtedness arose by reason of orders for the purchase by defendant of goods for the account of persons in the territory named and the proof, which showed that the commission was due upon business handled in a somewhat different manner, we are not disposed to regard this matter as material, because it could not have misled the defendant to its prejudice in maintaining its defense under all the facts in evidence in this case. Code Civ. Proc. § 469; Fielding v. Iler, 39 Cal. App. 559, 562, 179 Pac. 519; Holden v. Mensinger, 175 Cal. 302, 165 Pac. 950. Plaintiff would have been entitled to have amended his pleading to conform to the proof or the fact could have been found in accordance with the proof. Code Civ. Proc. § 470.

It is argued by appellant that it is unlikely that the defendant intended to contract to pay a commission upon profits made upon direct sales to customers, but that it is more reasonable to suppose that defendant intend-

ed to contract with plaintiff to pay a commission only upon purchases "for the account" of customers. We do not see the force of this reasoning. It is entirely clear from the record that the defendant was in the habit of handling its business in either of two ways; by purchasing for the account of a customer, charging a commission for its services, or by making a "firm offer" to the customer and then buying the goods in the open market for resale to the customer. The circular letters and advertising matter sent out by the plaintiff in pursuance of his contract with the defendant solicited business from prospective customers in the prescribed territory, under either of these arrangements. The cablegrams covering the Kailan Mining Administration transaction were submitted to Macondray, by plaintiff, before they were sent out. Mr. Macondray was in charge of the department where plaintiff worked, and plaintiff necessarily deferred to his judgment and advice as to the method of handling business that came to the defendant company. Macondray was therefore in a position to direct that the business be handled in either manner. There seems to be equal reason for allowing plaintiff a commission upon the one transaction as upon the other. Regardless of the way the business was handled by the defendant, it came to them out of the territory assigned to plaintiff and in response to his advertising methods and plaintiff has testified that the agreement made with him was for "an interest to the extent of 25 per cent. of gross on business done or coming from China" and the other countries mentioned.

Defendant seeks to charge plaintiff with negligence because, immediately upon receipt of the acceptance from the Mining Administration of the offer made to it by defendant, plaintiff did not place orders with the manufacturers for the merchandise required. Of course, the question of whether or not the plaintiff performed his duties carefully or negligently or used good or bad judgment during his period of service with the defendant is not an issue in this case. It would seem, however, that criticism of plaintiff's method of procedure would come rather ungracefully from the defendant, in view of the fact that plaintiff's failure to immediately place such an order resulted in a profit of many thousands of dollars to defendant, while the pursuit of the only other method suggested as proper would have made anything more than a nominal profit an impossibility. Defendant contends that the fortunate outcome was the result of merest chance, and that plaintiff was not warranted in taking this chance. However, plaintiff has testified that when he made the offer to the mining administration it was after consultation with the president of the defendant company, who was also the manager

of the export department; that prices of steel were then so high that the defendant was assured they would not go higher, and in fact the defendant was expecting a drop in such prices and also a drop in the freight rates. By the time shipment was made of this order freight rates had decreased by 50 per cent., and the price of steel had declined sufficiently to afford the defendant a profit, as shown by their books, of \$30,861, after deducting a "manager's bonus." The jury allowed to the plaintiff \$5,000.

[3] Complaint is made of the refusal of the trial court to give certain instructions to the jury by which the contract pleaded is construed to cover only transactions with customers by which goods are bought for the account of such customers. Our previous discussion of the pleadings answers this objection of appellant. We do not consider the contract pleaded to be so limited in its scope, and we think such instructions would have been erroneous. It is true, as contended by appellant, that the question of the interpretation of a contract is a question of law for the court, but the instructions offered by defendant on this subject do not fairly interpret the contract which plaintiff pleaded, and which he proved, not only by his own testimony, but by numerous other facts and circumstances appearing in the record and hereinafter referred to.

[4] The appellant also contends that there is no proof of the authority of Mr. Macondray to enter into such a contract on behalf of the corporation. Briefly, and in substance, the proof is: All of the shares of the capital stock of defendant were owned by Mr. Macondray and Mr. Rathbone. Mr. Macondray was the president of the company; Mr. Rathbone was the vice president and the manager of the insurance department. Mr. Macondray was, ostensibly at least, the manager of the export department of defendant, to which department of its business the contract with plaintiff related. Macondray employed and discharged clerks in said department, ordered goods, and saw that it was shipped out. No one but Macondray and Mr. Connolly participated in the business connected with the export department; the contract with the Kailan Mining Administration, upon which this commission is claimed, was made by Macondray on behalf of the defendant. There were four directors of defendant, Mr. Macondray, Mr. Kittle, Mr. Connolly, and Mr. Rathbone. The directors, practically, never held a meeting. Mr. Kittle, one of the directors, was merely a "dummy director," owning but one share of the stock, and never participated in the business. Mr. Connolly discussed with both plaintiff and Mr. Macondray the contract involved here, and was apparently satisfied with the same. Mr. Rathbone knew of the contract with plaintiff about January or Feb-

ruary, 1918, which was shortly after it was made, and, apparently, he made no objection to it. Mr. Connolly himself had a contract with defendant which was similar to the contract held by plaintiff, and such contract had been made with Connolly by Mr. Macondray as president of the defendant. It was never authorized by or acted upon in any way by the directors, and yet such contract was recognized by the defendant as a binding obligation, and payments were made thereunder to Connolly. Defendant also recognized plaintiff's contract, and furnished him with a statement of commissions due him thereunder—in fact, paid \$500 upon such commissions and tendered another small sum in full settlement, which was refused. It was only when plaintiff insisted upon having a commission upon this large transaction with the Kallan Mining Administration that any question was raised regarding the authority of Macondray to enter into this contract on behalf of defendant.

Under all of these facts we think the implied finding of the jury that Macondray did have authority to enter into this contract on behalf of the defendant was justified. *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 276; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 250, 123 Pac. 212; *Streeten v. Robinson*, 102 Cal. 542, 545, 546, 36 Pac. 946; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817; *Newhall v. Levy Bag Co.*, 19 Cal. App. 9, 25 et seq., 124 Pac. 875; *Algeltinger v. Burke*, 176 Cal. 621, 626, 627, 169 Pac. 373; *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 358, 131 Pac. 894.

There are no other matters requiring discussion.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

(57 Cal. App. 401)

CHAMBERS v. BOARD OF SUPRS OF TEHAMA COUNTY. (Civ. 2411, 2452.)

(District Court of Appeal, Third District, California. April 20, 1922.)

1. Waters and water courses §225—Proceeding for organization of irrigation district held judicial.

A proceeding before the board of supervisors for the organization of an irrigation district under St. 1897, p. 254, requiring a notice, a hearing, the taking of evidence, and a judgment, presents all the elements of a judicial proceeding.

2. Waters and water courses §225—On writ of review from order of a board of supervisors, only evidence before board considered.

On writ of review from an order of a board of supervisors denying a petition to establish an irrigation district, the investigation is limited

to the evidence before that board in determining whether it had any discretion to dismiss the petition.

3. Waters and water courses §225—Board's determination on credibility of witnesses and weight of the evidence held conclusive.

On writ of review from an order of a board of supervisors refusing to establish an irrigation district, the determinations of the board on questions of weight of the evidence and credibility of the witnesses are conclusive.

4. Mandamus §28—Office of writ of mandate stated.

The office of a writ of mandate is, not to control the discretion of an inferior tribunal, but to compel it to act where only one course is open to it under the law.

5. Waters and water courses §225—Whether owners of town lots qualified petitioners for irrigation district held question of fact.

The primary purpose of St. 1897, p. 254, providing for the establishment of an irrigation district on petition to a board of supervisors signed by a majority of the owners of "lands susceptible of irrigation from a common source," was to irrigate agricultural lands; but whether owners of town lots were qualified petitioners in any particular case was a question of fact for the board of supervisors.

6. Waters and water courses §225—Board of supervisors have power to include a town within irrigation district.

A board of supervisors with power to create irrigation districts on petition of landowners have authority to determine whether a town will be benefited by water for irrigation and may include it within the boundaries of an irrigation district.

7. Waters and water courses §225—Record held to authorize conclusion that petition for irrigation district was not signed by majority of landowners.

In a petition to a board of supervisors for the establishment of an irrigation district under St. 1897, p. 254, and amendatory acts, the record held to authorize the board's conclusion that petitioners had failed to maintain the burden of proving that petition was signed by majority of the qualified landowners.

8. Waters and water courses §225—Signatures to petition for establishment of irrigation district not to be withdrawn after publication.

Irrigation Act, § 2, providing that signatures to a petition for the establishment of an irrigation district may be withdrawn at any time before publication, implies that such signatures may not be withdrawn thereafter.

Petition by O. W. Chambers against the Board of Supervisors of the County of Tehama. From an order denying the petition, the petitioner applies for writ of review and for a writ of mandate. Denied.

McCoy & Gans and W. P. Johnson, all of Red Bluff, for petitioner.

Fred C. Pugh, of Red Bluff, for respondent.

BURNETT, J. Petitioner made an original application to this court for a writ of review (No. 2411) to annul an order or resolution of the board of supervisors of Tehama county denying a petition for the organization of an irrigation district to be known as Los Molinos Colony irrigation district, and later, an application for a writ of mandate (No. 2452) to require the board to adopt a suitable resolution determining that all the provisions of the Irrigation Act of March 31, 1897 (Stats. 1897, p. 254), and the amendatory acts have been complied with. The two applications were made for the reason that petitioner was in doubt as to whether it is a case for certiorari or for mandate, and it was stipulated at the hearing herein that they might be considered together by this court and covered in one opinion.

The petition to the board of supervisors was in proper form and was published as required by the statute. A written opposition or contest was filed by certain property owners within the proposed district, and after a public hearing the board denied the petition. Several questions have been discussed by counsel, but the only serious controversy seems to be as to whether the evidence before the board of supervisors showed without substantial conflict that the petition for the organization of the district was signed by the requisite number of property owners in view of section 1 of said act, providing:

"A majority in number of the holders of title or evidence of title to lands susceptible of irrigation from a common source, and by the same system of works, including pumping from subsurface or other waters, such holders of title or evidence of title representing a majority in value of said lands, may propose the organization of an irrigation district, under the provisions of this act."

[1] In considering this question there can be no doubt that the board exercised a judicial function.

"The board must hear all relevant and competent evidence offered, and thereupon determine whether or not the petition is signed by a majority in number of the holders of land within the proposed district susceptible of irrigation from the same source or system, and whether or not the lands held by such signers represent a majority in value of such lands within the district. * * * This scheme presents all the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment." *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780.

[2] We take it, also, that in the determination of the merits of these applications we are not to try any issues of fact that were presented to the board of supervisors, but our investigation is limited to an inquiry as to the evidence before said board and whether, in view of the situation as then and there existing, the board had any legal discretion

to dismiss or deny the petition. *Inglis v. Hopkin*, 156 Cal. 483, 105 Pac. 582; *Harelsan v. S. San Joaquin Irr. Dist.*, 20 Cal. App. 324, 128 Pac. 1010.

[3, 4] If there was any substantial evidence before the board, or there was any ground for a rational inference, that said petition was not signed by the requisite number of property owners, and, for that reason, the board decided against the petitioners, manifestly we cannot say that the board exceeded its jurisdiction, for the law expressly clothes the board with the authority to decide that very question in accordance with the view entertained by said board of the weight of the evidence and the credibility of the witnesses. Likewise, in such case the writ of mandate would not issue because its office is not to control the discretion of an inferior tribunal, but to compel it to act where only one course is open to it under the law; in other words, to require that said tribunal or officer discharge a plain ministerial duty. These propositions need not be discussed any further, as they are elementary and not disputed.

What, then, was the situation before the board in relation to this question? Without reviewing in detail the evidence as to the number of competent and qualified signatures to the petition we may accept the admission of petitioner that the number is 140. This is shown by the supplementary affidavit of H. S. Gans, one of the attorneys for petitioners, filed with the board on October 17, 1921.

[5, 6] What was the showing as to the whole number of qualified property owners within the proposed district? As to this, it was not disputed that 319 names appeared upon the assessment roll. From this number it is the claim of petitioner that 104 should be deducted because they were the owners of lots in the towns of Los Molinos and Dairyville. If such deduction were made we would have, of course, 215, of which 140 is obviously more than one-half. But here we are confronted with the contention of respondent that the showing before the board of supervisors did not justify any such deduction. Before considering the disputed question of fact, it is well to note the peculiar language of the statute requiring the signatures to the petition to be of a majority of the owners of "lands susceptible of irrigation from a common source." It does not necessarily follow from this that town lots should be excluded from consideration. The primary purpose of the act is to accomplish the irrigation of agricultural lands, and in the sense in which the expression is used in the statute the ordinary town lot should not be classified with said lands; but it is true that some town lots are of such size and put to such use as to require irrigation, and the difference between such lots and agricultural lands would be only one

of degree and would not justify any discrimination. Whether the owners of the town lots should be deemed qualified petitioners in any particular case would be a question of fact to be determined by the board of supervisors to whose discretion the Legislature has committed it. It is also true that the board has authority to determine whether a town will as a whole be benefited directly by water for irrigation and so include it within the boundaries of an irrigation district. The foregoing follows from a consideration of the statute and the decisions of the Supreme Court in *Board of Directors v. Tregoe*, 88 Cal. 334, 26 Pac. 237; *In re Central Irrigation District*, 117 Cal. 382, 49 Pac. 354; *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780; *La Mesa Homes Co. v. La Mesa, etc., Irr. Dist.*, 173 Cal. 121, 159 Pac. 593.

[7] Turning to the record before the board as to this feature of the case, we find that petitioners, after describing the lands to be included in the proposed district comprising some 12,000 acres, alleged in their petition:

"That said lands are susceptible of irrigation from the common sources and by the same system of works mentioned herein."

This allegation was not challenged by the written objection filed by the contestant property owners except that there appeared upon said petition "the names of twenty-nine persons who are the owners and holders of the title or evidence of title to town lots in the town of Los Molinos and are not the owners, or the holders of title or evidence of title to any other lands within said proposed irrigation district; said town lots not being agricultural lands and not being lands that will be benefited by irrigation," and the names of six persons "who hold the title or evidence of title to town lots in the town of Danville." There was thus presented an issue as to the property qualification of only thirty-five of those on the assessment roll, and while it may not be that petitioners would be estopped from showing before the board that a larger number was disqualified, yet the board of supervisors, acting as a judicial tribunal, would be justified, at least where no proof was offered to the contrary, in assuming that as to the remainder they were owners of lands susceptible of irrigation from a common source. And we find that no evidence was offered before the board as to this disqualification except as to those challenged by the contestants, and the effect of the showing in that regard is that twenty-four of petitioners were included in that class.

It is the contention, however, of petitioner that when it is shown that certain persons were owners of town lots, it must be inferred that such lots were not susceptible of irrigation from a common source and the owners were therefore disqualified. The only evi-

dence before the board shown by the record as to this is the following testimony of H. S. Gans:

"That of the said 319 persons whose names appear upon the said assessment roll, 91 were assessed upon property within the town of Los Molinos; that of said 91 persons, 27 were signers to the said petition for organization of district; that of said 319 persons, 13 were assessed upon property within the town of Danville; that of said 13 persons, 3 were signers to the said petition for organization of district; that taking the sum of 91 and 13 names, to wit, 104 names, from said 319 names, would leave the balance of 215 names as on the assessment roll; that 4 of said 27 persons signing said petition and on the assessment roll for lots within the town of Los Molinos, as aforesaid, were also on the said assessment roll for lands not in said town of Los Molinos and within the boundaries of said irrigation district."

There was, thus, no description whatever of the character or extent of the property within said towns not represented on said petition. It was not even designated as lots but property, and it would not be unreasonable to suppose that in these sparsely populated towns or villages the several tracts of land may have been of considerable extent and susceptible to irrigation. However, if we concede that from that evidence the board of supervisors should have drawn the inference that this property should not have been included in the calculation at all, there is nothing to show that the owners were not assessed upon other property in the district which should be so considered. It is to be observed that there is evidence in this respect as to those who signed the petition, but not as to the balance.

It is not to be disputed that the burden of proof was upon petitioners to prove every fact that lies at the foundation of their proceeding. They allege and were required to prove that their petition was signed by a majority of all the qualified owners of property within the proposed district. This involved, of course, the two considerations, to wit, the number of eligible names on their petition and the whole number upon the assessment roll. If either of these facts was left to conjecture or was not established satisfactorily, this court cannot say that the board exceeded its jurisdiction or violated a plain ministerial duty. As we view the record, we cannot say with any degree of certainty that more than 24 names should have been deducted, by reason of the ownership of lands not susceptible to irrigation, from the assessment roll. This would leave 295, and the 140 would therefore fall short of the required number.

[8] It appears that about 90 of those who signed said petition filed with the board, at the time of the hearing, a written application to have their names withdrawn and stricken from the petition upon the ground that they

signed it under a misapprehension. Petitioner urges that this circumstance probably influenced the board in its denial of the petition. But the said Irrigation Act in section 2 provides that "signatures to the petition may be withdrawn at any time before the publication is commenced, as in this section required," etc., thereby implying that it may not be done thereafter. Since the record does not show to the contrary, we must assume that the board of supervisors had due regard for this provision of the statute and gave no effect to the attempted withdrawal. Indeed, the minutes show the ground upon which the order was based as follows:

"Whereas, the above matter having been heard by this board and evidence oral and documentary having been introduced and it appearing therefrom that the said petition does not comply with the requirements of an act approved March 31, 1897, and the subsequent acts amendatory thereof and supplemental thereto, in that said petition does not contain, or is not signed by a majority in number of the holders of title, or evidence of title as required by said act and the amendments thereto,

"Now, therefore, be it resolved, that it is the sense of this board, and the board hereby finds, as a fact, that said petition contains less than a majority of the holders of title and evidence of title as shown by the assessment roll of Tehama county for the year of 1921, that the said petition be, and the same is hereby denied."

We think it cannot be held that the board acted without jurisdiction or in violation of its plain duty; and, moreover, if it might be said that there was sufficient evidence to justify a conclusion in accordance with the contention of petitioner, the state of the record is such that we should exercise our discretion in favor of respondent.

The order to show cause in each case is discharged, and the peremptory writ denied.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 385)

SCHOLES v. SILVIUS. (Civ. 3688.)

(District Court of Appeal, Second District, Division 2, California. April 19, 1922.)

1. Evidence §246—Excluding attorney's letter admitting one-fourth interest in property only, instead of one-half claimed, error.

In an action to establish a trust and quiet title to a one-half interest in real property, the exclusion of a letter written by plaintiff's attorney burdened with the admission that her interest in the property was but a one-fourth was error.

2. Evidence §258(2)—Letter written by attorney held to be utterance of client.

In an action to establish a trust and quiet title to a one-half interest in a parcel of real

property, evidence held to show that a letter admitting ownership of a one-fourth interest only written by plaintiff's attorney, was written under her express direction, and that it was her utterance, and not merely that of her counsel.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to establish a trust and quiet title by Grace M. Scholes against F. D. Silvius. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Hocker & Austin, of Los Angeles, and James F. McBryde, of Glendale, for appellant.

Leon R. Yankwich and Edward H. Allen, both of Los Angeles, for respondent.

WORKS, J. This is an action to establish a trust in a parcel of real property and to quiet title to an undivided one-half interest in it. The complaint alleges that upon certain considerations the parties had agreed to take title to the property, that defendant took title thereto in his own name in severalty, and that he refused to convey to plaintiff her one-half interest. Plaintiff had judgment, and defendant appeals.

It is contended by appellant that the trial court erred in refusing to receive a certain letter in evidence. The missive was written by respondent's counsel to appellant, and it was offered upon the theory that it contained an admission that respondent was entitled to but a one-fourth interest in the property; the objection to its reception in evidence being that it was but an offer of compromise. The body of the letter follows:

"Mrs. Grace Scholes of this city has retained me to protect her interests regarding the property located at 3028 South Hoover street in this city in which she has a one-fourth interest as a result of the agreement entered into between you and Mrs. Scholes at the time the property was purchased.

"A search of the records in the county recorder's office made this morning discloses the fact that no transfer of this property has been made, and, unless I receive a written assurance from you by return mail that you intend to live up to your agreement to the extent that she may be allowed to occupy the property at least until such time as the sum of \$325 shall have been applied as rent at the rate of \$25 per month for the apartment, I am instructed to file an action to have her declared an owner in said property to the extent of one-fourth interest.

"The sum of \$325 is arrived at by using the sum of \$3,500 as the actual value of the property. Mrs. Scholes is willing to settle the whole matter on the above basis; that is, that she be allowed to occupy the premises on the basis of \$25 per month rent so long as any part of the said sum of \$325 still remains due

her; otherwise we will commence suit for an interest in the property."

It should be observed in explanation of this letter that the mention of the figures contained in it and the offer of appellant to accept an occupancy of the premises in settlement of her claim to an interest in the property all arose from certain negotiations which, according to the testimony of appellant, had preceded the final agreement to acquire the place. It is strikingly apparent from a perusal of the letter that it is burdened with the admission that respondent's interest in the property was but a one-fourth interest. The only question to be considered is whether the admission is one which may be termed an independent admission. Whether it is so appears to us to be settled by *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658. The exact nature of the paper which was received in evidence in that case is not disclosed by the opinion of the Supreme Court, but we have examined the record on appeal in the litigation and have ascertained its contents. The case was a divorce case and one of the questions for determination was whether certain property was the community estate of the parties. The paper mentioned was signed by the husband. It opened with the assertion:

"I and Maria M. Rose are husband wife [sic], and are owners of the following community property, and which constitutes all the property that I have or own in my own name or otherwise."

There was next a statement that the two could not longer live happily as man and wife, followed by an offer to divide all the property describing it, equally with the wife. In disposing of the question as to the admissibility of the paper the Supreme Court said:

"The court did not err in admitting, on the issue as to the character of the property, the paper signed by defendant, in which he offered to divide the property, and described it as community property. It was admitted solely on the question as to whether the property was community or separate, and for this purpose it was proper as a declaration by the defendant, even conceding that the paper is to be regarded as an offer of compromise. The declaration as to the community character of the property was not essential to the purposes of the compromise, and is, therefore, not to be regarded as a concession made for that purpose. While, therefore, it would not be competent to admit an offer of compromise as such, the declaration therein of facts involved in the controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, are admissible against the party making them.

"The rule is thus stated by Mr. Rice: 'It is

never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with the design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made because it is a fact, the evidence to prove is competent, whatever motive may have prompted to the declaration. But, if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy.' 1 Rice on Evidence, 435."

[1] It seems clear that *Rose v. Rose* is in point here. In fact, if there is any difference between that case and this, it operates against, rather than in favor of, respondent. The statement of Rose that the property mentioned by him was community property bore a closer relation to his proposition for a division of it than respondent's statement that she had but a one-fourth interest in the property in question here bears to her offer to accept an occupancy of it in lieu of an interest in common in it. We are satisfied that the court erred in excluding the letter.

[2] Respondent contends that the communication was inadmissible because it was written by her counsel, and not by herself. There are two conclusive answers to this contention. In the first place, the point was not raised in the trial court, the only objection to the letter being that it was an offer of compromise; secondly, the letter was identified by respondent herself while under cross-examination, and the offer of it was based upon that identification. The testimony on this head was as follows:

"Q. Now, you employed Mr. Allen [her counsel] to adjust this matter for you? A. To adjust this matter; yes; because I thought he [appellant] was trying to cheat me out of my property. Q. And you explained to Mr. Allen fully all the facts and circumstances of the surrounding case? A. I did. Q. And at your suggestion and with your consent Mr. Allen as your agent wrote Mr. Silvius a letter asking a settlement of the matter? A. He tried to compromise, which failed. Q. You authorized the writing of the letter. Do you know whether or not this is the letter that he wrote (passing letter to the witness)? A. It is. Mr. Anstin: We ask that that be received as Defendant's Exhibit 1. A. (continuing). I had this letter written when I thought the property was sold."

It is apparent from this examination that the letter was written under the express direction of respondent, and that it was her utterance, and not merely that of her counsel.

Judgment reversed, and cause remanded for a new trial.

We concur: FINLAYSON, P. J.; CRAIG, J.

(58 OKL. 171)

YARHOLA v. DULING, County Judge, et al.
(No. 12636.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. **Indians** ¶4—Act held to grant no power or authority to probate attorney to represent full-blood adult incompetent Indian.

Section 6 of the Act of Congress approved May 27, 1908, 35 Stat. 312, defines the duties and powers of the local representative, now officially known as probate attorney, but grants him no power or authority in his official capacity to represent full blood adult Indians of the Five Civilized Tribes, although incompetent, in court proceedings when their unrestricted lands or funds are involved.

2. **Indians** ¶23—Devise of restricted funds by will pursuant to act of Congress operates to remove restrictions.

A devise of the restricted funds by will, made by a full-blood member of the Five Civilized Tribes, pursuant to the act of Congress, operates as a removal of restrictions on said funds, and the devisee takes said funds free from restrictions.

3. **Insane persons** ¶102—Where guardian has failed or refused to appeal, incompetent may appeal by next friend.

The general rule is that a next friend has no standing to prosecute an appeal where the interest of the incompetent are protected by guardian; this general rule is, however, subject to certain exceptions, and there are cases where the incompetent may appeal by next friend notwithstanding the general rule. *Held*, under the facts as stated in the opinion, the general rule does not apply.

4. **Prohibition** ¶10(1)—Writ proper where inferior court attempts excessive and unauthorized application of judicial force.

Prohibition is the proper remedy where an inferior court is attempting to make an excessive and unauthorized application of judicial force in a case otherwise properly cognizable by it.

5. **Prohibition** ¶10(1)—Will lie to restrain inferior court from enforcing order requiring excessive supersedeas bond.

The action of the county court fixing the supersedeas bond of an incompetent at \$65,000 when the incompetent desired to appeal by his next friend, from an order of said court authorizing the guardian of the incompetent to loan \$50,000 worth of Liberty Bonds upon a note secured by real estate mortgage, is excessive, and when it has the force and effect of depriving the incompetent of an appeal, the same constitutes an unwarranted application of judicial force in a case otherwise properly cognizable by said court, and prohibition will lie to restrain said inferior from enforcing said order.

Original action by Cussehta Yarhola, an incompetent, by Dudley Buell, probate attorney, and next friend, against S. A. Duling,

County Judge for Okfuskee County, and H. A. Dolen and another, joint guardians, for writ of prohibition. Ordered that alternative writ be made permanent, and the county judge and the guardians be prohibited from proceeding further on orders heretofore made on guardian's applications.

Dudley Buell, of McAlester, for plaintiff.

Sid White and R. S. Cate, both of Okmah, for defendants.

McNEILL, J. This is an original action commenced in this court by Cussehta Yarhola, an incompetent, by Dudley Buell, probate attorney and next friend, against S. A. Duling, county judge for Okfuskee county, H. A. Dolen and H. G. House, joint guardians of Cussehta Yarhola. The petition alleges that the plaintiff is a full-blood Creek Indian whose restrictions have not been removed, and was declared an incompetent by the county court of Okfuskee county in 1918, and H. A. Dolen and H. G. House are regularly appointed guardians. It is alleged: The plaintiff has a large estate amounting to approximately \$190,000, a portion of which came to him by will. That \$160,000 of said estate consists of United States Liberty Bonds. The petition alleges that certain parties filed an application with the county court of Okfuskee county, seeking an order to permit the guardians to loan \$50,000 worth of Liberty Bonds to the applicants, and that applicants be permitted to secure said loan by note and mortgage upon certain real estate. That said application was set for hearing, and the plaintiff, although an incompetent, filed objection to the making of said loan for the reason he considered the Liberty Bonds a safe investment. At the hearing the court announced he would make an order permitting the guardian to make the loan of said bonds and to take as security thereof applicant's note and mortgage bearing interest at the rate of 7 per cent. That the probate attorney appeared for the incompetent, in his official capacity, and also as next friend of said incompetent, and gave notice of appeal. The judge advised the plaintiffs in this action if they desired to appeal from the order permitting the loan he would fix the supersedeas bond in the sum of \$15,000, and if they desired a stay of said proceedings and prevent the loan of said bonds, it would require an additional bond in the sum of \$50,000 or a bond in the total sum of \$65,000.

The petition alleges there was another application made for a loan of the same amount of bonds, and the court made the same order and fixed the supersedeas bond in that proceeding in the sum of \$65,000.

It is next alleged that the bond is excessive, and the plaintiff is an incompetent and under guardian, and it is impossible to per-

fect such a bond, and that the fixing of the supersedeas bond in said amount constitutes an unwarranted and arbitrary use of judicial power upon behalf of the court, and that prohibition is the proper remedy to prevent such unauthorized application of such judicial force. This court, upon the filing of the petition herein and proper showing why the cause was commenced in this court, issued an alternative writ of prohibition against the county judge and the guardians. The defendants filed an answer and response to the alternative writ. This answer raises certain questions of fact, and also questioned the right and authority of the plaintiff as probate attorney in his official capacity to appeal from the order of the county court or to represent the incompetent in this proceeding, for the reason that the funds to be loaned came to the plaintiff by will, and are unrestricted, and, the same being unrestricted, the probate attorney in his official capacity had no authority to represent the incompetent in a transaction where his unrestricted funds are involved. The answer admitted that the court made the order authorizing the loaning of said funds, and the court fixed the bond in the sums heretofore stated. The plaintiff admits the funds were acquired by him by will executed by a restricted Indian, in compliance with the acts of Congress.

[1] We will first consider the question of whether the probate attorney in his official capacity has any power or authority to appear for the incompetent in this court, or had any such authority to appear in the county court, in his official capacity, for the reason the funds attempted to be loaned were unrestricted, it being contended the United States nor its agents have any supervisory control over said funds. Section 6 of the act of May 27, 1908 (32 Stat. 312), in referring to the jurisdiction of the probate court and empowering the Secretary of the Interior to appoint local representatives commonly known as probate attorneys to advise and appear for members of the tribes, said:

"And such representatives of the Secretary of Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all their legal rights with reference to their restricted lands without charge * * * and at the request of any allottee having restricted land he shall * * * prosecute an appeal thereof to cancel and annul any deed, conveyance, mortgage or lease * * * or any other incumbrance of any kind or character made or attempted to be made or executed in violation of this act or any act of Congress and to take all steps necessary to assist said allottee in acquiring and obtaining possession of their restricted lands."

The different appropriation acts, appropriating money for the payment of probate at-

torneys, must all be construed in connection with the above act, and the above act refers only to the restricted lands and funds of adults. Yarhola being an adult, although an incompetent, the Secretary of Interior and its representatives have supervisory control only over the restricted lands or restricted funds. See *Barlow v. Soldofsky* (Okl.) 202 Pac. 1009; *McKinney v. Bluford*, 81 Okl. 166, 197 Pac. 430; *Cochran v. Teehee*, 40 Okl. 392, 138 Pac. 565; *Armstrong v. Phillips*, 82 Okl. 182, 198 Pac. 499.

[2] The next question for consideration is whether the funds sought to be loaned, being acquired by Yarhola by will, are unrestricted. The Supreme Court of the United States in the case of *La Motte v. U. S.*, 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. 410, held in substance that the devisee of restricted land by will, approved according to the act of Congress, operates as a conveyance of the land free of restrictions. By applying the same principle to restricted funds that were devised by will, executed in accordance with an act of Congress, the devisee would take the same free of restrictions. See, also, *McKinney v. Bluford*, supra, and *Barlow v. Soldofsky*, supra. We think the position of the defendant is well taken, and the probate attorney in his official capacity has no authority to appear in this case, nor did he have such right or authority to appear in the county court in his official capacity, for the reason the funds were unrestricted and not under the supervision or control of any agency of the United States.

[3] It is next contended that the incompetent could not appeal from the order of the county court by his next friend nor prosecute this action by his next friend because said proceedings must be taken by his guardian. In support of this contention, the defendants cite the case of *Clark v. De Graffenreid*, 64 Okl. 177, 166 Pac. 736. We cannot agree that this case supports that contention. 64 Okl. 179, 166 Pac. 738 the court states as follows:

"Although a next friend ordinarily has no standing to prosecute an appeal where the interests of the minor are protected by a guardian (*Lawless v. Reagan*, 128 Mass. 592; *E. B. v. E. C. B.* 28 Barb. [N. Y.] 299), there are cases in which minors having guardians may appeal notwithstanding this general rule (*Patterson v. Millions' Adm'x*, 3 Ky. Law Rep. 538; *Miller v. Cabell*, 81 Ky. 178, 4 Ky. Law Rep. 962; *Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 850; *Davidson's Appeal*, 1 Root [Conn.] 275).

In the case of *Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 850, supra, the court has a very elaborate discussion of this question, and in the body of the opinion states as follows:

"When a general guardian has been appointed by a court of probate, he is usually the proper

person to represent the infant plaintiff in such action. But there are frequently cases when the infant may properly sue by next friend, notwithstanding the existence of such guardian, as when the guardian is absent, or is unwilling or unable to institute or prosecute the required action or appeal; and especially when, though declining to take such action himself, he does not forbid such proceeding, or when he is disqualified by interest hostile to that of the infant, or is for other reasons an improper or unsuitable person to prosecute such actions in behalf of the ward. In such cases, and in the absence of any statute requiring infants to sue by probate guardian, there seems to be no good reason why actions and appeals may not at least be commenced by an infant by next friend."

A long line of cases is cited to support this proposition.

In the instant case Yarhola is an incompetent, and had been so adjudged by the county court, and guardians were appointed to represent him. The guardian failed to appeal, and in fact refused to appeal. Yarhola himself desired to appeal from the order of the county court, and gave as his reasons that the Liberty Bonds were a safe investment, and the return derived therefrom was sufficient to support him. This court in the case of *In re Hickory's Guardianship*, 75 Okl. 79, 182 Pac. 233, in the fifth syllabus, stated as follows:

"Theoretically speaking, a minor has no capacity at all to judge what is best for him or his estate; but, practically speaking, when a minor is of an age approaching majority and has had the benefits of an education, he may suggest facts and views of policy worthy of consideration by a court in the exercise of its discretion, and, if worthy of consideration, should be given great weight."

We can see no reason why this should not apply to a full-blood Indian, although incompetent to manage his own estate, but when he has sufficient intellect to advance the idea above stated, it should be worthy of consideration for the court, and be given great weight. The court would not be bound to follow his suggestions, but if he desired to appeal through a next friend when his guardian refuses he should be given that opportunity, without being required to give a bond that has the force and effect of denying him an appeal. We do not mean to say that in every instance he may appeal, but in a case where the questions involved are of so much importance as the one in the case at bar, and the power and authority of the court to make the orders made are doubtful, that right should not be denied him.

[4, 5] The only questions now necessary to consider are whether the acts of the county court amounted to an unauthorized application of judicial force in a case otherwise cognizable by it, and, should the writ of prohibition be made permanent, to prevent such

unauthorized application of judicial force. It is so apparent that the fixing of the supersedeas bond in the sum of \$65,000 to be given by an incompetent when attempting to appeal by his next friend from this kind and character of an order is so excessive that it amounts to denying to him the right of appeal. There is no damage that could be suffered by virtue of the appeal, and in a case where the jurisdiction of the authority of the court is questionable the bond should be simply a nominal bond to cover the costs. No one could suffer unless it would be the incompetent. The only difference would be the difference in the amount of interest that would be derived for the benefit of the estate of the incompetent, and in doing this it must also be considered there is some hazard in taking the note and mortgage. The same also necessitates a greater expense, and whether the actual income of the incompetent would be greater may be a question that is not free from doubt.

The appeal bond in the instant case should not have exceeded the sum of \$500, and when the court fixed the same at such an excessive amount, it has the force and effect of denying an appeal, and constitutes an unwarranted and arbitrary use of judicial force such that a court will enjoin by prohibition. Such was the holding of this court in the case of *Martin v. O'Reilly*, 81 Okl. 261, 200 Pac. 687, where the court stated in the third syllabus as follows:

"The action of a county court sitting in probate in appointing a guardian for an alleged incompetent without notice, and without the alleged incompetent being present, and without a full and fair hearing upon the petition, and setting an appeal bond in the sum of \$7,500 upon notice by the alleged incompetent of her intention to appeal from said order appointing a guardian, such action of the court constitutes an unwarranted and arbitrary use of judicial power, and prohibition is the proper remedy to prevent such unauthorized application of such judicial force."

Whether the appeal could be perfected at this time by the trial court reducing the bond would likewise be a question that is not free from doubt. The question involved regarding the loaning of the Liberty Bonds is a new question in this jurisdiction, and as far as we know has never been passed upon by any court, and before this court passes upon the same the matter should be properly presented and briefed in a proper case appealed in the regular manner. Whether the county court has power and authority to make an order authorizing the guardian to loan Liberty Bonds and to take therefore security is a question that is not free from doubt and upon which this court will express no opinion.

It is ordered that the alternative writ be made permanent, and the county judge and

the guardians be prohibited from proceeding further with the orders, heretofore made, on the above applications.

PITCHFORD, V. C. J., and JOHNSON, NICHOLSON, MILLER, and KENNEMAR, JJ., concur.

(86 Okl. 164)

BROADWELL v. BOARD OF COM'RS OF SEQUOYAH COUNTY. (No. 10707.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Counties \S 69(1)—Before officer can draw from treasury for compensation, he must have some constitutional or statutory provision authorizing it.

Before a county officer can rightly draw money from the county treasury, either for salaries, fees, expenses, or extra compensation, he must be able to point to some constitutional or statutory provision, or some lawful contract, either express or implied, that justifies his claim to such money.

2. Record held to require reversal and remand of case with directions.

Record examined, and judgment of the trial court reversed and cause remanded, with direction.

(Additional Syllabus by Editorial Staff.)

3. Costs \S 174(2)—Claim of county clerk for services not provided for by statute held not allowable.

Rev. Laws 1910, \S 3207, fixing fees allowed county clerks, does not contain a provision defining services for making a certified copy of claim or provide for any compensation therefor, and such is not allowable.

Appeal from District Court, Sequoyah County; E. B. Arnold, Judge.

George B. Broadwell appealed from the board of county commissioners of Sequoyah county to the circuit court, which dismissed the appeal at the cost of plaintiff, and, from a judgment and decree overruling plaintiff's motion to retax certain costs, the plaintiff appeals. Judgment of the trial court reversed, and cause remanded, with direction to proceed in accordance with views expressed in opinion.

T. L. Brown, of Tulsa, for plaintiff in error.

JOHNSON, J. Plaintiff in error prosecutes this appeal from the district court of Sequoyah county to reverse the judgment and decree of the district court in overruling the motion of the plaintiff to retax certain costs assessed against him in a proceeding then pending in the district court of said county on an appeal from the board of county commissioners of Sequoyah county, which

said appeal from the said board of county commissioners having been dismissed at the cost of plaintiff in error by the district court.

The record discloses that the plaintiff in error on the 1st day of March, 1922, filed his brief with an acknowledgment of service, as required by rule 7 by this court (165 Pac. vii), and that the defendant in error has filed no brief, as required by said rule, or shown to this court any reason for his failure so to do. Said rule provides, among other things, that—

"In case of failure to comply with the requirements of this rule, the court may continue or dismiss, the case, or reverse or affirm the judgment in its discretion."

From a careful examination of the record we are convinced that the plaintiff in error is entitled to have the judgment of the trial court reversed, and the cause remanded, with instructions to the court to vacate its judgment overruling motion of the plaintiff in error to retax costs with direction to the trial court to render a judgment sustaining such motion.

The record discloses that the plaintiff in error, George Broadwell, filed his claim with the board of county commissioners of Sequoyah county to refund certain moneys paid as taxes on Indian allotments; claiming the same to be exempt from taxation; the said claim was filed on the 12th day of May, 1915; that thereafter on the 7th day of June, 1915, the board of county commissioners met pursuant to adjournment and rejected said claim, and afterwards on the 25th day of June, 1915, plaintiff in error gave notice of appeal from the order and decision of the said board of county commissioners to the district court of Sequoyah county, which said notice was duly served by the sheriff of Sequoyah county on R. L. Horn, a member of the board of county commissioners, and on the 26th day of June, 1915, plaintiff in error filed his bond, as required by law, which said bond was approved by the county clerk of Sequoyah county on the 26th day of June, 1915, and on the 20th day of November, 1915, J. V. Blackard, county clerk of Sequoyah county, filed his transcript of said appeal with the court clerk of the district court; that on the 1st day of January, 1917, this cause was continued by agreement of the parties, and on the 1st day of January, 1918, the district court in and for Sequoyah county, Okl., dismissed said action and appeal for want of prosecution; that on the 20th day of March, 1918, plaintiff in error filed his motion to retax the cost in said action, which said motion to retax cost was on the 13th day of January, 1919, denied and overruled by the district court of Sequoyah county, Okl.; that on the 16th day of January, 1919 plaintiff in error filed his motion for a new trial, which said motion for a new trial was

by the court overruled, and to the overruling of which motion plaintiff in error excepted and prayed his appeal to this court.

[3] The item in the clerk's bill of costs sought to be eliminated by the plaintiff in error's motion was "for certified copy of claim, etc., 40 thousand words at 10 cents per folio, \$400.00."

Section 3207, R. L. 1910, fixing the fees allowed county clerks of this state, is as follows:

"The county clerk shall charge and collect the following fees and none other, except as otherwise provided by law:

"For recording reports or instruments other than such as pertain to or are required by law to be recorded by the county, per folio \$.10.

"Countersigning and entering certificate of redemption, \$.10.

"Certificate and seal, \$.25.

"Filing each paper, except such as pertain to county business, \$.10.

"Issuing license, to be paid by person receiving same, \$.10.

"Assignment of tax sale certificate to be paid by the party purchasing, \$.50.

"For recording any mark or brand and giving certificate for same, \$.50.

"For recording each certificate for estrays and forwarding description of same, as required by law, \$.25.

"For approving each bond, including justification, \$.10.

"For recording each bond, per folio, \$.10."

It will be observed that the foregoing section provides that the county clerk shall charge and collect the fees therein enumerated and none other, except as otherwise provided by law, and does not contain a provision defining the services sought to be charged for in the instant case or provide any compensation therefor.

[1, 2] In the case of Board of County Commissioners of Comanche County v. Compton, 77 Okl. 193, 187 Pac. 801, in syllabus 1 of the opinion the court stated as follows:

"Before a county officer can rightly draw money from the county treasury, either for salaries, fees, expenses, or extra compensation, he must be able to point to some constitutional or statutory provision or some lawful contract, either express or implied, that justifies his claim to such money."

All the conditions therein mentioned are wanting in the instant case.

The principle there announced has universally been adhered to by this court in a long line of decisions. The instant case comes clearly within the rule announced; therefore the judgment of the trial court is reversed, and the cause remanded, with direction to further proceed herein in accordance with the views herein expressed.

McNEILL, NICHOLSON, MILLER, and KENNAMER, JJ., concur.

BOWER-VENUS GRAIN CO. v. NORMAN MILLING & GRAIN CO. (No. 10657.)

(Supreme Court of Oklahoma. May 9, 1922.)

(Syllabus by the Court.)

1. Sales \S 396—Buyer's petition to recover money paid for corn, refused as not of the kind and quality bought, held to state a cause of action.

Where the plaintiff alleged in its petition that it purchased a car load of corn of the defendants, the corn to be No. 2 white, according to destination, weights, and grades, that the defendant shipped a car of corn to plaintiff and drew draft for \$2,682.39, with bill of lading attached, which draft the plaintiff paid as the purchase price of the corn, and that when the car of corn arrived the plaintiff ascertained that the corn was not of the kind and grade purchased according to an official inspection made, that the plaintiff immediately notified the defendant of its refusal to accept the corn and drew a draft upon the defendants for the amount paid by the plaintiff for the corn, which the defendants refused to pay, and that by reason thereof the defendants were indebted to the plaintiff in the amount paid for the corn for money had and received, *held*, the petition stated cause of action, and the court did not commit error in overruling the demurrer of the defendants filed to the petition.

2. Sales \S 166(1)—Tender of article of the kind and quality sold is a precedent condition to buyer's liability.

Where a sale is made of an article to be of a certain kind and quality, the tender of an article of the kind and quality sold is a condition precedent to the purchaser's liability, and, if the condition is not performed, the purchaser has the right to reject the article delivered provided he does so within a reasonable time.

3. Customs and usages \S 17 — Evidence of custom and usage is not admissible to vary, add to, or contradict plain and definite contract terms.

Evidence of custom and usage is not admissible to vary, add to, or contradict the terms of a plain and definite contract or impose a duty or obligation upon a party to a contract not incorporated therein, where such duty or obligation is expressly or impliedly excluded by the terms of the contract.

4. Customs and usages \S 15(1)—Evidence of custom is generally admissible to explain an ambiguous or uncertain contract where parties knew of custom.

Evidence of custom or usage is generally admissible to explain the meaning and intention of parties to a contract where the contract is ambiguous and the meaning is uncertain without the aid of extrinsic evidence, and the parties had knowledge of the existence of the custom or usage sought to be established.

5. Record held to require affirmance of judgment.

Record in this cause examined, and *held*, that the judgment of the trial court should be affirmed.

(Additional Syllabus by Editorial Staff.)

6. Sales ⇨181(5)—In buyer's action to recover price paid, evidence of corn's condition at a place other than destination where grade was to be determined was properly excluded.

In buyer's action to recover price paid, the corn having been rejected for quality, evidence of a sample of the corn and testimony showing its condition at M. was properly excluded, where under the terms of the sale contract the weights and grades were to be determined at destination, N.

7. Sales ⇨181(12)—Evidence held to show goods were not of the quality contracted for.

In a buyer's action to recover the price paid for corn, evidence held to show that the corn tendered by the defendant sellers was not of the quality which sellers had obligated themselves to deliver.

Appeal from Superior Court, Muskogee County; Guy F. Nelson, Judge.

Action by the Norman Milling & Grain Company against the Bower-Venus Grain Company, a partnership, composed of J. W. S. Bower and H. J. Venus, to recover the sum of \$2,682.39 for money had and received. Judgment for plaintiff. Defendants appeal. Affirmed.

Vilas V. Vernor, of Muskogee, for plaintiffs in error.

John H. Mosier, of Muskogee, and J. B. Dudley, of Oklahoma City, for defendant in error.

KENNAMER, J. The Norman Milling & Grain Company, a corporation, as plaintiff, commenced this action against Bower-Venus Grain Company, a partnership, composed of J. W. Bower and H. J. Venus, defendants, in the superior court of Muskogee county.

The petition of the plaintiff in substance alleged:

That on April 6, 1918, the defendant wired plaintiff offering for sale one car bone-dry Oklahoma No. 2 white corn \$1.97, to which the plaintiff replied by wire:

"Wire received. Offer 1.95 one car dry Oklahoma No. 2 white corn, deliver Norman, destination weights and grades."

That on April 6, 1918, the defendants wrote the plaintiff the following letters:

"Bower-Venus Grain Co., Wholesale Grain, Hay & Feed. Muskogee, Okl. 4-6-1918. Norman Milling & Grain Co., Norman, Okl.—Dear Sirs: We sold to you to-day the following: 1 car Okl. No. 2 white corn, price \$1.95, basis Norman, destination, weights, and grades, cars to be loaded to marked capacity, shipment within at once days to you at Norman. Send invoice covering shipments and draw on you with bills of lading attached at Norman, leaving reasonable margin to guarantee weights and grades. Notify us immediately if any error or irregularities in this confirmation; otherwise

same will be accepted as correct. Yours very truly, Bower-Venus Grain Co., by H. J. V."

"Bower-Venus Grain Co. Muskogee, Okl. 4-6-1918. Norman Milling & Grain Co., Norman, Okl.—Gentlemen: Agreeable with our exchange of wires to-day we are booking you car of Okl. white corn at \$1.95 per bushel delivered. This car will go forward at once. We thank you for this order and ask that you let us hear from you when again in the market. We have a car of Kaffir corn at Broken Arrow that we offer at \$4.00 per cwt. delivered subject to previous sale. Wire us if interested. Yours truly, Bower-Venus Grain Co. HJ.V. V."

That the plaintiff confirmed this sale of the corn by the following letter:

"April 6, 1918. Bower-Venus Grain Co., Muskogee, Okl.—Gentlemen: This letter will confirm our purchase from you to-day by wire of one car of Oklahoma No. 2 white corn at \$1.95 a bushel, delivered Norman, Oklahoma, destination weights and grades, shipment at once. Yours very truly, Norman Milling & Grain Company."

The petition alleged: That these letters and messages constituted the contract of sale. That, pursuant to the contract entered into between the plaintiff and defendants, the defendants shipped to the plaintiff a car of corn via the Missouri, Kansas & Texas Railway Company, and on the 9th day of April, 1918, drew a draft upon the plaintiff for \$2,682.39, with bill of lading attached to said draft representing the purchase price of the corn. That on the 11th day of April, 1918, the plaintiff paid the draft, and that thereafter, on the 21st day of April, 1918, the car of corn arrived at Norman, Okl., its destination. That on the same date of the arrival of the corn plaintiff had the corn inspected by M. I. Jordan, federal inspector, and that said inspector delivered to the plaintiff the following certificate:

"Grain Inspection Certificate. No. 1535, Original. Oklahoma Board of Trade. Oklahoma City, Oklahoma. April 21, 1918. I hereby certify that I hold a license under the United States Grain and Standards act to inspect and grade the kind of grain covered by this certificate; that on the above date I inspected and graded the following parcel of grain; and that the grade thereof, according to the official grain standards of the United States, is that stated below: Car initials, S. E. Car No., 80178. Location, their track. Amount, 1 car, Kind, shelled corn, Grade, No. 3, mixed. Analysis—Foreign material and cracked corn, 6 per cent.; damaged, 4.4 per cent.; moisture, 14 per cent.; other colors, 7.4 per cent. Inspected for Norman Mill & Grain Co. M. I. Jordan, License Inspector."

That the plaintiff, after receiving the certificate and having ascertained that the car of corn was not of the kind and grade ordered and purchased on April 22, 1918, sent the following message to the defendants:

"Car corn eighty seventeen eight received today. Federal Inspection graded mixed. We cannot use it. Advise."

That thereafter, on the 24th day of April, 1918, the plaintiff wrote a letter to the defendants calling attention to its failure to deliver corn in accordance with contract and requesting it to make disposition of the corn, also to advise the defendants that a draft had been drawn for the amount of the draft paid for the purchase price of the corn plus 50 cents inspection fee.

That the defendants failed and refused to pay the draft, and by reason thereof is indebted to the plaintiff in the sum of \$2,682.89, with interest.

To the petition filed by the plaintiff the defendants filed a general demurrer. The demurrer was overruled, and exceptions allowed.

The defendants answered, admitting the making of the contract as set forth in the plaintiff's petition, but asserting a compliance therewith. The defendants pleaded a custom and usage with reference to contracts of this kind and the rules of the Grain Dealers' Association for the state of Oklahoma, under which it was alleged that, if the car of corn did not grade up to that as ordered, where the defendants had agreed to guarantee the plaintiff against loss, it was the duty of the plaintiff to unload the corn and handle it for the account of the defendants.

The trial court sustained a motion to strike that part of the defendants' answer pleading custom and usage, to which action of the court the defendants excepted.

The cause was tried to a jury on the 17th day of February, 1919, which resulted in a verdict in favor of the plaintiff for the amount sued for, and upon the verdict of the jury the court entered judgment. Defendants filed timely motion for new trial, which was overruled by the court, to which action of the court the defendants excepted, and gave the statutory notice in open court of their intention to appeal to the Supreme Court.

The defendants have prosecuted this appeal to reverse the judgment of the trial court and assigned eight assignments of error for reversal of the judgment. We will refer to the parties as they appeared in the trial of the cause.

[1] Counsel for the defendants argue as the first ground for reversal of this cause that the court erred in overruling the defendants' demurrer to the plaintiff's petition. It is the contention of counsel in support of this assignment of error that, the plaintiff having paid the draft attached to the bill of lading for the corn in controversy, title thereby vested in the plaintiff, that he became the owner of the car of corn, and that he is precluded thereby from recovering the

purchase price paid. We are unable to concur with counsel in this contention. It is immaterial in this case whether the title to the corn passed upon the payment of the draft by the plaintiff, for, conceding that it did, it would be merely a conditional title subject to the right of inspection and rejection if the corn was inferior in quality to the corn sold to the plaintiff under the terms of the contract of sale. If the title, in fact, passed to the plaintiff, it was a conditional title, and the condition was that the corn should be found to be of the quality purchased. *Eaton v. Blackburn et al.*, 52 Or. 300, 96 Pac. 871, 873, 97 Pac. 539, 20 L. R. A. (N. S.) 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198; *Alden v. Hart*, 161 Mass. 578, 87 N. E. 742.

[2] Under the terms of the contract of sale, the corn was to be weighed and graded at destination. It is clear, under this contract, the purchaser had the right to inspect the corn when same was received at Norman, the destination of the same, and, if upon an inspection of the corn it was found not of the quality sold, the purchaser had the absolute right to reject the corn and refuse to accept it. The rule is, where goods are ordered of a specific quality, which the vendor undertakes to deliver to the purchaser by a carrier at a distant place, the right of inspection, in the absence of any specific provisions in the contract, continues in the vendee until the goods are received and accepted at their ultimate destination. The carrier is not the agent of the vendee for the purpose of accepting the goods as corresponding with the contract, although the carrier may be the agent of the vendee for the purpose of transporting the goods to the vendee. *Eaton v. Blackburn et al.*, supra.

This court, in the case of *Brown v. Davidson*, 42 Okl. 568, 142 Pac. 837, held:

"If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and, if the condition is not performed, the purchaser has the right to reject the article, or, if he has paid for it, to recover the price as money had and received for his use."

The court in the opinion approved the rule announced in *Benjamin on Sales*, p. 798, § 918, as follows:

"When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description. * * * If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and, if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price as money had and received for his use; whereas in case of warranty the rules are very different, as will appear post."

This court, in the case of *Emerson-Brantingham Imp. Co. v. Ware*, 174 Pac. 1066, held:

"Where an article is sold according to a particular description, and the thing delivered is not according to the description, it is a non-performance of the contract upon the part of the seller.

"Where a sale is made of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and, if the condition is not performed, the purchaser has the right to reject the article delivered, provided he does so within a reasonable time."

Under these authorities it is quite clear that the petition stated a cause of action, and that the demurrer of the defendants was properly overruled.

[3-5] The second proposition argued by counsel for the reversal of the cause is that the court committed error in striking that part of the defendants' answer pleading usage and custom and excluding the evidence with reference thereto. It is the contention of counsel for the defendants that, although the plaintiff found the car of corn to be inferior in quality to the corn purchased by plaintiff under contract of sale, it was his duty to accept the corn and dispose of it for the defendants; the defendants having notified the plaintiff they would protect him against any loss in disposing of the corn for them. Counsel cite the rule as found in 12 Cyc. pp. 1081 and 1082, as follows;

"The admission of evidence of a custom and usage is not dependent on the rule that parol evidence is not admissible to vary a written contract, but on the ground that the law makes the custom and usage a part of the contract, the same taking hold where the contract leaves off." Custom and Usage, 12 Cyc. p. 1081.

"Evidence of custom and usage is allowed not only to explain but to add tacitly implied incidents to the contract in addition to those which are actually expressed."

We have no fault to find with this rule, but we are unable to see how the rule in any way supports the contention of counsel for the defendants in this case. The rule is universally adhered to by the authorities that custom and usage may be proved to aid the court in the construction of an ambiguous contract, but no authority supports the rule that custom and usage may be established to vary the terms of a definite written contract, or to relieve a party from a solemn obligation assumed by him under the terms of a definite contract, or to impose upon one of the parties to the contract a duty not expressed in the contract or that may not fairly be implied therefrom. 17 C. J. p. 495; Powell et al. v. Thompson, 80 Ala. 51.

This court, in the case of *Cherokee Grain Co. v. Elk City Flour Mills Co.*, 78 Okl. 120, 186 Pac. 1067, announced the rule in harmony with great weight of authority:

"Customs or usages may properly be received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, where the parties knew of the existence of the custom or usage, and contracted in reference to it."

In the instant case the defendants contracted to deliver a carload of No. 2 white corn to the plaintiff at Norman according to destination, weights, and grades. Therefore, as a prerequisite to the right of the defendants to insist upon the plaintiff accepting the corn, they must deliver such corn as they had contracted to deliver, and their obligation in this respect cannot be avoided under any custom which directly conflicts with their contractual obligation. Hence the trial court did not commit any error in striking that part of the answer pleading custom or usage as a defense to the action.

In view of our conclusion reached in respect to the first and second propositions argued by counsel for the defendants, it is unnecessary to consider the third proposition that the court erred in overruling defendants' demurrer to the plaintiff's evidence.

[6] The fourth proposition argued by counsel for defendants is that the court erred in excluding a sample of corn offered in evidence and the testimony of one of the defendants with reference to the condition of the corn at Muskogee, Okl. Under the terms of the contract of sale the defendants sold the corn according to weights and grade at destination. Therefore it was immaterial as to the grade of the corn at Muskogee, as the destination of the corn was Norman.

This court, in the case of *Citizens' Independent Mill & Elevator Co. v. Perkins*, 52 Okl. 242, 152 Pac. 443, held:

"Where corn is purchased as of a certain grade and quality, according to official inspection, such inspection, in the absence of anything to impeach it as dishonest or collusive, is conclusive as to grade and quality shipped.

"In an action against a grain dealer for breach of contract for corn purchased by him of a certain grade and inspection, it is entirely immaterial what the condition of the corn is when it reaches its destination, if the agreed inspection shows it was of the grade contracted for."

The rule announced here is supported by the weight of authority. The defendants in this case did not attack by any pleading the inspection made by Mr. Jordan, who was an official and licensed inspector, both of the federal and state government. This inspection made was conclusive in the absence of collusion or fraud.

[7] The evidence in the case at bar established clearly the fact that the corn tendered by the defendants to the plaintiff was not of the quality which the defendants had obligated themselves to deliver to the plaintiff. We are unable to see how the jury could

have arrived at any other verdict than one in favor of the plaintiff, and, finding no reversible error in the record, the judgment of the trial court is affirmed.

PITCHFORD, V. C. J., and JOHNSON, KANE, and MILLER, JJ., concur.

(8 Okl. 159)

BAKER v. GRAYSON et al. (No. 10500.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Homestead §118(5)—No alienation by the wife alone is of any validity.

No alienation of the homestead by the wife alone, in whatever way it may be effected, is of any validity; nothing that she can do or suffer to be done can cast a cloud upon the title. It remains absolutely free from all grants and incumbrances, except those mentioned in the Constitution.

2. Homestead §118(2)—Cannot be alienated except by written instrument joined in by husband and wife.

Under the provisions of the Constitution and laws of Oklahoma, the homestead, exempt by law, cannot be alienated except by a written instrument joined in and subscribed by both husband and wife, where that relation exists.

3. Homestead §84—Tenant in common is entitled to homestead exemption in land held in common.

The established rule in many jurisdictions that a tenant in common is entitled to a homestead exemption, in land held in common, should, under our policy of liberally construing the exemption law so as to afford protection to a debtor and his family in the possession of a home, obtain in this state.

Appeal from District Court, Wagoner County; R. P. De Graffenried, Judge.

Petition by Angeline Grayson and another against Earl Baker. Judgment for the plaintiffs, and the defendant appeals. Affirmed.

A. A. Davidson, of Tulsa, for plaintiff in error.

Ledbetter, Stuart, Bell & Ledbetter, of Oklahoma City, for defendants in error.

PITCHFORD, V. C. J. Angeline Grayson and Julia Hawkins, as plaintiffs, filed their petition in the district court of Wagoner county, Okla., against Earl Baker et al. for a decree declaring them to be the owners of a one-half interest in the north half of the southwest quarter, and the southwest quarter of the southwest quarter, of section 16, township 17 north, range 16 east, alleging the same to have been allotted to William McIntosh, a Creek freedman, during his lifetime.

That McIntosh died in 1906 without issue, and without having been married, and left as his sole heirs his mother, Louisa Jones; Angeline Grayson, his aunt, a half-sister of his father; and Julia Hawkins, his cousin, the daughter of one Babe Hawkins, a half-brother of the allottee's father. And that plaintiffs were therefore the owners of a one-half interest of said lands. Earl Baker, defendant in error, by his answer claimed the whole estate and asserted that Louisa Jones was the mother and sole heir of the allottee. He claimed title by virtue of the following deeds: A deed of October 3, 1907, from Louisa Jones to C. W. Lumpkin; a deed of March 31, 1908, from C. W. Lumpkin to Adeline Orcutt; a deed of September 15, 1908, from Adeline Orcutt to Maggie Baker; and a deed of June 26, 1913, from Maggie Baker to defendant Earl Baker. The plaintiff in error also asked for possession of the land, and that his title be quieted.

Deichman and Prentice, on motion of plaintiffs, were made additional parties defendant. Answering the cross-petition of Baker, Deichman and Prentice claimed title to the entire premises under an execution sale on a judgment obtained by them in the district court of Tulsa county, on the 22d of January, 1911, against Maggie and J. N. Baker. The judgment of the trial court was that the plaintiffs were the owners of a one-half interest in the land, and that Deichman and Prentice owned the remaining one-half interest under a sheriff's deed made pursuant to the sale of the land by virtue of an execution under the foregoing judgment. Earl Baker filed his motion for new trial, and same having been overruled he appeals. No appeal is prosecuted from that part of the judgment awarding one-half interest in the land to Angeline Grayson and Julia Hawkins. The controversy on appeal is between Earl Baker, Deichman, and Prentice, and involves only the undivided one-half interest in the land inherited by Louisa Jones. J. N. Baker and Maggie Baker had for several years after December 15, 1908, occupied and were so occupying at the date of the judgment the premises as a homestead. After the execution of the deed by Maggie Baker, she and her husband, J. N. Baker, moved away from the premises and at no time thereafter occupied the same.

[1] Notwithstanding the numerous errors assigned for reversal of the judgment of the trial court, there is really but one question involved in this appeal, and that is, whether Deichman and Prentice, by virtue of their purchase at sheriff's sale, have rights in the land superior to those of Earl Baker? It was the theory of the trial court that the land was the homestead of Maggie and J. N. Baker at the date of the deed to Earl Baker,

and that said deed was invalid, because same was not joined in by J. N. Baker, the husband, and that this deed was ineffectual as a conveyance, and that, by reason of the abandonment of the homestead by Maggie and J. N. Baker, the land became subject to the execution of the Deichman and Prentice judgment. It is the contention of plaintiff in error that, while the deed executed by Maggie Baker to Earl Baker was ineffectual as a muniment of title, yet the protection to a homestead afforded by the constitutional and statutory provisions lasts no longer than the occupancy of the premises, and that such deed may become effectual after the homestead right ceases. To sustain this contention, numerous authorities are cited, and from an examination of the same we are of the opinion that the contention appears to be sustained in the jurisdictions from which the citations are taken. Whatever may be the rule in other states, it is well established in this state that a deed to the homestead executed by either husband or wife during the occupancy of the homestead by both husband and wife is absolutely void for all purposes.

[2] Article 12, § 2, of the Constitution of Oklahoma, provides:

"The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; provided, nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage."

Section 1143, Rev. Laws of 1910, contains the provision:

"* * * And no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing, and subscribed by both husband and wife."

In *Whelan v. Adams et al.*, 44 Okl. 696, 145 Pac. 1158, L. R. A. 1915D, 551, the third and fourth paragraphs of the syllabus reads as follows:

"3. An attempted conveyance by deed of the homestead of the family, by a married man, given without the wife's consent in the manner prescribed by law, is void."

"4. Where the relation of husband and wife exists, the deed of the former to the homestead of the family conveys no title, and this notwithstanding the fact that the husband and wife be living separate and apart, or even though the wife may have without justifiable cause abandoned the husband."

We quote from the body of the opinion as follows:

"No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he can do or suffer to be done can cast a cloud upon the title; it remains absolutely free from all grants and incumbrances, except those mentioned in the Constitution." *Morris v. Ward*, 5 Kan. 239.

In *Carter Oil Co. v. Popp* (Okl. Sup.) 174 Pac. 747, in the body of the opinion, it is stated:

"Homestead rights cannot be conveyed or incumbered except by the joint consent of husband and wife. The interests are not severable, and both parties are necessary to a conveyance. One party cannot convey his or her rights without the consent of the other, and the rights of both must be conveyed together."

To the same effect, see *Treese v. Shoemaker*, 80 Okl. 235, 195 Pac. 766; *Davis v. McGilbray*, 81 Okl. 42, 196 Pac. 339.

In *Hawkins v. Corbit* (Okl. Sup.) 201 Pac. 649, this court in the third and fourth paragraphs of the syllabus, said:

"3. Under the above provisions of the Constitution and laws of Oklahoma, the homestead exempt by law cannot be alienated except by a written instrument joined in and subscribed by both husband and wife, where that relation exists. In this case the husband executed a deed at Muskogee on February 2d. The wife was not present at the time he executed the deed. On February 5th at Tulsa, the wife signed a separate deed, an entirely different writing, in the absence of her husband. Held, this was not a sufficient compliance with the statute to convey title to the homestead."

"4. It is not within the equitable power of courts in this state to declare any indebtedness a lien on a homestead. The Constitution and statutes of this state have prescribed the manner in which it may be created, and they must be strictly followed."

In the still more recent case of *Thomas v. James* (Okl. Sup.) 202 Pac. 499, the rule is stated as follows:

"By the provision of this section of the statute 'no deed * * * to the homestead * * * shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated,' this language is clear and unambiguous, and can only be construed as meaning that the homestead can be conveyed only by the husband and wife executing a joint deed. Under the provisions of the statute the deed executed by Martha James on September 24, 1913, was invalid, because not subscribed by the husband, and likewise the deed from Jacob James, executed on October 8, 1913, was invalid because not subscribed by the wife; and, each of these deeds being invalid, both of them will not operate as a valid conveyance. As was said in *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 684, wherein the court was considering the effect of separate mortgages on the homestead, one executed by the husband and the other by the wife:

"How, then, can it be said that two void instruments, one executed by the husband and the other by the wife, mortgaging the homestead, can have the effect of creating a lien? They are void for all purposes, whether considered separately or taken together."

As above stated, the judgment of Delchman and Prentice against the Bakers was secured while the premises in controversy were occupied as a homestead by the Bakers. The judgment was kept alive, and when the homestead was abandoned, and another established, then the interest of Maggie Baker in the land became subject to the claim of Delchman and Prentice, and when this interest was sold under the execution, and Delchman and Prentice became the purchasers, and the sale being approved by the proper court, and a deed duly issued, the rights so acquired by Delchman and Prentice became superior to any rights claimed by Earl Baker by virtue of his deed from Maggie Baker, for the reason that the deed not being joined in by J. N. Baker, the husband, the same was a nullity and conveyed no rights to the grantee. The land, notwithstanding the deed, remained the property of Maggie Baker and was subject to sale on execution the same as though the deed had never been executed.

[3] Plaintiff raises another question, and this is, "Whether Maggie Baker and J. N. Baker could in any case have a homestead in an undivided interest in the land." We fail to understand how plaintiff in error could obtain any advantage, even should it be held that no homestead character attached to the land involved. If the homestead character had not attached, then under section 1174, Rev. Laws of 1910, as construed in *Ward v. Wiggins* (Okl. Sup.) 174 Pac. 231, the attempted gift of Maggie Baker to Earl Baker was without any valuable consideration; such attempted gift was void against Delchman and Prentice, who held the judgment at that time against Maggie Baker. The deed from Maggie Baker to Earl Baker was not executed until June 26, 1913. Earl Baker testified that the land was given to him; however, it is not necessary to discuss this question.

It has been expressly held in this state that a tenant in common may have his homestead and is entitled to a homestead exemption in lands held in common. In *Atlas Supply Co. v. Blake*, 51 Okl. 778, 152 Pac. 601, in the body of the opinion the court said:

"The established rule in many jurisdictions that a tenant in common may have a homestead, and is entitled to a homestead exemption, in land held in common (21 Cyc. 505, and cases cited), should, under our policy of liberally construing the exemption law so as to afford protection to a debtor and his family in the possession of a home, obtain in this state. Accordingly, in the instant case the premises levied on constituted the homestead

of the defendant at the time of the creation of the debt sued on, and ever since."

To the same effect, see *Alexander v. Bobler* (Okl. Sup.) 166 Pac. 716.

We conclude that the judgment of the trial court should be affirmed, and it is so ordered.

JOHNSON, McNEILL, MILLER, NICHOLSON, and KENNAMER, JJ., concur.

(86 Okl. 161)

HOGAN et al. v. STATE INDUSTRIAL COMMISSION et al. (No. 12479.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Master and servant \S 417(7)—Decision of Industrial Commission without evidence reviewable under Compensation Law.

By the provisions of section 10 of article 2 of the Workmen's Compensation Law, as amended by section 10, c. 14, Laws 1919, the decision of the State Industrial Commission is made final as to all questions of fact; but this is so only when there is some evidence to support such decision, and, where there is absolutely no evidence to support such finding and decision, the same may be reviewed as a matter of law.

2. Master and servant \S 403—Burden on compensation claimant to show injury in employment.

In a proceeding before the State Industrial Commission, seeking compensation for an alleged injury, the burden of proof is upon the claimant to show by the evidence that the injury complained of was accidental, and arose out of and in the course of his employment.

3. Master and servant \S 361—Compensation award held unwarranted.

Evidence examined, and held, that there is no evidence to support the award.

(Additional Syllabus by Editorial Staff.)

4. Master and servant \S 361—Compensation payable only where claimant is an employee.

Compensation is payable only when the claimant is an employee within Laws 1915, c. 246, art. 1, \S 2, as amended by Laws 1919, c. 14, \S 1.

Appeal from State Industrial Commission.

Application by James Otto Cherry for an award under the Workmen's Compensation Act which was opposed by T. R. Hogan, transacting business as the Wilburton Gin Company, employer, and the United States Fidelity & Guaranty Company, insurer from an award by the Industrial Commission, the employer and insurer appeal. Award vacated, and cause reversed and remanded to the Industrial Commission, with direction to dismiss the claim.

Ross & Thurman, of Oklahoma City, for appellants.

S. P. Freelling, Atty. Gen., and R. E. Wood, Asst. Atty. Gen., for respondent State Industrial Commission.

G. B. Mitchell, of Wilburton, for respondent Cherry.

JOHNSON, J. The petitioners, who were the employer and insurance carrier, respectively, have filed their petitions in this court joining the State Industrial Commission and James Otto Cherry, who was the claimant, as respondents, to review an order and award made by the State Industrial Commission in a proceeding before it designated as No. 18641, wherein James Otto Cherry was claimant, T. R. Hogan doing business as Wilburton Gin Company, was respondent, and United States Fidelity & Guaranty Company was insurance carrier, which order was made on June 26, 1921, and was amended by an order made on July 6, 1921, required the respondent and insurance carrier to pay to the claimant compensation at the rate of \$8 per week for 250 weeks as for the loss of an arm, together with all medical bills. For convenience, reference will be made herein to the parties as they were named in the proceeding before the Industrial Commission.

Counsel for the respective parties agree that there is but one question here for determination; that is, whether the relation of master and servant existed between the applicant and T. R. Hogan, transacting business as Wilburton Gin Company, or was James Otto Cherry an employee of the respondent T. R. Hogan.

The undisputed facts, in substance, are that, on December 15, 1919, the respondent, T. R. Hogan, was operating a cotton gin at Wilburton, Okla., under the name of Wilburton Gin Company, and on that day had in his employ a superintendent and a ginner, the latter being named Green. On that day the claimant, James Otto Cherry, hauled a load of cotton to the gin, arriving about 10 o'clock a. m., and, finding a number of wagons to be unloaded ahead of him, he waited there until about 1:30 p. m., and was at that time standing in the doorway at the gin room, which contained four gin stands in a row, running east and west. The west gin stand became clogged, and Green, the ginner, went to it, raised the breast, and asked Cherry, who was standing near by to help him hold it. Thereafter the east gin became clogged and Green went to that gin stand. The additional weight of the breast being thrown on Cherry caused his hand and arm to be pulled down into the saws, which so tore his hand and forearm that it was necessary to amputate his arm. Cherry had never worked around a cotton gin, and had never engaged in any other occupation than

farming. Green had no authority from the respondent to employ additional help about the gin, and Cherry did not understand that Green, or any one else, intended to pay him for rendering the assistance requested by Green, and Cherry did not expect pay for such assistance.

[1, 2, 4] Section 2 of article 1, chapter 246, Session Laws 1915, as amended by section 1, c. 14, of the Session Laws of 1919, provides that compensation provided for in the act shall be payable for injuries sustained by employees. Subdivision 3 of section 3, art. 1, of the act provides that the term "employer" means persons, partnerships, associations, corporations, etc., employing workmen in hazardous employments. Subdivision 4 of the said section provides that "employee" means any person in the employment of any person, firm, etc., carrying on a business covered by the act. Subdivision 8 of said section provides that "wages" means the money rate at which the service is recompensed under the contract of hiring in force at the time of the accident.

It seems to us that it obviously follows from the above provisions of the Workmen's Compensation Law that compensation is payable only where the claimant is an employee under the quoted provisions, and that the Commission erred in concluding that the claimant was such employee.

In 1 Labatt's Master and Servant (2d Ed.) pp. 316 to 321, inclusive, this principle of law is stated as follows:

"88. Assent of Parties; Proposal and Acceptance.—As in the case of other contracts the formation of a binding contract of service may be established either by evidence which tends directly and specifically to show that one of the parties had accepted absolutely and without qualification the proposal of the other with regard to the performance of certain work, or by evidence which tends indirectly to prove the fact of acceptance—as, for example, that the alleged servant did the work in question with the consent and for the benefit of the alleged master, or that one of them, by some express declaration, recognized the other as his servant, or that he performed functions which only a person in the position of a servant was entitled to perform."

In 26 Cyc. 968, the law is as follows:

"The relation of master and servant arises only out of contract which, except where controlled by the statute of frauds, may be either express or implied, verbal or written; and may contain such terms and conditions as the parties see fit to make, provided they are not illegal and do not contravene public policy."

"A person who voluntarily assumes to act as the servant of another cannot recover for personal injuries as though he were in fact a servant. The fact that a volunteer was requested or ordered by a servant of his master to give his assistance will not authorize him to recover for personal injuries on the ground that he

thereby became a servant of the employer, unless, by reason of his position or the necessities of the case, such servant had authority to make the request." 26 Cyc. 1035.

In the case of Hot Springs R. Co. v. Dial, 58 Ark. 318, 24 S. W. 500, the court says:

"Appellant was making up a train at its depot at Hot Springs on the yard of the company, near the depot, at a street crossing, a bridge spanned the track. Appellee, a boy 15 years of age, was standing erect upon a freight car as it passed under the bridge, and, same being too low to admit his passage in the position, he was struck upon the head, and knocked from the car, receiving a severe scalp wound, from which he suffered greatly. * * * He sues the company, * * * alleging that he was induced to go upon the car by the conductor of appellant for the purpose of throwing off the brake," etc. "Where a railroad company has not given its conductor express authority to employ help, nor clothed him with the apparent authority, and there is no exigency requiring extra help, a boy of 15, who willingly obeys his request to assist on a car, is a trespasser, and, if injured, cannot recover from the company, in the absence of willful and gross negligence. * * * The proof shows that the conductor had no power to employ brakemen. The extent of his express authority was to control the movements of his train with such subalterns as were furnished him by the superintendent, who 'employed all men working on all trains' of the company. * * * No exigency supervened; no urgent circumstances were shown; nothing to call for the exercise of implied authority."

To the same effect see Mickelson v. New East Tintic R. Co., 23 Utah, 42, 64 Pac. 463; Langan v. Tyler, 114 Fed. 716, 51 O. C. A. 503.

"The relation of employer and employee is contractual. Like every other contractual relation, it is the product of a meeting of the minds. Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; 18 R. C. L. 490. To create the relation of employer and employee there must be an express contract, or such acts as will show unequivocally that the parties recognize one another as master and servant. 18 R. C. L. 493. It is essential to the existence of every contract of employment that it be definite and certain as to parties. Parsons v. Trask, 7 Gray (Mass.) 473, 66 Am. Dec. 502. By virtue of section 4 of the Workmen's Compensation Act, the obligation of the employer to pay, and the right of the employee to receive, compensation in accordance with the provisions of said act, becomes a part of every contract of service between every employer and employee covered by said act. Acts 1915, p. 393; Hagenback v. Leppert, 117 N. E. 531. To the employee this right to compensation is a precious element of the contract. One of the considerations, and an important one, which he gives for that right, is the relinquishment by himself and his dependents of all other rights and remedies at common law or otherwise for his injury or death arising out of the employment.

Section 6, W. C. A." Rogers et al. v. Rogers et al. (Ind.) 122 N. E. 778, 780.

The Supreme Court of Washington said:

"We think there can be no doubt of this premise, but the principles of the common law can be of little assistance to us in measuring the right of a workman to claim compensation under the industrial insurance law. It is the purpose of that law to compel the industries of the state to bear the burden of accidents occurring in their operation, and being in derogation of the common law, it cannot be construed so as to include those who do not, by words or necessary implication, come within its terms. * * * The law in its tenor and terms contemplates that the relation between employer and employee shall possess some element of certainty. It implies, if indeed it does not liberally provide, that there shall be an actual contractual relation between the parties—that is, an agreement to labor for an agreed wage or compensation." Hillestad et al. v. Industrial Insurance Commission, 80 Wash. 423, 141 Pac. 913, Ann. Cas. 1916B, 789.

[3] There is no evidence in this record upon which to base the conclusion that the relation of master and servant existed between the respondent, Hogan, and the claimant, Cherry, at the time of the injury, and, that being true, there can be no award justified under the Workmen's Compensation Law, and the award made by the State Industrial Commission should be vacated, and the cause is reversed and remanded to the Commission, with directions to dismiss the claim; and it is so ordered.

McNEILL, NICHOLSON, MILLER, and KENNAMER, JJ., concur.

(86 Okl. 149)

WHITEHEAD COAL MINING CO. et al. v. STATE INDUSTRIAL COMMISSION et al. (No. 12647.)

(Supreme Court of Oklahoma. May 9, 1922.)

(Syllabus by the Court.)

1. Master and servant ⇐417(7)—Commission's findings on evidence in compensation case conclusive.

When there is any evidence reasonably tending to support the order of the State Industrial Commission, such order is final and conclusive in this court. Under section 10, c. 14, Sess. Laws 1919, the decision of the State Industrial Commission is final as to all questions of fact, and cannot be reviewed by this court on appeal. Consolidated Fuel Co. et al. v. State Industrial Commission et al., 205 Pac. 170.

2. Master and servant ⇐419—Limitation inapplicable to review of compensation award.

Under article 2, § 12, c. 246, Sess. Laws 1915, the State Industrial Commission is au-

thorized, at any time, to review any award made by it upon its own motion or the application of any interested party upon the ground of change in condition, and the jurisdiction of the Commission after having once vested over a claim is continuing. The only limitation applicable to the Commission is the maximum amount to be paid to the injured employee under the law, and the limitation of one year for the filing of a claim from date of injury found in section 17 of the act is inapplicable.

3. Award modified and affirmed.

Record examined, and *held*, that the award be affirmed.

(Additional Syllabus by Editorial Staff.)

4. Master and servant ~~419~~—Wife of mentally incapable employee may present claim under Compensation Law.

Workmen's Compensation Law (Sess. Laws 1915, c. 246), must be liberally construed, and article 2, § 12, will not be construed to deny to the wife of the injured employee the right to call to the attention of the Industrial Commission by motion the claim of her husband, who, by reason of his injury, is mentally incapable of presenting his claim on account of change in condition after the award.

Action by the Whitehead Coal Mining Company, a corporation, and the Consolidated Underwriters, petitioners, against the State Industrial Commission and William Walsh, respondents, to reverse an award of the Industrial Commission in favor of William Walsh. Award modified and affirmed.

Simpson, Hummer & Foster, of Henryetta, (Con Murphy, Jr., of Kansas City, Mo., of counsel), for petitioners.

George F. Short, Atty. Gen., and Kathryn Van Leuven, Asst. Atty. Gen., for respondents.

KENNAMER, J. The Whitehead Coal Mining Company, a corporation, and the Consolidated Underwriters, petitioners, instituted this proceeding in this court against the State Industrial Commission and William Walsh, respondents, to reverse an award made on the 28th day of July, 1921, in favor of William Walsh, directing the petitioners to pay to the respondent \$18 per week until the termination of disability.

The record discloses that William Walsh was injured while in the employ of the Whitehead Coal Mining Company July 1, 1919, while working in a mine, by a rock falling upon his back; that on the 28th day of July, 1919, the Industrial Commission made an award to William Walsh, as claimant, awarding him the sum of \$17.31 per week to continue until termination of disability and that they pay all medical expenses incurred by the claimant not to exceed the sum of \$100; that the petitioners paid the award until September 3, 1919, when

William Walsh returned to work in the same employment as a coal miner, as an employee of the Whitehead Coal Mining Company, and continued to work at such employment until about the 15th day of March, 1921, at which time William Walsh became mentally incapacitated and was taken to the Hospital for the Insane at Vinita, Okla.

In July, 1921, Mrs. William Walsh, wife of William Walsh, filed a petition with the Industrial Commission asking for a review of the award made to William Walsh on the 28th day of July, 1919, alleging there had been a material change in the condition of the claimant William Walsh since the award of July 28, 1919, which was a direct result of the injury sustained by the respondent William Walsh; that the injury sustained had caused a permanent disability; that an X-ray examination had been made of the injury to Walsh, which disclosed a crushed vertebra in the dorsal region; that William Walsh, as a result of the injury, had a permanent stiff back; that the claimant William Walsh was being treated in the Hospital for the Insane at Vinita, Okla.

The petition for review of the award was set for hearing on the 28th day of July, 1921. After a hearing upon the petition at Henryetta before Commissioner H. C. Meyers and the introduction of testimony on behalf of the respective parties, the Commission, on the 25th day of August, 1921, made an award awarding William Walsh compensation from March 15, 1921, at the rate of \$18 per week to continue during disability.

The petitioners by this action seek to reverse this award and urge three propositions: First. There is no evidence supporting the order made by the Commission. Second. That the Commission, after having heard the testimony on the hearing for a review of the award, made an order that the claimant William Walsh undergo an examination to be made by Dr. Louis Bagby of Vinita, the examination to be made on August 25, 1921, and that before the examination was made on August 25, 1921, the award herein was made. Third. That the claim of William Walsh is barred under section 17, art. 2, c. 246, Session Laws 1915, requiring a claim for compensation to be filed within one year after the injury.

[1] Upon an examination of this record, it is obvious that there is no merit in this first contention made by counsel for the petitioners. Counsel in their brief have attempted to impose the duty upon this court of weighing the evidence and determining on which side of the controversy the weight lies. It is the settled law in this jurisdiction that this court will not weigh the evidence presented to the Industrial Commission for the purpose of ascertaining where the weight

of evidence lies or on which side it preponderates. Section 10, c. 14, Session Laws 1919; Choctaw Portland Cement Co. et al. v. Lamb et al., 79 Okl. 109, 189 Pac. 750; Board of County Commissioners of Cleveland County v. Barr et al., 68 Okl. —, 173 Pac. 206; Raulerson v. Industrial Commission of Oklahoma et al., 76 Okl. 8, 183 Pac. 880; Consolidated Fuel Co. et al. v. Industrial Commission et al. (Okl. Sup.) 205 Pac. 170.

Dr. W. L. Stevenson, a regular licensed physician who has practiced medicine for 13 years, testified on the hearing for a review of the award made by the Commission that he had been the family physician for the claimant William Walsh for 12 years; that he had the claimant under his observation and treatment ever since his injury until he was carried to the hospital; that Dr. Fisherman, of Oklahoma City, made an examination of the claimant in his presence and that he assisted in making the examination; that they gave the claimant various tests and that he had considerable vertigo; that he could not stand on one foot or with his feet close together; that his back was very stiff and he would fall forward. Dr. Stevenson stated positively in his testimony that the claimant was never sick before in his life prior to the injury, except with smallpox, and that his present condition was the direct result of the injury received by him.

The evidence was uncontradicted that Walsh received a serious injury by a heavy rock falling from the roof of the mine on his back.

The report of Dr. Louis Bagby, the physician who made the examination of the claimant, which the petitioners complain was not before the Commission at the time the award was made, shows that he made an X-ray of the spine of the claimant, and that the X-ray examination disclosed a lesion of the body of the third lumbar vertebra and a slight lateral deviation in the lumbar region.

The evidence of witnesses who worked with the claimant tended to show that he had never recovered from the injury inflicted upon him by the falling rock. With all this evidence in the record, counsel for the petitioners say in their brief that there is no evidence supporting the award made by the Commission. This assertion is based upon the assumption that the Commission was bound to give more weight to the evidence of certain medical experts that examined the claimant and who gave testimony in effect that the mental condition of Walsh was due to the disease of syphilis, which was disclosed by the positive Wasserman reaction as shown by the report and laboratory findings of Dr. C. J. Fisherman.

Counsel for petitioners admit that Dr. W. L. Stevenson stated that the injury contrib-

uted to the present condition of insanity by lowering the vitality of the respondent, but that his evidence is not to be given any weight because he is not a graduate of a school of medicine, and that his evidence is in direct conflict with the testimony of physicians who are graduates. This very contention made by counsel for the petitioners destroys their first proposition that the award of the Commission is not supported by any evidence and shows conclusively that the petitioners are seeking to have this court weigh the evidence. The only purpose for which this court will examine the testimony in this class of cases is with a view of ascertaining whether or not there is any substantial evidence supporting the award. This court, in the case of Associated Employer's Reciprocal & Missouri Valley Bridge Co., Corporations, Petitioners, v. State Industrial Commission, Respondents, 83 Okl. —, 200 Pac. 862, did announce the rule that where the award of the Commission is not supported by any evidence then the award should be reversed. The rule announced in this case is in harmony with the rule universally adhered to by the courts that an award cannot be sustained without proof of the essential prerequisites imposed by the statute, such as the fact that there was an accident resulting in an injury and the relation of employer and employee. However, the authorities support the rule that the finding of the Commission does not require so much evidence to support it as a finding made by a court, although such finding must be supported by substantial evidence. Nevertheless it is not necessary that such finding be supported by a preponderance of the evidence. Workmen's Compensation Acts C. J. 115; Englebreton v. Ind. Acc. Comm., 170 Cal. 793, 151 Pac. 421; Voelz v. Industrial Commission, 161 Wis. 240, 152 N. W. 830.

We are clear in this case that there is substantial evidence in the record authorizing the award made by the Commission, and that it was not necessary for the Commission to delay the award awaiting for the report of Dr. Bagby, who made an examination of the claimant. The better practice, however, would be for the Commission, after having ordered the claimant to undergo an examination, to wait a reasonable time for the examination to be made, if such an examination would materially aid the Commission in arriving at a just conclusion. But it would not be necessary for the Commission to delay its award where the Commission is satisfied that the claimant is entitled to an award.

As counsel for the petitioners have only complained under their second proposition as to the action of the Commission in making the award prior to the filing of the report of Dr. Bagby, it is not necessary to give further attention to this contention.

[2] The third proposition argued by counsel for the petitioners is that under section 17, art. 2, c. 246, Session Laws 1915, the claim of the claimant Walsh is barred. That part of the section relied on is as follows:

"The right to claim compensation under this act shall be forever barred unless within one year after the injury, a claim for compensation thereunder shall be filed with the Commission."

We are unable to concur in this contention. The statute only required that the claimant make a claim within one year from the date of the injury, and it is admitted that the claimant did make his claim within one year from the date of his injury and an award was thereon made. But this statute nowhere limits the time within which the claimant may file an application for a review of an award made by the Commission. It is true in this case, over one year intervened between the time the claimant ceased to receive compensation and the date of the application for a review of the award, but article 2, § 12, c. 246, Session Laws 1915, provides:

"Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the Commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Act, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall effect such award as regards and money already paid."

This section of the statute does not provide any limitation of time within which a review of an award must be made, but only prescribes as a prerequisite that there has been a change in conditions. Furthermore, the statute specifically authorizes the Commission upon such showing being made to review an award at any time. This section of the statute also answers the contention made by counsel that the wife of the claimant had no right to have the award reviewed for the claimant. It is clear from this section of the statute that the award may be reviewed, not only upon the motion of any interested party, but upon the motion of the Commission.

[4] The rule has been repeatedly announced by this court that the Workmen's Compensation Law must be liberally construed in favor of the injured employee. It would be a most narrow construction of section 12, supra, to deny to the wife of the injured employee the right to call to the attention of the Industrial Commission, by motion, the claim of her husband, who by reason of his injury is mentally incapable of present-

ing his claim. It is apparent that the award for \$18 per week was made through error, and should have been for \$17.31 per week. The same is modified in this respect.

[3] The award of the Industrial Commission in this cause as modified is affirmed.

HARRISON, C. J., and JOHNSON, KANE, and MILLER, JJ., concur.

(38 OkL 168)

AULTMAN & TAYLOR MACHINERY CO. v. FUSS. (No. 10674.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 301, 870(5) — Two methods of presenting error in overruling demurrer to petition stated.

When a defendant desires to present to this court as error the overruling of a demurrer to the petition, it may be presented by two methods: First, saving the proper exception, and having the appeal lodged in this court within six months from the date of the order; second, by saving the proper exception and incorporating in the motion for new trial the error of the trial court in overruling the demurrer, and perfecting his appeal to this court within six months from the date of overruling the motion for new trial.

2. Executors and administrators \S 154—The term "alienate" in statute relating to alienation of property of estate signifies its wrongful transfer.

The term "alienate" as used in section 6324, Rev. Laws 1910, signifies the wrongful transfer of such property to another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alien—Alienate—Alienation.]

3. Executors and administrators \S 154—Party alienating deceased's property prior to administrator's appointment is liable for twice its value.

A party guilty of alienating the property of deceased after his death, and prior to the time of the appointment of administrator, is liable in damages to the administrator for twice the value of the property alienated.

4. Executors and administrators \S 450—Evidence held to support a verdict against defendant for alienating deceased's property.

Record examined, and held, that the evidence is sufficient to support the verdict of the jury that the property had been alienated within the meaning of section 6324, Rev. Laws 1910.

5. Executors and administrators \S 450, 451 (3) — Instruction that defendant's acts amounted to alienation of deceased's property approved; recovery would be twice the remainder after subtracting the amount of lien from the value of the property; evidence held sufficient to sustain verdict for plaintiff.

Record examined, and held, the instructions submitted the question of facts to the jury un-

der proper instructions, and there was sufficient evidence to support the finding of the jury, and the judgment will not be disturbed.

Appeal from District Court, Grant County; J. W. Bird, Judge.

Action by J. H. Fuss, administrator of the estate of B. E. Smith, deceased, against the Aultman & Taylor Machinery Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

J. G. McKelvy and E. H. Breeden, both of Medford, for plaintiff in error.

C. S. Ingersoll, Sam P. Ridings, and A. C. Glenn, all of Medford, for defendant in error.

McNEILL, J. This action was commenced in the district court of Grant county by J. H. Fuss, administrator of the estate of B. E. Smith, against the Aultman & Taylor Machine Company, to recover damages for alienation of certain property belonging to the estate of B. E. Smith prior to the appointment of the administrator. The petition alleged that B. E. Smith died on the 14th day of April, 1917, and was the owner of a threshing machine of the value of \$2,000; that on the 8th day of May, 1917, and prior to the appointment of an administrator of the estate of deceased, the defendant through its authorized agent took possession of and converted to its own use and alienated the threshing machine, and delivered possession to J. T. Smith. It is alleged that the threshing machine was of the value of \$2,000 and judgment is prayed for in the sum of \$4,000. To this petition the defendant filed a demurrer which was overruled by the court.

Thereafter the defendant filed an answer and cross-petition. The answer admitted that Smith died as alleged in the petition; that he was the owner of the property described in the petition; and alleged further that the property was not of the value to exceed \$1,500 and at the time of the death of the deceased the defendant held a chattel mortgage on the same of more than \$1,700, and further alleged that it felt itself insecure, and found the property in control of J. T. Smith, a brother of deceased, and made a contract whereby Smith executed his note and chattel mortgage on the property as collateral security for the indebtedness of B. E. Smith. A copy of the agreement made with J. T. Smith was attached to the answer. The defendant for cross-petition alleged that B. E. Smith was indebted to the defendant on two promissory notes secured by chattel mortgage on the threshing machine, the total amount of said notes was approximately \$1,900, and asked to have the mortgage foreclosed. The case was tried to a jury, and the verdict returned in favor of plaintiff and against the defendant for \$1,558.50. Judgment was rendered on the verdict, and from

said judgment the defendants have appealed.

[1] For reversal the defendant presents numerous assignments of error. It is first contended the court erred in overruling the demurrer to the petition for the reason the petition failed to state facts sufficient to constitute a cause of action, because the petition failed to allege the administrator had made a demand for possession of the property prior to bringing of suit. The plaintiff in error has waived this question because it did not appeal within six months from the date of the order overruling the demurrer, nor did it incorporate as error the overruling of the demurrer in its motion for new trial. If this error had been presented in the motion for new trial, the same could be considered at this time. See *Brooks v. Watkins Medical Co.*, 81 Okl. 82, 193 Pac. 956. This was not done, and the error cannot now be considered.

[2, 3] It is next contended there is no evidence to support the verdict or judgment of the court because the evidence is insufficient to support a finding that the plaintiff in error had alienated or embezzled the property. The plaintiff in error contends the words "embezzle or alienate" as used in section 6324, R. L. 1910, means the fraudulent taking or passing the possession of property, and must be so steeped in fraud as to place the property beyond the reach of the administrator, and thereby cause the same to be lost to the estate. The Supreme Court of California, in defining embezzlement and alienation as used in the statute of that state, which is almost identical with our statute, in the case of *Jahns v. Nolting*, 29 Cal. 508, stated as follows:

"To embezzle, as the term is employed in section 116, is to fraudulently appropriate to one's own use, or conceal the effects of the estate which such person has in his possession; and to alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. An action of the nature of an action of trover may be brought by the administrator, without the aid of section 116, against any person who has embezzled or alienated the personal property of the estate, prior to the grant of administration; and that section does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss—that is, the time intermediate the death of the deceased and the issuing of the letters of administration."

The above case has been followed and cited by courts of different states in several opinions, and correctly defines the term "alienation," and we know of no case holding to the contrary. A party who wrongfully takes possession of the property of a dece-

dent after his death and prior to the time of the appointment of administrator cannot pass title even if he does alienate the same. If he alienates the same and transfers the possession to a third party, this is all he can do, and amounts to wrongful conversion and alienation of the property. Section 6324, R. L. 1910, as held in the case of Jahns v. Noltling, supra, increases the amount of damages for such a wrongful conversion. The evidence in this case disclosed about the following facts:

[4, 5] Smith prior to the time of his death had left a threshing machine close to Pond creek on the farm of a party by the name of Adams. J. T. Smith, the brother of decedent, wrote the defendant in error regarding the machine. The agent of the plaintiff in error came to Grant county and entered into a written agreement with Smith. The agreement recites that J. T. Smith assumed the indebtedness of B. E. Smith, the deceased, which indebtedness was evidenced by certain promissory notes, and J. T. Smith agreed to give his notes, which were to be held as collateral, and also a chattel mortgage to secure said collateral notes, the chattel mortgages on the threshing machine which is the property claimed to be alienated. It also contains the following recital:

"The party of the second party (being J. T. Smith) accepts the machine where it stands and as it stands without any warranty of any nature on the same."

The agreement provides that the agreement shall not be binding until accepted by the company. The agent for the company, Mr. Bass, testified in substance that he dealt with J. T. Smith because he (J. T. Smith) wanted to take over the outfit and pay for it. So he turned it over to him, drew up the agreement, and turned it over to him as far as the part of the company was concerned, and he turned it over to him by virtue of the agreement, and took a mortgage from J. T. Smith on the threshing machine to secure the indebtedness. Smith testified that he assumed the indebtedness of the company, and, after making the agreement, he took possession of the property according to the company's instructions; that he took possession by virtue of the agreement with the company, and had possession of the machine since said time, and had been using the machine, and in fact at the time of the trial had paid the company a part of the notes executed by him.

The evidence further disclosed that B. E. Smith at the time of his death had very little property, but owed some debts. Other creditors of B. E. Smith applied for letters of administration, and had J. H. Fuss, who appears to have no interest in the controversy, appointed administrator. After being appointed the administrator commenced this action for damages. The plaintiff in

error contends that the agreement existing between the company and J. T. Smith must be construed by the court whether it amounts to an alienation, and cite the case of Bales v. N. W. Consolidated Milling Co., 21 Okl. 421, 96 Pac. 599. The administrator relies not only upon the contract but the evidence offered by the plaintiff in error to support the contention that this contract, together with the acts of the company and Smith, amounts to alienation and conversion of the property. The contract between J. T. Smith and the plaintiff in error is indefinite. It is hard to tell what the written contract between Smith and the defendant company might be termed. The construction the parties placed upon it, according to the evidence of the agent of the company and by Smith himself, was that the company was transferring possession of this property to Smith, and he was to take the property, and use it and pay the company's indebtedness. The agent of the company stated that he was turning the property or all their right and interest in the property to Smith. This presents a question of fact.

The court in instruction No. 7 advised the jury in substance if they found the effect and result of the acts and conduct of the company amounted to alienation of the property it could not avoid the result of its acts or evade liability by applying any other name to said transaction. We think this was a proper instruction, and under these facts submitted the question to the jury as to whether the acts and conduct of the defendant company amounted to alienation. The jury by their verdict found the same amounted to an alienation. This court in a long line of decisions has announced the rule, if there was any evidence reasonably tending to support the verdict of the jury the same will not be disturbed on appeal. We think the evidence sufficient to support a finding that the acts and conduct of the defendant amounted to an alienation of the property by the defendant to Smith.

It is next contended that the court erred in instructing the jury as to the amount of recovery if the plaintiff should recover. The plaintiff in error contends that the court should have advised the jury the amount of recovery would be the value of the property, less the amount of the lien upon said property, and then double that amount, and, if the lien was more than the value of the property, the plaintiff could not recover. The statute is plain and unambiguous, and makes no reference to a lien, and the contention is contrary to the holding in the case of Litz v. Exchange Bank of Alva, 15 Okl. 564, 83 Pac. 790. The instruction of the court followed the statute, and was not erroneous. The court advised the jury, they could offset the amount of the lien of the defendant. This portion of the instruction is not questioned.

The other assignments of error refer to the other instruction of the court. An examination of the instruction disclosed that the case was submitted to the jury upon proper instructions.

For the reasons stated, the judgment is affirmed.

PITCHFORD, V. C. J., and JOHNSON, NICHOLSON, MILLER, and KENNAMER, JJ., concur.

(56 Okl. 174)

CROSBIE et al. v. NATIONAL BANK OF COMMERCE et al. (No. 10695.)

(Supreme Court of Oklahoma. May 16, 1922.)

(Syllabus by the Court.)

1. Contracts \S 152—In interpretation the court may not substitute one word for another, unless otherwise would involve absurdity or unreasonable result.

The language of a contract is to govern its interpretation, and the court in construing the contract has no authority to substitute one word, for another, unless in interpreting the language according to its real meaning would involve an absurdity, or produce an unreasonable result, or unless the contract is ambiguous and it becomes necessary to do so to express the real intent of the parties to the contract.

2. Contracts \S 152—Words are to be understood in their popular sense, unless given a special meaning by usage.

Under and by virtue of section 948 and 954, Rev. Laws 1910, the language of the contract is to govern its interpretation, and the words are to be understood in their ordinary and popular sense, or unless a special meaning is given to them by usage, in which case the latter must follow.

3. Escrows \S 5—"Peaceable possession" in escrow agreement used to contradistinguish from disputed or contested possession.

The word "peaceable" in connection with the word "possession" in its ordinary and popular sense is used as contradistinguished from disputed or contested possession, and that it shall be under a claim of ownership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Possession; Second Series, Peaceable and Adverse Possession.]

4. Appeal and error \S 1010(1)—Judgment on the general findings will be reversed, where not supported by competent testimony.

When there is a trial by a court without the intervention of a jury, and the court makes a general finding in favor of one of the parties and against the other, and there is no competent testimony reasonably tending to support the judgment, the same will be reversed on appeal.

5. Appeal and error \S 1010(1)—Record held to show no competent evidence to support the judgment.

Record examined, and held: There is no competent evidence to support the judgment of the court, and the judgment is reversed.

Appeal from District Court, Wagoner County; Benjamin B. Wheeler, Judge.

Action by J. E. Crosbie and others against the National Bank of Commerce and others, in which W. A. Brigham, by permission, intervened. From a judgment in favor of the intervener the plaintiffs appeal. Reversed and remanded for new trial.

C. A. Steele and W. A. Daugherty, both of Tulsa, for plaintiffs in error.

David A. Kline, of Muskogee, for defendant in error Brigham.

MCNEILL, J. J. E. Crosbie et al. commenced this action against the National Bank of Commerce of Coweta to recover \$1,200 deposited in said bank by the terms of an escrow agreement executed by H. C. Zeigler and W. A. Brigham; H. C. Zeigler having assigned his interest to Crosbie and Gillespie. The agreement was dated March 17, 1914, and was substantially as follows: That W. A. Brigham had executed and delivered to Zeigler a certain oil and gas lease on certain land situated in Wagoner county and part of the consideration was that Zeigler was to pay \$1,200 bonus, the agreement recited that there was a possibility of defect in the title of Brigham whereby Zeigler might be deprived of the peaceable and quiet possession of the same. The agreement then reads as follows:

"It is therefore agreed between the parties hereto that said \$1,200 shall now be deposited in the National Bank of Commerce of Coweta, Okl., and there remain for the space of 120 days from this date, at the end of which time, if the title to said property in said W. A. Brigham, shall not have been questioned and brought in issue by legal proceedings, or the said H. C. Zeigler has not thereby been deprived of the peaceable possession thereof by reason of such legal proceedings, then the same sum of \$1,200 shall be unconditionally turned over and paid to said W. A. Brigham. This agreement shall be deposited with and remain in said bank for the space of 120 days from date, and may be examined by but not removed therefrom, by either party hereto. In case such adverse proceedings should be begun during said time, it is agreed that said H. C. Zeigler may withdraw said \$1,200 or use the same or such part thereof as may be necessary in defending our common interest, as may be then agreed upon between the parties hereto, but in no event shall said H. C. Zeigler, or his assigns, surrender the possession of said premises to any stranger to this agreement except to his associates J. E. Crosbie, F. A. Gillespie, and F. D. Zeigler."

The petition alleged that in pursuance to the above agreement the \$1,200 was deposited in the bank; that on the 14th day of July, 1914, and within 120 days from the 17th day of March, John S. Bilby brought an action in the district court of Wagoner county against W. A. Brigham, H. C. Zeigler, and a tenant of Brigham by filing a petition in said court and causing summons to be issued thereon, and alleged in the petition that Bilby was the owner of the premises and entitled to possession. The plaintiff further alleged that Zeigler had not withdrawn the \$1,200 from the bank; that on the 23d day of July, 1914, he executed to the agent of the plaintiffs an order for said money, and that demand had been made for payment of the same and was refused. Plaintiff claims that under and by virtue of the escrow agreement and the commencement of the suit of John S. Bilby against Brigham and Zeigler within 120 days, Zeigler was entitled to return of said money.

To this petition the bank filed an answer, claiming no interest in said money. W. A. Brigham by permission of the court intervened, and admitted execution of the escrow agreement, and asked that he be decreed to be entitled to \$1,200 under the agreement. He further alleged that the suit filed by Bilby did not disturb Zeigler in possession of his oil and gas lease, and further alleged the plaintiffs induced Bilby to bring said suit in order to avoid the payment of said \$1,200. The plea of intervention was amended, and a further plea made that Brigham obtained a judgment in the federal court against John S. Bilby quieting his title, that the suit of John S. Bilby in the district court against Brigham and Zeigler terminated in favor of Brigham. He further pleaded that a separate oral agreement, and as a part of the consideration of the contract it was agreed between Brigham and Zeigler that nothing should be said to any person, and John S. Bilby in particular, about the matter or interest which Zeigler had by virtue of his lease, and Zeigler violated said agreement, and that was the direct cause of Bilby instituting the suit within 120 days. With the issues thus framed the cause was tried to the court without a jury. The bank deposited the money with the court clerk, and is no longer interested in the controversy. The court in announcing his judgment stated as follows:

"The court holds and interprets this contract to mean that in order to defeat the right of W. A. Brigham to the \$1,200 put in escrow, not only must the title to said property in said W. A. Brigham have been questioned, and brought in issue by legal proceedings, but in addition to that said H. C. Zeigler must have been thereby deprived of the peaceable possession of said land under the lease given by Brigham to Zeigler by reason of such legal proceedings."

The court then rendered judgment in favor of Brigham for possession of said money. From said judgment the plaintiffs have appealed.

For reversal it is contended that the court erred in interpreting the contract to mean that to defeat the right of Brigham to the \$1,200, not only must the title to said property in Brigham have been questioned and brought in issue by legal proceedings, but in addition to that Zeigler must have been thereby deprived of peaceable possession.

[1] The interpretation the court placed upon the contract is erroneous, and cannot be sustained without changing the word "or" to "and." Courts have no authority to substitute the word "and" for "or," unless in construing the contract, according to its real meaning, would involve an absurdity, or produce an unreasonable result, or unless the contract is ambiguous, and it becomes necessary to do so to express the intent of the parties. The contract recites that Brigham is entitled to the money, if the title in Brigham shall not have been questioned and brought in issue by legal proceedings, or if Zeigler has not been deprived of peaceable possession by reason of said legal proceedings. In order for Brigham to prevail it was necessary for him to show first that the title had not been questioned and brought in issue by legal proceedings. It is admitted that the title was brought in question by legal proceedings by John Bilby within 120 days by filing a petition in the district court of Wagoner county.

Counsel for Brigham, however, contends that the record fails to disclose that a summons was issued in the Bilby suit. The record does not disclose whether a summons was issued and served or not, but the record does disclose that Brigham filed an answer and cross-petition in the action so the effect of the suit under those circumstances would relate back to the date of filing the petition.

[2] The court cannot indulge in the presumption that, although the petition was filed within 120 days, no summons was issued until some time thereafter. The evidence upon behalf of Brigham is insufficient to support a finding that no action was commenced within 120 days. In order to sustain the judgment in favor of Brigham for the money it is also necessary that the record disclose that the action commenced did not deprive Zeigler of peaceable possession. There is no contention that Zeigler was deprived of actual possession, but the question for consideration is whether the filing of an action which questioned the title of the person in possession, and seeks to cancel the instrument on which he bases his title, deprive him of peaceable possession. In construing contracts, this court is to be guided by the statute which provides how

contracts must be construed. Section 948, R. L. 1910, provides:

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Section 954, R. L. 1910, provides as follows:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

[3] By applying the above statutory enactments we must presume that the parties to the contract used the term "peaceable possession" in its ordinary and popular sense when applying to possession of real estate.

The Supreme Court of Alabama, in the case of *Southern Ry. Co. v. Hall*, 145 Ala. 224, 41 South. 135, stated as follows:

"The word 'peaceable' in connection with the word 'possession' is used 'as contradicting distinguished from disputed or contested possession, and that it shall be under claim of ownership.' *Adler v. Sullivan*, 115 Ala. 587, 22 So. 87."

This same interpretation is also reflected in the following cases: *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87; *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259; *Allaire v. Ketcham*, 55 N. J. Eq. 168, 35 Atl. 900; *Bowers v. Cherokee Bob*, 45 Cal. 495; *Bradley v. McPherson* (N. J. Ch.) 58 Atl. 105; *Logan v. Meade* (Tex. Civ. App.) 98 S. W. 210. By applying the above interpretation to the words "peaceable possession" the filing of the proceedings by Bilby whereby he attempts to have canceled and declared for naught the interest of both Brigham and Zeigler had the force and effect of contesting and disputing Zeigler's possession and deprive him of peaceable possession. This idea is further substantiated by referring to a latter portion of the contract which provided:

"In case such adverse proceedings should be begun during such time, it is agreed said H. C. Zeigler may withdraw said \$1,200 or," etc.

If the proceeding questioned the title of Brigham and Zeigler, he would be deprived of peaceable possession and entitled to a return of the money.

It therefore follows in accordance with the contract there is no evidence to support the judgment of the court which awarded to Brigham the money in question. Even as the court interpreted the contract the facts are undisputed Zeigler was deprived of peaceable possession, by reason of the commencement of the proceedings within 120 days. There being no competent evidence reasonably tending to support the judgment, it is the duty of this court to reverse the judgment. *Tate v. Coalgate State Bank* (Okl. Sup.) 180 Pac. 687.

[4, 5] The defendant in error, however, contends judgment should be sustained for the reason that the finding of the court was a general finding, and would include the finding that the action of Bilby was brought at the solicitation or by the procurement of the plaintiff. There is no evidence in the record to support such a finding. The evidence disclosed that Mr. Dillard, as attorney representing the plaintiff in this case prior to the 120 days, attempted to obtain a quitclaim deed from Mr. Bilby, which Mr. Bilby refused to give. Mr. Bilby testified that prior to that time he had employed attorneys to bring proceedings to recover the possession of the land. The evidence is insufficient to support the judgment in favor of Brigham upon this ground. This was a jury case, and if there is any evidence reasonably tending to support the judgment, the case will not be reversed, but this court has announced where there is no evidence to support the judgment of the court the judgment will be set aside. This is the only theory the defendant in error seeks to sustain the judgment, and this position is not well taken.

For the reasons stated, the case is reversed, and the cause remanded for a new trial.

PITCHFORD, V. C. J., and JOHNSON, NICHOLSON, MILLER and KENNAMAR JJ., concur.

(86 Okl. 139)

OHIO DRILLING CO. et al. v. STATE INDUSTRIAL COMMISSION et al.
(No. 12933.)

(Supreme Court of Oklahoma. May 2, 1922.)

*(Syllabus by the Court.)***1. Master and servant §347 — Compensation Law valid exercise of police power.**

Chapter 246 of Session Laws 1915, which requires all employers, including partnerships, engaged in certain hazardous occupations therein enumerated to provide compensation according to certain schedules for all accidental injuries without regard to fault upon the part of said employer arising out of or in the course of employment, and such diseases and infections as may naturally and unavoidably result therefrom, by one of three methods prescribed in the act, and places the supervision and administration thereof under the State Industrial Commission, provides penalties for violations of the act, and abrogates the right of action to recover damages not resulting in death, except a right of action reserved to the State Industrial Commission, for the benefit of an injured employee, is within the authority of the Legislature, and the enactment thereof was a legitimate exercise of the police power of the state.

2. Master and servant §417(7) — Industrial Commission's decision on questions of fact in compensation case final.

By the provisions of section 10 of article 2 of the Workmen's Compensation Law (chapter 246, Session Laws 1915) the decision of the State Industrial Commission is made final as to all questions of fact, and on appeal to this court from an award of the Industrial Commission the court is without jurisdiction to weigh the evidence for the purpose of determining whether the same preponderates in favor or against the findings of fact made by the Industrial Commission.

3. Master and servant §361 — Partner injured in partnership business held entitled to compensation as "employee."

Where the business of a partnership is such as comes within the provisions of the Workmen's Compensation Law of this state, which compels the partnership to comply with the provisions of the law requiring it to provide compensation for its injured employees by furnishing insurance in one of the ways provided for in the act, which was done by the partnership by contracting with an insurance company for that purpose, and where the partnership was composed of four members, who were the sole employees of such partnership in carrying on its business, and one of whom happened to be accidentally injured under the circumstances that would entitle an employee who was not a member of the partnership to compensation, likewise entitled the injured partner to compensation where the four members of the partnership performed all the labor incident to its business and did not hire other employees to perform the labor, and where each member of the partnership drew the same wage, which was paid from the earnings of the partnership,

and the net income from the business of the partnership was equally divided between the four members thereof, the Industrial Commission was correct in holding that such injured employee was entitled to the compensation provided by the schedule of the act, and the order of the Commission awarding such compensation should be affirmed; and it is so ordered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Law by O. D. Hupp for compensation for injuries, opposed by the Ohio Drilling Company, employer, and the Aetna Life Insurance Company, insurance carrier. Award by the State Industrial Commission for claimant, and employer and insurance carrier appeal. Affirmed.

Moss & Owen, of Tulsa, for petitioners.

George F. Short, Atty. Gen., and Kathryn Van Leuven, Asst. Atty. Gen. for respondents.

JOHNSON, J. The petitioner seeks by petition to this court, with a transcript of the proceedings had before the State Industrial Commission attached to such petition, a review by this court of the following award made to the claimant, O. D. Hupp, to wit:

"Now on this 7th day of December, 1921, this cause comes on to be determined on the claimant's claim for compensation for an injury which he alleged occurred to him while in the employment of the Ohio Drilling Company on the 22d day of September, 1920, near Slick, Okl., and the Commission having considered the testimony taken at a regular hearing at Cushing, Okl., on the 22d day of November, 1921, before a member of the Commission, at which hearing the claimant appeared in person and the respondent and insurance carrier were represented by H. M. West, and, having all the records on file in said cause and being otherwise well and sufficiently advised in the premises, finds the following facts:

"(1) That the claimant herein was in the employment of the Ohio Drilling Company, and was engaged in a hazardous occupation within the meaning of the statute, and that while in the employment of said respondent and in the course of his employment the claimant received an accidental injury, on the 22d day of September, 1920.

"(2) That as a result of said accident the claimant suffered the loss of use of the index finger on the left hand.

"(3) That the respondent had proper notice of said accident, and the employee filed his claim for compensation with the Commission within the statutory period.

"(4) That the claimant's average wage at the time of his injury was \$14 per day.

"The Commission is therefore of the opinion that by reason of the aforesaid facts the claimant is entitled, under the law of compensation,

at the rate of \$18 per week for a period of 35 weeks.

"It is therefore ordered that within 10 days from this date the Ohio Drilling Company, or the Aetna Life Insurance Company, pay to the claimant compensation computed from the 22d day of September, 1920, at the rate of \$18 per week, and continue said payments weekly for a period of 35 weeks until the sum of \$630 is paid, and also pay all medical expenses incurred by said claimant as a result of said accident."

The petitioners' assignments of error are:

"(1) There was no evidence submitted to the Commission which warranted the Commission in finding that the claimant was an employee of the Ohio Drilling Company, and such finding by the Commission was unwarranted, and has no basis in the evidence offered before the Commission, and could not be found as a fact, there being no evidence introduced which made it legally possible for the commission so to find.

"(2) The evidence at the hearing conclusively established that the claimant was not an employee of the Ohio Drilling Company, and that the said Ohio Drilling Company was a copartnership, and that the said C. D. Hupp was one of the members of such copartnership.

"(3) That the only finding that the Commission had a legal right to make, in view of the evidence offered before it, was that the claimant, C. D. Hupp, was not an employee of the Ohio Drilling Company, and that the Ohio Drilling Company was a copartnership, and that said C. D. Hupp was one of the copartners.

"Wherefore, upon final determination, petitioners pray that such award or decision be reversed and vacated."

Concerning these assignments of error, counsel for petitioners say in their brief:

"This is an appeal from an order of the State Industrial Commission, awarding compensation to C. D. Hupp on account of an injury sustained by him. The Commission found that Hupp was an employee of the Ohio Drilling Company, and that while so employed he was injured, and entitled to compensation, and the Ohio Drilling Company and the Aetna Life Insurance Company, the insurance carrier, were ordered to pay the compensation awarded. It was contended at the hearing before the Commission that Hupp was not an employee of the Ohio Drilling Company, but that the Ohio Drilling Company was a copartnership, and that Hupp was one of such copartners. The Commission found that Hupp was an employee of the Ohio Drilling Company, and awarded certain compensation. This appeal was perfected to review such decision on the ground that the finding of the Commission to the effect that Hupp was an employee was without any support whatever in the evidence. We understand that the law is that if there is any evidence whatever to support the Commission's finding, it is conclusive as to any question of fact. It is our contention, however, that there was absolutely no evidence upon which the Commission could base the finding."

It is perfectly clear that the evidence of the claimant, which was the only evidence

introduced upon the subject, showed that the Ohio Drilling Company was a copartnership, and that Hupp was one of the partners. It is true that the claimant, in response to the second question asked him, which was as to for whom he was working at the time of the injury, answered such question by saying that he was working for the Ohio Drilling Company. He makes perfectly clear, however, in his evidence, that the Ohio Drilling Company was a copartnership composed of himself, B. W. Hupp, John Lowry, and Billy Coon; that these four men owned the tools and participated equally in the profits; that they each took out \$14 per day until the tools were paid out; that they four partners were the only employees of the partnership.

Counsel cite in support of their contention the decision of the Industrial Commission of this state in the case of Albert G. Kirby v. New Model Laundry, Aetna Life Insurance Co., Insurance Carrier (No. 681) Okl. Ind. Com. Rept. 62, where, in the syllabus the Commission said:

"Under the Workmen's Compensation Law of Oklahoma, a member of the partnership who works as a driver of an automobile delivery wagon for said partnership and while so engaged fractures his arm is not an employee within the meaning of the act. Compensation denied."

In the body of the opinion in this case, it was stated as follows:

"The Commission has not been favored by any briefs in this case, and we have been unable to find any American cases on this proposition.

"The British act, in defining employer and employee, is similar to ours, and we have found a number of British cases construing their law.

"In the case of Ellis v. Ellis & Co. [1905] 92 L. T. 718, 7 W. C. C. 97, it was held:

"When partners entered into an agreement that one of their number should act as a working foreman and he received 33 shillings a week for his services as such in addition to his share of the profits, it was held that his widow was not entitled to compensation from the other partners because of the death of such foreman partner by accident, as he was not a workman within the meaning of the act."

Counsel have cited no other cases in support of their contention, and we know of none, and it is apparent in the instant case that the Industrial Commission has reversed itself, and thereby refuses to follow its decision in the Kirby Case, supra.

[3] We are constrained to approve the holding of the Commission in the instant case. Section 2 of Workmen's Compensation Act, c. 246, Session Laws 1915, as amended by chapter 14, § 1, Session Laws 1919, provides compensation shall be payable for injuries sustained by employees engaged in hazardous employments, which include the

business of drilling wells by machinery, and subdivision 1, § 3, c. 14, provides that hazardous employment shall mean manual or mechanical work or labor connected with or incident to one of the industries named in section 2.

And section 3, subdivision 3, of chapter 246, Session Laws 1915, provides that:

"'Employer,' except where otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association, or corporation, employing workmen in hazardous employments, and shall include the state, county, city or any municipality when engaged in any hazardous work within the meaning of this act in which workmen are employed for wages."

Subdivision 4 provides:

"'Employee,' means any person engaged in manual or mechanical work, in the employment of any person, firm or corporation carrying on a business covered by the terms of this act."

Section 1 of article 3 of chapter 246 of Session Laws 1915, as amended by section 11, at page 22, chapter 14, Session Laws 1919, provides that:

"An employer shall secure compensation to his employees in one of the following ways: (a) By insuring and keeping insured the payment of such compensation" by some one of the character of the insurance companies named in the section.

[1,2] The Workmen's Compensation Law, chapter 246, Session Laws 1915, has been uniformly held valid by this court against all attacks made upon it upon constitutional or other grounds. The reasons therefor were given in detail and at great length by this court in the case of *Adams v. Iten Blacuit Co.*, 63 Okl. 52, 162 Pac. 938, in an exhaustive opinion by Hardy, J., and in *Wick et al. v. Gunn et al.* (Okl. Sup.) 169 Pac. 1087, 4 A. L. R. 107; *Booth & Flynn, Ltd. v. Cook et al.*, 79 Okl. 282, 193 Pac. 36, and many other decisions of this court might be cited to the same effect. Likewise the act amendatory of the original act (chapter 14, Session Laws 1919) has been sustained by this court, and a very recent case is that of *Missouri Valley Bridge Co. v. State Industrial Commission*, 207 Pac. 562, decision April 25, 1922, not yet officially reported, wherein it was held, among other things, that the decision of the State Industrial Commission is made final as to all questions of fact, and on appeal to this court from an award of the Industrial Commission the court is without jurisdiction to weigh the evidence for the purpose of determining whether the same preponderates in favor or against the findings of fact made by the Commission. Also, that these acts creating the Industrial Commission and defining its powers were a prop-

er exercise of the police powers of the state by the Legislature, and were a departure from, and in derogation of, the common-law rule of damages, and that under section 2048, Rev. Laws 1910, should be liberally construed so as to accomplish the legislative intent.

The Attorney General, in his brief in support of the doctrine announced in the decision, *supra*, the case of *City of Milwaukee v. Henry Miller et al.*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847, which is a very exhaustive opinion by Marshall, Justice, where, in the syllabus it is said:

"3. In construing a statute which is referable to the police power and was originated to promote the common welfare, supposed to be seriously jeopardized by the infirmities of an existing system—the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be embodied in the enactment, and the effects and consequences as regards responding to the prevailing conception of the necessities of public welfare should be considered and the enactment given such broad and liberal meaning as can be fairly read therefrom so far as required to effectively eradicate the mischiefs it was intended to obviate.

"4. Proper administration of the Workmen's Compensation Act requires appreciation of the manifest legislative purpose to abolish the common-law system regarding injuries to employees as unsuitable to modern conditions and conceptions of moral obligations, and erect in place thereof one based on the highest present conception of man's humanity to man and obligations to members of the employee class—one recognizing every personal loss to an employee, not self-inflicted, as necessarily entering into the cost of production and required to be liquidated in the steps ending with consumption.

"5. In dealing with a personal injury claim under the Workmen's Compensation Act, the logic and makeweights formerly supposed to justify penalizing employers as wrongdoers, to the ultimate expense of consumers, should not be allowed to play any part; but the directly responsible party should be regarded as standing for the aggregate of consumers and joining with the injured person in submitting to the sound judgment of impartial administrators the question of how much, under all the circumstances, by legislative standards, should the public be burdened as a reparation to such person or his dependents for his or their loss."

As we have seen, counsel for the insurance carrier's sole contention is that the finding of the Commission that the claimant was an employee of the Ohio Drilling Company was without evidence to support it, because the evidence showed that the claimant and three other persons named constituted the Ohio Drilling Company, and that the same was a partnership.

The other findings of the Commission, that the claimant received accidental injuries in the employment of the Ohio Drilling Company and engaged in a hazardous occupation,

within the meaning of the statute and in the course of his employment, and that as a result of said accident the claimant suffered the loss of use of the index finger on the left hand, and that the claimant's average wage at the time was \$14 per day, are in no way assailed.

We think that the construction of the Workmen's Compensation Act that a member of a partnership, who works for the partnership, and while so engaged is injured, is not an employee within the meaning of the act, is an exceedingly narrow construction of the act, where the sole reason therefor is that stated in the British case, *supra*, that a member of the partnership cannot place himself into the position of being a workman employed when he is one of the persons giving employment, and to so hold in the instant case would fail to satisfy the rule announced that the act should be liberally construed so as to effect the legislative intent. We see no good reason why the members of a partnership cannot jointly or severally perform the work or labor incident to the success of the joint undertaking and at the same time draw wages from the earnings of the partnership.

The undisputed testimony of the claimant that the claimant and three others constituted the Ohio Drilling Company, a partnership, and that they shared equally in the profits and each drew wages at the rate of \$14 per day, and divided the excess profits equally among themselves, would not preclude the partnership when engaged in a hazardous business from coming within the provisions of the Workmen's Compensation Law, but, on the contrary, would compel the partnership to comply with the provisions of the law requiring it to provide compensation for its injured employees by furnishing insurance in one of the ways provided for in the act, and as it seems was done by the partnership in contracting with the insurance carrier herein for that purpose; and where the four members of the partnership were the sole employees of such partnership in carrying on its business, and one happened to be accidentally injured, affords no reason for holding that in these circumstances there was any infringement of the provisions of the act, or breach of any contract for indemnity with the insurance carrier. The character of the business of the partnership brought them clearly within the provisions of the act, and the fact that the members of the partnership performed the labor incident to its business rather than hire other employees to perform the labor it seems in no way hazarded the risk of the insurance carrier or gave it any reasonable excuse for avoiding its obligation to the partnership or to the state.

We think that the Industrial Commission properly held as a matter of law under the

facts in the case that the claimant was entitled to compensation, and therefore the action of the Commission in so holding is affirmed.

HARRISON, C. J., and McNEILL, NICHOLSON, and KENNAMER, JJ., concur.

(36 Okl. 182)

BUSH et al. v. MISSOURI STATE LIFE INS. CO. et al. (No. 10704.)

(Supreme Court of Oklahoma. May 23, 1922.)

(Syllabus by the Court.)

1. Trusts \S 247—Beneficiary, who is real party in interest, may sue without joining trustee.

Where a contract is entered into with one as trustee for the benefit of another, who is the real party in interest, the latter may sue thereon in his own name, without joining the trustee.

2. Parties \S 25—Any person having or claiming interest in controversy adverse to plaintiff, who is necessary party, may be made defendant.

Any person, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of settlement of the questions involved, may be made a party defendant. *Haynes v. City National Bank of Lawton*, 30 Okl. 614, 121 Pac. 182.

3. Pleading \S 204(2)—Where pleading states facts entitling to any relief, general demurrer should not be sustained.

Where a pleading states any facts upon which the pleader is entitled to any relief under the law, a general demurrer should not be sustained thereto.

4. Insurance \S 629(1)—In action on life insurance policy petition held to state cause of action.

Record examined, and held, that the petition of the plaintiffs states a cause of action and that the trial court committed reversible error in sustaining the general demurrer of the defendant to the plaintiffs' petition.

Appeal from District Court, Oklahoma County; George W. Clark, Judge.

Action by Victoria Bush and another against the Missouri, State Life Insurance Company and another to recover upon a life insurance policy. Judgment entered sustaining demurrer to plaintiffs' petition, and they appeal. Reversed and remanded, with directions.

W. A. Smith, of Oklahoma City, for plaintiffs in error.

Keaton, Wells & Johnston, of Oklahoma City, and Jourdan, Rassieur & Pierce, of St. Louis, Mo., for defendant in error Missouri State Life Ins. Co.

Embry, Johnson & Kidd, of Oklahoma City, for defendant in error *Ætna Bldg. Ass'n.*

KENNAMER, J. Victoria Bush and Frank A. Bush, a minor, by Victoria Bush, next friend, plaintiffs in error, prosecute this appeal to reverse a judgment of the district court of Oklahoma county, sustaining a general demurrer filed by the Missouri State Life Insurance Company, one of the defendants in error, to the plaintiffs' petition and a judgment of the court sustaining a motion of the *Ætna Building Association of Las Vegas, N. M.*, defendant in error, quashing the service of summons made upon said defendant in error. The parties appear here the same as they appeared in the trial court, and will be referred to as plaintiffs and defendants.

The action was commenced by the plaintiffs to recover the sum of \$1,000, alleged to be due them on a life insurance policy issued by the Missouri State Life Insurance Company on the 18th day of May, 1914, insuring the life of Lewis A. Bush. The material allegations of the plaintiffs' petition, necessary to be considered in determining this cause, are as follows:

That the defendant Missouri State Life Insurance Company made its contract of insurance in writing insuring the life of Lewis A. Bush in the sum of \$1,000, according to the terms of a contract attached and made a part of the plaintiffs' petition. That prior to the execution of the life insurance contract about the 18th day of May, 1914, Victoria Bush and Lewis A. Bush, her deceased husband, negotiated a loan of \$800 on some real estate in Oklahoma City with the *Ætna Building Association of Las Vegas, N. M.* That, as a part of said loan contract, the *Ætna Building Association* required the plaintiff and her husband, Lewis A. Bush, to procure and carry a life insurance policy in the sum of \$1,000 on the life of Lewis A. Bush. The premiums on said life insurance policy to be paid by the plaintiff and her husband in monthly payments required to liquidate said loan. That such a policy was issued by the Hartford Life Insurance Company of Hartford, Conn., said policy being a ten-year renewable term. That some time prior to the expiration of the first term of said insurance so issued, the same was taken over and assumed by the defendant the Missouri State Life Insurance Company, and that, on the 18th day of May, 1914, the policy sued on herein was issued by said defendant. That said policies as written were payable on the death of Lewis A. Bush to the *Ætna Building Association*, trustee, or its successors or assigns.

That the plaintiffs have not the possession of said policies, the originals being in the possession and control of one or both of the defendants. That the loan contract between

the plaintiff, Victoria Bush and Lewis A. Bush, her deceased husband, and the *Ætna Building Association* was an ordinary loan contract, consisting of a note in the sum of \$800, secured by a real estate mortgage on certain property in Oklahoma City, to be paid off by monthly payments at the rate of \$20 per month. The loan contract was entered into in Oklahoma City, and the life insurance was applied for in said city.

That a verbal agreement and understanding was entered into with reference to the life insurance, in which it was agreed that out of the monthly payments made to the *Ætna Building Association*, the premiums on the life insurance policy were to be paid by the *Ætna Building Association*, named as trustee in the life insurance policy. That the *Ætna Building Association* was named as trustee in the policy as beneficiaries for the wife and son of the insured, plaintiffs in this action, and that, when any valid indebtedness due the *Ætna Building Association* had been paid, any balance due on the insurance policy, in case of death of insured, would be payable to the plaintiffs, and that this agreement was assented to by the life insurance company.

That, on October 13, 1915, a full settlement was made with the defendant, *Ætna Building Association*, and the loan and indebtedness fully paid and settled, but that the said loan company continued to pay the premiums due upon the life insurance policy including December, 1917. That Lewis A. Bush, the insured, on the 28th day of December, 1917, died and due proof satisfactory to the Missouri State Life Insurance Company of his death had been made and that said defendant life insurance company had signified its willingness to pay the amount due on the policy to the person or persons entitled thereto. That the *Ætna Building Association*, trustee, was claiming the whole proceeds of said policy and refusing to account to the plaintiffs for the same. That the *Ætna Building Association* had paid premiums since the settlement of the loan due it by the plaintiff Victoria Bush and her deceased husband in the sum of \$41.86, which amount the plaintiffs tender to the defendant, *Ætna Building Association*.

The plaintiffs prayed the judgment of the court decreeing that the *Ætna Building Association* had no interest in or to the proceeds of said property other than the amount of premiums paid in the amount of \$41.46, and that said association be decreed trustee for the plaintiffs only and for judgment against the Missouri State Life Insurance Company for the amount due on the policy with 6 per cent. interest.

On the filing of the petition, the plaintiff secured a restraining order from the court, directed to the Missouri State Life Insurance Company, restraining said insurance company

from paying the proceeds of the policy to the Aetna Building Association. Constructive service of summons was made on the defendant Aetna Building Association.

A general demurrer filed by the defendant Missouri State Life Insurance Company to the petition of the plaintiffs was sustained by the trial court. The first questions for our consideration is whether or not the trial court erred in sustaining the demurrer.

Counsel for the defendant life insurance company contend that, under the allegations of the petition, the Aetna Building Association was the holder of the legal title of the cause of action and was the party for whose benefit the contract of insurance was taken out, and owned the chief beneficial interest in the insurance at the time of the execution of the policy. It may be conceded that, on the date of the execution of the policy, that the building association had the chief beneficial interest in the contract of insurance for the obvious reason the loan, which the plaintiff Victoria Bush and her husband, Lewis A. Bush, had procured from said building association, had not been paid; but, under the allegations of the petition, which are admitted to be true by the demurrer, the beneficial interest of said building association on the date of the death of Lewis A. Bush, the insured, had been extinguished by the payment of the loan.

The policy of insurance shows upon its face that the Aetna Building Association, named as beneficiary in the policy, was the beneficiary in a representative capacity as trustee, but it does not disclose by its terms as to whom the beneficiary was trustee for, and to that extent the policy is ambiguous and the term "Aetna Building Association, trustee," was subject to explanation by oral testimony. The allegations of the petition are that the Aetna Building Association was beneficiary trustee for the plaintiffs in this action and that the conditions of the trust had been fully performed; that, under the agreement, which was assented to by the life insurance company, the trust which the beneficiary was named in the policy, to wit, the liquidation of the loan, had been fully performed. It is obvious, under these allegations admitted to be true by the demurrer, that the plaintiffs in this action are entitled to the proceeds of the policy, and that the petition stated a cause of action. It is clear that, if the allegations of the petition are true, the plaintiffs are the real owners of the proceeds of the policy and entitled to the same. We fail to perceive of any valid reason why, if the allegations of the petition are true, that the plaintiffs were not entitled to maintain this action against the defendant Missouri State Life Insurance Company.

[1-3] It is apparent, under the allegations of the plaintiff's petition, that, in case of

death of the insured, the Aetna Building Association, named as beneficiary in the policy, was only entitled to receive the proceeds of the policy for the purpose of discharging the indebtedness owed by the insured to the beneficiary named in the policy. Without the existence of this indebtedness, the beneficiary, under the allegations of the petition, is not entitled to receive the proceeds of the policy. In this situation it is clear that the defendant Missouri State Life Insurance Company, by answer may present an issue as to whether the plaintiffs are entitled to the proceeds of the policy or pay the proceeds of the policy into court and move the court to have the defendant Aetna Building Association made a party defendant and summoned to show what interest, if any, it has in the proceeds of the policy.

Under the allegations of the petition, the plaintiffs in the action are the real parties in interest. In this jurisdiction any person who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of settlement of the questions involved, may be made a party defendant. *Haynes v. City Nat. Bank of Lawton*, 30 Okl. 614, 121 Pac. 182; *Edmondston et al. v. Porter* (Okl.) 162 Pac. 692.

Under section 4722, Revised Laws 1910, "in actions which relate to, or the subject of which is, real or personal property in this state" a nonresident defendant, claiming an interest in such property, may be summoned by publication. It is quite clear, under this section of the statute, on the payment of the proceeds of the policy claimed by a resident and a nonresident beneficiary into court, the court would have jurisdiction of the res and that summons by publication could be made upon any nonresident defendant claiming an interest in the property. Then the judgment of the court in the action would be conclusive upon the nonresident defendant asserting an interest in the property.

Counsel for the defendant life insurance company contend for the rule that the trustee of an express trust is the real party in interest and entitled to maintain the action, the trustee being the holder of the legal title of the cause of action, citing in support of this rule 30 Cyc. p. 92; *Weed v. Hamburg-Bremen Fire Insurance Co.*, 133 N. Y. 394, 31 N. E. 231; *Minnesota Thresher Mfg. Co. v. Heipier*, 49 Minn. 395, 52 N. W. 33. We have no fault to find with the rule announced in these authorities, but we fail to recognize any applicability of the rule to the facts pleaded in the petition of the plaintiffs in the instant case. Assuming the allegations of the petition filed by the plaintiffs in the case at bar to be true, the very purpose for which the trust was created had been fulfilled, and, un-

der the allegations of the petition, the life insurance company was under a contractual obligation to recognize the plaintiffs as the real beneficiaries of the policy of insurance.

Many authorities support the rule that it does not matter, because the trustee may maintain the action, that the beneficiaries of the trust may also maintain the action. *Rice v. Savery*, 22 Iowa, 470; *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. 877. The rule as to the right of a trustee or the beneficiary of a trust to maintain an action is stated in 30 Cyc. p. 86, as follows:

"The trustee of an express trust or the person with whom or in whose name a contract is made for the benefit of another may sue in his own name alone, or he may sue with the beneficiary as a party; or the beneficiary may sue in his own name as real party in interest."

Under sections 3421 and 3422 of the Revised Laws 1910, it is the mandatory duty of a foreign insurance company to file with the insurance commissioner of this state a certified copy of its charter, statement of its financial condition and deposit with the commissioner at least \$100,000 worth of securities in order to be permitted to do business in this state; also constitute and appoint the insurance commissioner its lawful attorney upon whom all lawful process in any action or legal proceeding against it may be served. The primary purpose of these statutes was to insure the citizens of this state, doing business with foreign insurance companies, of their financial responsibility to discharge their legal obligations and to bring such companies within the jurisdiction of the courts

of this state, for the purpose of enforcing any just claim against such companies.

[4] Our conclusion in this case is that the petition of the plaintiffs stated a cause of action; that, under the allegations of the petition, the plaintiffs are entitled to enforce the obligation of the defendant life insurance company to recognize them as the rightful beneficiaries to the proceeds of the policy on which the action is based. Therefore the trial court committed reversible error in sustaining the general demurrer of the defendant insurance company to the petition of plaintiffs. The plaintiffs, having failed to appeal from the order of the trial court quashing the motion of the Aetna Building Association to quash the service of summons within six months from the date the order was entered, this court is without jurisdiction to review the action of the court in sustaining said motion. However, in view of the conclusion reached in this cause, it is not material at this time. If either party desires that the defendant Aetna Building Association be made a party defendant in the further prosecution of this action, service of process may be made as heretofore suggested.

The judgment of the trial court sustaining the demurrer of the defendant insurance company is reversed, and the cause is remanded to the district court of Oklahoma county, with directions to overrule the demurrer and order said defendant to answer the petition of the plaintiff and proceed with the cause, in accordance with the views herein expressed.

HARRISON, C. J., and JOHNSON, KANE, and MILLER, JJ., concur.

(35 Okl. 148)

ATCHISON, T. & S. F. RY. CO. v. McCURDY,
County Treasurer. (No. 10597.)

(Supreme Court of Oklahoma. May 9, 1922.)

(Syllabus by the Court.)

1. Counties \S 191—Revenue from automobile license taxes held to be for road purposes, so that excise board need not deduct it in estimating needs for fiscal year.

By virtue of section 11 of Session Laws of Oklahoma 1915, c. 173, p. 329, providing that 90 per cent. of all moneys received by the department of highways from automobile license tax should be paid to the treasurer of the respective counties in which the individual owners paying such license tax reside, to be used only on the druggable roads of the county, *held*, that such moneys so received constitute a special fund created for a special purpose, and that the county excise board, in estimating the current needs of the county for the fiscal year, need not deduct such probable income from the estimated needs of the county.

2. Counties \S 191—Excise board not required to deduct from estimated current expenses the gross production tax invalid as to Indian lands.

The gross production tax provided for under chapter 39, Session Laws Ex. Sess. 1916, being invalid as to restricted Indian lands (*E. A. Gillespie v. State of Oklahoma*, 257 U. S. —, 42 Sup. Ct. 171, 66 L. Ed. —, October term, 1921), the county excise board of Osage county was not required to deduct from the estimated current expenses for the fiscal year beginning July 1, 1917, and ending June 30, 1918, the estimated income to be derived from the gross production tax.

Appeal from District Court, Osage County;
R. B. Boone, Judge.

Two actions by the Atchison, Topeka & Santa Fé Railway Company against E. J. McCurdy, County Treasurer of Osage County, to recover taxes alleged to have been in excess of the amount authorized and required by law were consolidated, and from a judgment sustaining a demurrer to the Railway Company's petition, it appeals. Affirmed.

Cottingham, Hayes, Green & McInnis, of Oklahoma City, for plaintiff in error.

A. L. Jeffrey, of Pawhuska, for defendant in error.

KENNAMER, J. The Atchison, Topeka & Santa Fé Railway Company, a corporation, instituted two actions in the district court of Osage county against E. J. McCurdy, county treasurer of Osage county, to recover \$408.79 taxes paid by the railway company alleged to have been in excess of the amount authorized and required by law. The actions were consolidated. The trial court sustained a demurrer to the railway company's petition. This appeal is prosecuted

by the railway company to reverse the judgment of the court sustaining the demurrer filed by the county treasurer.

Two questions are presented by this appeal for determination: First. Should the excise board of Osage county have deducted from its estimate for current expenses of the county for the fiscal year beginning July 1, 1917, and ending June 30, 1918, the estimate of income to be derived from automobile license taxes? Second. Income to be derived from the gross production tax.

[1] Counsel for the railway company assert that because the petition alleged that the excise board included in its estimate of needs for the county \$10,000 for the county road maintenance fund of said county, and, the truth of this allegation being admitted by the demurrer, that the trial court committed error in sustaining the demurrer. We are unable to concur in the contention made by counsel for the railway company. By virtue of section 11 of Session Laws of Oklahoma 1915, c. 173, p. 329, the county excise board is without authority to make any estimate as to what purpose funds received by the county from automobile license tax may be expended. It is specifically provided in this statute that the 90 per cent. of all moneys received by the counties through the department of highways should be used on the druggable roads of the county and for such purpose only. It is quite clear in this situation that the county excise board in making up an itemized estimate of the needs of the county for current expenses has nothing to do with the funds derived from automobile license tax, and the reasonable inference is that the board in preparing its statement of current expenses, including a county road maintenance fund, did so in contemplation of the law providing how the funds arising from the motor license tax must be expended.

The contention of counsel for the railway company seems to be made upon the assumption that the fund derived from the motor tax when paid to the county treasurer becomes a part of the item estimated by the excise board for a county road maintenance fund. We are unable to concur with counsel in this assumption or the conclusion reached. The county excise board has nothing to do with making an estimate for the expenditure of this fund for the obvious reason the statute does not vest the board with any discretion in the matter, but specifically provides how the fund should be expended. It is a special fund to be used only for a special purpose, and is therefore not to be deducted from any estimate made by the county excise board for current expenses or any item of current expenses such as road maintenance. *Atchison, Topeka & Santa Fé Railway Co. v. Johnson, Treasurer* (OkL.

Sup.) 204 Pac. 910, not yet officially reported; *St. Louis & S. F. Ry. Co. v. Bockoven*, County Treasurer, 75 Okl. 145, 182 Pac. 507.

[2] The case of *F. A. Gillespie v. State of Oklahoma*, 257 U. S. —, 42 Sup. Ct. 171, 66 L. Ed. —, decided by the Supreme Court of the United States, October term, 1921, in which the gross production tax arising from restricted Indian lands was held to be invalid, is controlling of the second question presented by this appeal.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

HARRISON, C. J., and JOHNSON, KANE, and MILLER, JJ., concur.

(111 Kan. 271)

UNITED STATES FIDELITY & GUARANTY CO. v. GRABSKE et al.
(No. 23722.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Evidence \S 444(2)—Written contract, complete in itself, cannot be altered by prior or contemporaneous oral agreements.

When parties have deliberately put their engagements in a written contract in itself complete, it is deemed to be the best evidence of their agreement, and it is not competent for one of them to assert or show that there were oral, prior, or contemporaneous negotiations and understandings as to conditional liability which are inconsistent with and contradictory of those in the written contract.

(Additional Syllabus by Editorial Staff.)

2. Evidence \S 442(1)—Indemnitor could not avoid liability by showing agreement with agent inconsistent with the written bond.

In action on indemnity bond, indemnitor could not avoid liability by showing agreement of its agent inconsistent with the bond, which was complete in itself and free from ambiguity.

Appeal from District Court, Wyandotte County.

Action by the United States Fidelity & Guaranty Company against Theodore T. Grabske and another. Demurrer to defendant's answer sustained, and defendant named appeals. Affirmed.

W. G. Holt and J. K. Cubbison, both of Kansas City, Mo., for appellant.

W. L. Wood, of Kansas City, Kan., for appellee.

JOHNSTON, C. J. This was an action brought by the United States Fidelity & Guaranty Company upon an indemnity bond given by Theodore T. Grabske, to indemnify

the plaintiff against loss on a contract of suretyship. It was decided that the answer of the defendant did not state a defense, and from that ruling Grabske appeals.

From the pleadings it appears that Albert H. Nooney entered into a contract with the board of education of Kansas City to furnish material and install a heating apparatus in a high school building. He procured the guaranty company to give a bond that the contract would be carried out. Before doing so, the guaranty company required Nooney to give a bond indemnifying it against loss by reason of its suretyship. That bond was signed by Grabske, and this action is brought thereon. It appears that Nooney failed in the performance of his contract with the board of education and the guaranty company were obliged to pay a considerable sum of money to the board of education under its contract of guaranty. Grabske's defense was set up in an answer, and was to the effect that he had been invited by one Taylor, the agent of the guaranty company, to sign the bond, and that as a consideration for signing it Taylor represented that he had arranged with the board of education that no money should be drawn by Nooney on the contract without the consent of Taylor, and that Taylor assured him that no money would be paid on the contract, except under the directions of Taylor that he would not permit any money to be drawn for materials until it had been used on the building, and would permit no money to be paid to Nooney for personal use or the payment of his own labor, but that the guaranty company had failed to do so, and he insisted that therefore he was not liable on the bond. A demurrer to this answer was sustained, and the question is whether the written contract may be enlarged or affected by the alleged oral agreement.

[1, 2] It is elementary that a written contract, in itself complete and free from ambiguity, cannot be altered or enlarged by showing prior or contemporaneous oral agreements, where the writing purports to be a full expression of the agreement. When parties have deliberately put their engagements in a written contract, it is deemed to be the best and only evidence of their agreements, and it is not competent for one of them to assert or show that there were conditions or limitations of liability different from those specified in the writing. The indemnity contract in question is a complete instrument which purports to embody the conditions upon which the liability of defendant should depend. The pleaded oral agreement so closely relates to the subject-matter of the writing as to be in fact a part of the transaction, and not only adds conditions not in the writing, but some of them are contrary

to its terms and obligations. In such a case all prior or contemporaneous negotiations and understandings are deemed to be merged in the contract, and must be determined from the writing itself. *Van Fossan v. Gibbs*, 91 Kan. 866, 139 Pac. 174, and cases cited; *Stevens v. Inch*, 98 Kan. 306, 158 Pac. 43; *Underwood v. Viles*, 106 Kan. 287, 187 Pac. 881, and cases cited.

The court ruled correctly in sustaining the demurrer to defendant's answer, and its judgment is affirmed.

All the Justices concurring.

(111 Kan. 214)

ROCK v. GAEDE. (No. 23496.)

(Supreme Court of Kansas. May 6, 1922.)

(Syllabus by the Court.)

1. Sales ¶116, 177—Defect in goods delivered under another contract not ground for rescission or repudiation.

The buyer has no right to rescind, or refuse to perform, a contract for the purchase of a quantity of flour on the ground that a shipment of the same brand, made under a separate contract between the same parties, had proved unfit for use, particularly where earlier shipments had been satisfactory.

2. Sales ¶384(6)—Flour manufacturer, who bought wheat to fill contract for delivery of flour, could on buyer's renunciation of contract recover decline in price of wheat.

Where a milling company contracts for the future delivery of flour of its own manufacture and thereupon buys and holds wheat to enable it to fill the contract, upon the renunciation of the agreement by the buyer before the flour is made, the company may, in an action for damages for the breach of the contract, recover the loss occasioned by the decline in the price of wheat from the time it was purchased until such renunciation.

3. Sales ¶384(2)—Seller may await expiration of period for delivery on buyer's cancellation of contract, and recover difference between agreed price and market price at end of such period.

Where after the execution of a contract for the future delivery of flour to be manufactured by the seller the buyer without right undertakes to cancel it, the seller may await the expiration of the period fixed for delivery, and then recover damages based upon the difference between the agreed price and the market price of the flour at the end of such period, or at the time the refusal to accept delivery was treated by him as final.

4. Appeal and error ¶1042(5)—Refusal to strike out separate defense held harmless, in view of its subsequent withdrawal.

Minor rulings considered.

Appeal from District Court, Wilson County.

Action by Charles F. Rock against John C. Gaede. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Glen A. Wisdom, of Kansas City, Mo., and J. L. Stryker and D. J. Sheedy, both of Fredonia, for appellant.

E. D. Mikesell, of Fredonia, for appellee.

MASON, J. The Wichita Flour Mills Company has for several years been making a brand of flour called "Kansas Expansion." On August 7, 1917, John C. Gaede, who operates a bakery at Fredonia, ordered from it 150 barrels of that flour at \$13.40 a barrel, to be shipped within 30 days, the order being accepted. On August 19 the buyer sent a letter, stating that he canceled the order. The statement was repeated in a letter of September 2, which the seller appears to have accepted as a cancellation of the contract. The seller executed an assignment of its claim against the buyer by reason of his breach of contract to Charles F. Rock, who sued him thereon. A verdict was returned in favor of the defendant, on which judgment was rendered. The plaintiff appeals.

The ground upon which the defendant gave notice of his cancellation or refusal to perform the contract was that a half car of Expansion flour, which he had begun using after its execution, had proved unfit for use—was incapable of making marketable bread. Evidence was introduced by him tending to support this claim. The plaintiff complains of an instruction to the effect that the jury should return a verdict for the defendant if they found that the flour of that shipment was unfit as alleged, and believed that he was justified in canceling his order for the later shipment on that account. The defendant testified that he had used at least one car of Expansion flour before that complained of, and had no fault to find with it. In response to his complaint regarding the half car shipment the Mills company wrote that—

"Every sack of Kansas Expansion is just like every other sack, and our laboratory tests insure its being so."

To this the plaintiff replied:

"Of course you claim that Kansas Expansion is the same always, but we beg to differ with you, it was all right until the last car we got."

[1] A buyer who has contracted for flour cannot be required to accept an article that will not make bread. *Kaull v. Blacker*, 107 Kan. 578, 193 Pac. 182. But it does not follow that one who has contracted with the manufacturer for flour of a designated brand may, without liability, refuse to accept it because a shipment of the same brand, pur-

chased under a separate contract, proves unfit for that purpose, where former shipments have been satisfactory. The breach of one contract does not justify the aggrieved party in refusing to perform another. 13 C. J. 613; Williston on Sales, § 467, p. 806, note 84; Brunswig v. Grain Co., 100 Kan. 261, 265, 164 Pac. 154. The flour alleged to have been unfit for use was furnished upon a different contract from that here sued upon, and the fact that each related to the furnishing of flour of the same brand does not so connect the two contracts as to justify treating them as one for the purpose of taking the case out of the general rule. The statement in the letter of the mills company (which the defendant contradicted) that all Expansion flour was alike cannot be deemed to establish conclusively, even against the company, that the flour that would have been shipped under the contract of August 7, would have been precisely like that of the shipment complained of. There seems no reason to assume that it would have resembled that rather than the earlier shipments with which no fault was found, and at any rate the buyer had no right to rescind the new contract because of the seller's breach of the prior contract, or upon his belief in the probability, however well founded, that the flour furnished under it would be unfit for use. As was said in a quite similar case, the buyer's "anticipation of nonperformance, however reasonable under the circumstances, would not have been a justification for * * * rescinding or repudiating the second contract." *Hanson & Parker v. Wittenberg*, 205 Mass. 819, 326, 91 N. E. 383, 384. The first paragraph of the syllabus of that case reads:

"Where there are two independent contracts between the same persons for the furnishing of certain goods of the same kind and quality at different times, the fact that the seller has committed a breach of the first contract by furnishing goods inferior to those required by the contract and by failing upon demand to furnish goods of the kind and quality required, does not justify the buyer in assuming that the seller also will break his second contract for a further supply of like goods, and, although the buyer may be reasonably apprehensive of a like breach of the second contract, he has no right to rescind or repudiate the second contract before it has been broken by the seller."

We conclude that the bad quality of the flour delivered under the prior contract could afford no valid ground for the cancellation of or refusal to perform the contract here involved.

[2] 2. The plaintiff in his petition alleged that in accordance with its practice the mills company upon the making of its contract with the defendant purchased 675 bushels of wheat at the market price of \$2.88 for use in filling the order, and that by August 19 the price had declined 73 cents, so that it

suffered a loss of \$494.75. The instructions adopted this measure of damages in case of a verdict against the defendant. The plaintiff in his brief states that he asked permission, which was denied, to amend his petition so as to present as an alternative measure of damages the difference between the contract price of the flour and its market value at the time of delivery. The abstract shows his request to have been merely a general one for leave to amend the petition to conform with the evidence. This, however, is not now important. If the case is to be retired it is desirable that a correct rule be adopted as to the amount of damages recoverable.

Inasmuch as the contract was to supply a brand manufactured by the seller, it is obvious that the parties had in mind that the flour was not on hand; that it was to be made to fill the defendant's order. Where the buyer repudiates an executory contract to purchase an article to be manufactured by the seller, various tests have been applied to determine the amount of damages recoverable. Illustrative cases are collected in a note in 58 C. C. A. 363, 377, 380. The effort always is to apply a rule that will make good the actual loss under the particular facts of the case. Where no steps have been taken in performance of the contract and no expenses have been incurred in preparation for it, the correct rule would appear to be the one sometimes adopted, allowing a recovery of the value of the bargain, measured by the difference between the contract price of the article and what it would cost to produce it. A more common rule which may lack something in strict accuracy, but which has the advantage of being easier of application, is to allow the difference between the contract price and the market price at the time and place of delivery, the same as in cases where the seller is not the manufacturer. It has been held that in a contract for the delivery of flour by the manufacturer it is competent for the parties to agree that the seller's damages in case of a refusal by the buyer to accept delivery should be measured by the difference in the market price of wheat at the time of the contract and at the time of its breach. *Sheffield Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180, 115 N. E. 1014; *Sheffield Milling Co. v. Jacobs*, 170 Wis. 389, 175 N. W. 796. It has also been held that (in the absence of a specific agreement) no recovery can be had on account of the depreciation in the price of wheat purchased or contracted for, between the making of a contract to furnish flour and its breach by the buyer. *Russell Miller Mill Co. v. Bastasch*, 70 Or. 475, 142 Pac. 355. That decision was based upon the theory that such damages were not within the contemplation of the parties when the contract was made. It does not appear, except as it might be inferred from the fact of the seller being a milling company, that it

was to manufacture the flour, and in the opinion it is said:

"For aught that appears in this case, the plaintiff could have gone into the open market and purchased flour to fill its contract." 70 Or. 479, 142 Pac. 353.

The contract having been treated as one merely for the sale of personal property, the decision is not really in point upon the question under consideration. In *Erie Baking Co. v. Hubbard Milling Co.*, 217 Fed. 759, 133 C. C. A. 489, it was held that upon the buyer's refusal to accept delivery of flour from the miller, from whom it had contracted to take it, damages should be allowed for the decline in value of wheat bought to be used in its manufacture, between the time of such purchase and the breach of the contract.

We think the measure of damages for the repudiation of a contract to buy flour from its manufacturer should ordinarily be the difference between the agreed price and the market value at the time and place of delivery. Where the miller has purchased wheat from which to make the flour, and its value declines before the breach takes place, this rule may obviously fail to compensate him for his actual loss. Possibly the practice of mills, as soon as a contract to deliver a certain quantity of flour is made, to buy or contract for sufficient wheat to produce it is so general that courts may take notice of it, and parties may be deemed to contract with reference to it. Apart from that consideration, however, we think that such precaution is so reasonable that the loss that would be occasioned by a decline in value of wheat so purchased in case of a buyer's refusal to accept the flour he had agreed to take must be regarded as within the contemplation of the parties upon entering into the contract. One who obtains a contract for the delivery of articles he is to manufacture and who upon the faith thereof incurs expenses in procuring the raw material is entitled to be compensated for any loss occasioned thereby in case of a default of the buyer. One who has agreed to furnish flour of his own manufacture at a certain time for a fixed price necessarily becomes in effect a speculator, subject to gain or loss according to the fluctuations of the wheat market, unless he arranges to procure the wheat necessary to fill his contract at the then existing price, upon the basis of which his own contract was made. It is only by hedging—by buying wheat against his contracts to deliver flour—that the miller is enabled to set a price for a future delivery based upon the cost of manufacture regardless of the subsequent rise or fall of wheat. He who causes a loss

by refusing to carry out his own agreement to take the flour ought not to be heard to urge that the manufacturer bought his wheat too soon, when there is so great and obvious need for promptness in the matter. If the mills company, as the plaintiff alleges, by reason of its contract with the defendant, at once bought wheat sufficient to produce the required quantity of flour, and kept it continuously on hand, reserved for that purpose, until August 19, it should, as the trial court instructed, be allowed to recover damages measured by the fall in the price of wheat while it was so held. It is, of course, immaterial whether the identical wheat originally bought was kept during the whole period; it being sufficient if the quantity on hand was at all times larger by that amount than it would otherwise have been.

[3] 3. If damages should be allowed upon the theory indicated no further allowance should be made. But if the plaintiff should fail to prove the purchase and retention of the wheat he might under an appropriate amendment of his pleadings show himself entitled to the difference between the agreed price and the market price of the flour at the time the contract was canceled. Because of this possibility it becomes material to inquire what should be regarded as the date of cancellation. After the defendant's letter of August 19 further correspondence was had in which the mills company tried to persuade the defendant to accept the flour, and it appears that the effort was not abandoned until about September 4. The mills company was not required to acquiesce in the defendant's renunciation of the contract, but had the privilege of waiting until the expiration of the time fixed for delivery upon the chance of his changing his mind. *Milling Co. v. Scale Co.*, 105 Kan. 87, 181 Pac. 554, and authorities there cited.

[4] 4. Complaint is made of an instruction submitting to the jury the question whether the plaintiff was the legal holder of the claim. It appears to be true as the plaintiff contends that there was nothing in the evidence to impair the effect of the written assignment by the mills company to him, so that there was in fact nothing for the jury to try in this regard. The court refused to strike out matters pleaded as a separate defense, and overruled objections to evidence offered under it, but finally withdrew the defense from the consideration of the jury. There is therefore no occasion to pass upon the earlier rulings.

The judgment is reversed and the cause is remanded for further proceedings in accordance herewith.

All the Justices concurring.

(35 Idaho, 468)

CUPPLES et al. v. STANFIELD. (No. 3589.)

(Supreme Court of Idaho. May 15, 1922.)

1. Principal and agent \S 22(1)—Declarations of one assuming to act as agent held not admissible to prove agency.

The declarations of one assuming to act as an agent, made without the hearing of his principal, are not admissible to prove such agency.

2. Partnership \S 49—Declarations of alleged partner not in the presence of copartner not competent to prove partnership against latter.

The declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of a partnership between them as against such other partner.

3. Principal and agent \S 23(3)—That one has honored drafts of another is insufficient to constitute such other party his agent.

The mere fact that a party has at times honored the drafts of another party is not alone sufficient to constitute such other party his agent.

4. Appeal and error \S 384(1), 392—Undertaking held not invalid for failure to name statute under which it was given; objections to undertaking on appeal not attacked as specified by statute are waived.

Undertakings on appeal in this case held sufficient under C. S. §§ 7154 and 7236.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by John W. Cupples and another, copartners as Cupples & Mitchell, and as the Cupples Mercantile Company, against R. N. Stanfield and others, to recover the amount of two drafts. From a judgment for plaintiffs the named defendant appeals. Reversed.

Ed. R. Coulter, of Weiser, for appellant.

M. H. Eustace, of Caldwell, for respondents.

DUNN, J. This action was brought by respondents against appellant and C. D. Wood and L. R. Wrinkle to recover the amount of two drafts drawn on appellant by C. D. Wood, one of the defendants in the court below. The claim against appellant rests upon the contention that the said C. D. Wood at the time he drew the drafts in controversy was acting as the agent of appellant. A verdict was returned by the jury in favor of respondents, and thereupon judgment was entered by the court against appellant. Appellant moved for a new trial, which was denied. Appeal was taken from the judgment and order denying a new trial.

[4] The motion for new trial was not disposed of within the time allowed for appeal from the judgment, but said appeal from the judgment was taken within the statutory

time and an undertaking on appeal filed by appellant. Respondents object to this undertaking for the reason that it is drawn under the provisions of C. S. § 7236, and reads in part as follows:

"Whereas, the defendant R. N. Stanfield desires to give an undertaking for appeal to the Supreme Court of the state of Idaho, as provided to be given in section — of the Revised Codes of the state of Idaho," etc.

Objection is based upon the fact that the number of the section is omitted from the undertaking. We think this is immaterial. There is only one section of our statute under which such an undertaking could be given. The undertaking in this case substantially complies with C. S. § 7236.

After the time for appeal from the judgment had expired, the court entered an order denying appellant's motion for a new trial, and from this order appeal was taken. The undertaking given by appellant after the denial of the motion for a new trial reads, in part, as follows:

"Whereas, the defendant R. N. Stanfield, in the above-entitled action, has appealed to the Supreme Court of the state of Idaho, from a judgment made and entered against him in the above-entitled action in the above-named district court, in favor of the plaintiff in said action on the 25th day of March, 1920, for the sum of \$207.75 and \$29.05 costs of suit, and from the whole thereof; and has also appealed to the said Supreme Court from the order made in the above-entitled cause and court, dated July 3, 1920, and filed July 8, 1920, overruling the motion of defendant R. N. Stanfield for a new trial and from the whole of said order;

"Now, therefore, in consideration of the premises and of such appeal, we the undersigned, residents of Washington county, Idaho, do hereby jointly and severally undertake and promise on the part of said appellant R. N. Stanfield that said appellant will pay all damages and costs which may be awarded against him on appeal or on a dismissal thereof, not exceeding the sum of \$300.00, for which amount we acknowledge ourselves jointly and severally bound."

It is the contention of respondents that this undertaking, which was apparently intended to cover both appeals, is void because it is conditioned to pay all damages and costs which may be awarded against appellant "on appeal or on a dismissal thereof" without specifying on which appeal. The objection of respondents would be well taken if it had been made within 20 days after the filing of such undertaking. Not having attacked this undertaking within the time and in the manner specified in C. S. § 7154, respondents waived their objection. *Clear Lake Power & Improvement Co. v. Christwell et al.*, 31 Idaho, 339, 173 Pac. 326.

[1, 2] There is in the record a total lack of competent evidence to sustain the verdict

of the jury. Attempt was made to prove that Wood was the agent of Stanfield by hearsay evidence of statements made by Wood and other parties without the hearing of appellant that Wood was a partner of appellant. It is too well settled to require a citation of authorities that agency cannot be established by proving the declarations of the alleged agent made out of the hearing of his principal. If the claim that Wood was a partner of Stanfield had been established by competent evidence, of course this would have constituted him the agent of the partnership. "But the declarations of one partner, not made in the presence of his co-partner, are not competent to prove the existence of a partnership between them as against such other partner." 20 R. C. L. p. 487, § 53.

[3] Evidence was also received over the objection of appellant to the effect that several drafts similar to those in controversy had been drawn by Wood and paid by other parties and honored by appellant. This was not competent evidence to support the claim of agency, since there was nothing in the form of the drafts in controversy, nor of the others testified to by witnesses, indicating that they were drawn by Wood as the agent of appellant. The mere fact that appellant paid some of them did not in any sense tend to prove that Wood was his agent in drawing them.

The judgment is reversed, and a new trial granted. Costs awarded to appellant.

RICE, C. J., and BUDGE, McCARTHY, and LEE, JJ., concur.

(35 Idaho, 572)

STATE v. HALVERSON.

(Supreme Court of Idaho. June 2, 1922.)

1. Criminal law \S 1106(3)—Lapse of time in filing transcript is not jurisdictional.

Under C. S. §§ 9079 and 9013, lapse of time in filing a transcript on appeal in a criminal case is not jurisdictional, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing the transcript.

2. Criminal law \S 1106(3)—When transcript is not filed in prescribed time and there is no extension taken or explanation of delay, the appeal should be dismissed.

When the transcript is not filed in the time prescribed by C. S. § 9077, no extension has been obtained, and no explanation is made of the delay, the appeal should be dismissed.

Appeal from District Court, Cassia County; Wm. A. Babcock, Judge.

Henry Halverson was convicted of murder, and he appeals. On motion to dismiss appeal. Motion granted.

S. T. Lowe, of Burley, for appellant.

Roy L. Black, Atty. Gen., and James L. Boone, Asst. Atty. Gen., for the State.

McCARTHY, J. [1, 2] Respondent has moved to dismiss the appeal on the ground that no reporter's transcript, clerk's transcript, bill of exceptions, or other record of the trial of the action has been served on respondent or filed in this court within the time prescribed by law. On an appeal of a criminal case the transcript must be filed within 40 days from the taking of the appeal, unless further time is given by the district court or by a member of the Supreme Court. C. S. § 9077. If the transcript is not filed within said time, the court may dismiss the appeal, unless for good cause it enlarges the time for that purpose. C. S. § 9079.

"Lapse of time in filing a transcript on appeal in a criminal case is not jurisdictional, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing the transcript." State v. Ricks et al., 34 Idaho, 122, 201 Pac. 827.

The judgment was entered April 8, 1919. The appeal was taken October 7, 1919. December 5, 1919, appellant's attorney applied to this court for an order granting an extension of 60 days to file and serve the transcript. The records of this court do not show that any action was taken on this application by the court or a justice thereof. No subsequent application was made. On April 10, 1922, respondent served, and on April 11 filed, in this court, the motion to dismiss, which was set for hearing and appellant's counsel notified. No showing has been made by appellant explaining the delay in filing the transcript or failure to obtain an extension of time. Appellant's counsel did not appear on the hearing of the motion to dismiss. It would seem that the appeal has been abandoned. In any event, more than 20 times the length of time prescribed by the statute has elapsed, the transcript has not been served or filed, and no explanation is made of the delay. We conclude that, under these circumstances, the discretion vested in us by section 9079 should be exercised by dismissing the appeal.

The motion to dismiss is granted.

RICE, C. J., and DUNN and LEE, JJ., concur.

(85 Idaho, 458)

CUPPLES et al. v. ZUPAN. (No. 3572.)

(Supreme Court of Idaho. May 15, 1922.)

1. Sales \S 354(2)—Where answer denies that plaintiffs sold and delivered goods, "sold" includes delivery, and the denial, although in the conjunctive, raises an issue as to both sale and delivery.

Where a complaint is to recover the value of goods, wares and merchandise alleged to have been sold and delivered, and the answer denies that plaintiffs "sold and delivered" such goods, wares, and merchandise, the use of the word "sold" includes a delivery, and a denial, although in the conjunctive, raises an issue both as to sale and delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sold.]

2. Pleading \S 76—Matter controverting complaint is a traverse, while that introducing a new element by confession or avoidance is new matter, to be affirmatively pleaded.

The test of whether defensive matter is new is to be determined by the effect it has upon the issues presented by the complaint; if it controverts the cause of action, and tenders no new issue, it is a traverse; if it introduces a new element by way of confession and avoidance, it is new matter, and should be affirmatively pleaded.

3. Appeal and error \S 97(3)—Greater latitude should be allowed in cross-examining parties, and a reviewing court will reverse only where abuse of discretion is shown.

Greater latitude should be allowed in the cross-examination of witnesses who are parties to the action than of others, and a reviewing court will not reverse a judgment for allowing such a cross-examination, unless an abuse of discretion is shown.

4. New trial \S 97—The "accident" or "surprise" which is a ground for new trial is that against which ordinary prudence could not have guarded.

Accident or surprise, mentioned in the statute as grounds for a new trial, is that which ordinary prudence could not have guarded against, and, if appellants misapprehended the issues raised by the pleadings, and were for that reason not prepared to proceed with the trial, they should ask for a continuance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental; Surprise.]

5. New trial \S 97—Parties cannot experiment with the result of suits, and after adverse verdict have the same set aside because misled by pleadings.

Parties cannot experiment with the result of suits, and after an adverse verdict ask to have the same set aside upon the ground that they were misled by the pleadings, when such pleadings properly presented the issues to be tried.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by John M. Cupples and another, copartners, doing business under the firm name of Cupples & Mitchell, against Mike Zupan, to recover the value of goods, wares, and merchandise sold and delivered. Judgment for defendant, and plaintiffs appeal from the judgment and from an order denying a new trial. Affirmed.

J. A. Elston and M. H. Eustace, both of Caldwell, for appellants.

J. P. Pope and E. J. Dockery, both of Boise, for respondent.

LEE, J. This was an action to recover the value of goods, wares, and merchandise alleged to have been sold and delivered by appellants to respondent at his special instance and request. The answer denies that appellants "sold and delivered" said goods, wares, and merchandise to him. The cause was tried by the court with a jury, and a verdict was returned for respondent. Appellants moved for a new trial, which was denied, and this appeal is from the judgment, and from the order denying a new trial. In their brief appellants assign 51 errors of law, and also state 27 separate propositions of law, with authorities relied on in support of the same, conformable to rule 42 of this court, as grounds for a reversal. It appears from the pleadings that they present a single issue of fact, and it does not seem probable that the trial of an action of this character should give rise to this number of errors or propositions of law of sufficient importance to require that each be severally considered. If such were the case, the work of reviewing courts would be interminable. Therefore, without attempting to consider or discuss each assignment or proposition of law separately, we will give attention to such as appear to be material.

Respondent was a subcontractor under one William Long, who had a contract with the government for work on a drainage canal. Immediately prior to this time appellants had furnished respondent with the necessary camp supplies to enable him to carry on his work while he was a subcontractor under one Comerford, who had a contract for doing similar work upon this canal. These supplies had been delivered to respondent by appellants, and charged to Comerford. It was agreed that appellants should be notified before respondent's work as a subcontractor under Long began, so that they might discontinue charging merchandise to Comerford and make the necessary change in their charge account, but as to what this change should be is in controversy. Appellants claim that under the new arrangement they were to charge these supplies direct to respondent, with the understanding that the principal contractor, Long, or his agent,

Gresham, should guarantee payment for the same out of the payments the government was to make to Long.

[1] Appellants contend that respondent's answer, being in the form of a denial only, is not sufficient to admit of the evidence that was offered and received on his behalf, which tended to show that, while the merchandise in question was delivered to him, it was in fact sold to the principal contractor, Long, or his agent, Gresham, and that this testimony could only have been admitted under an answer affirmatively alleging that the sale was to the principal contractor.

In *Feldman v. Shea*, 6 Idaho, 717, 59 Pac. 537, it is said that "sold," as here used, includes delivery, and that a denial, even though it be in the conjunctive, raises an issue as to both the sale and delivery of the goods, citing in support thereof *Le Mesnager v. Hamilton*, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81. The issue presented by the pleadings being as to the sale of this merchandise to respondent, testimony tending to show that the sale of such merchandise was not to him, but to Long, the principal contractor, was relevant and competent under this answer, as it supported his contention that the goods were not sold to him.

[2] The rule is well stated in *Lindsay v. Wyatt*, 1 Idaho, 738, wherein it is said that the test of whether matter is new is to be determined by the effect it has upon the issue presented by the complaint. If it controverts the cause of action, and tenders no new issue, it is a traverse. If, on the other hand, it introduces a new element by way of confession and avoidance, it is new matter, and must be pleaded affirmatively.

[3] Appellants contend that there was error in allowing respondent too wide a scope in the way of cross-examination, particularly in allowing appellants to be cross-examined with regard to the agreement between themselves, respondent, and the contractor, Comerford, which immediately preceded this one. It appears that both of the parties understood that respondent had entered into a new contract for work under Long or Gresham, and that supplies furnished him should no longer be charged to Comerford after the 1st of June. The several transactions between the parties and the other contractors were more or less related. At least one article, the "rooter plow," which was delivered to respondent while he was working under his contract with Comerford, was by appellants later added to the account sued on in this action, Comerford having refused to pay for the same. Under these circumstances, we think there was no abuse of discretion in allowing respondent to go into this transaction between the subcontractor and his principals to the extent that was done, and the transactions were so interrelated that doing so could not have been en-

tirely avoided. Greater latitude should be allowed in the cross-examination of witnesses who are parties to the action than in the examination of other witnesses, and a reviewing court will not reverse a judgment for allowing too great a latitude on cross-examination of the parties to the action unless an abuse of discretion is shown. Just v. Idaho Canal Co., 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140; *Anderson v. Salt Lake, etc., Ry. Co.*, 35 Utah, 509, 101 Pac. 579; 40 Cyc. 2506.

[4, 5] We do not think there is merit in appellants' contention that they were taken by surprise by the admission of testimony tending to show that Long and Gresham owed the account for which respondent was being sued. Respondent having denied that he purchased these goods, it was competent for him under the pleadings to show that some one else had purchased them, because this directly supported his defense that he had not done so; and appellants cannot predicate error upon the ground of surprise in the introduction of any proof which tends to support an issue properly raised by the pleadings. Accident or surprise, mentioned in the statute as ground for a new trial, is that which ordinary prudence could not have guarded against, and, if appellants misapprehended the issues raised by the answer, and were therefore not prepared to proceed with the trial, they should have asked for a continuance. Parties cannot experiment with the result of suits in this manner, and, when they have an adverse verdict, ask to have it set aside upon the ground of being misled by the pleadings, when in fact such pleadings properly presented the issue tried.

Appellants complain of the court's instruction wherein the jury were instructed:

"If you find from the evidence, gentlemen of the jury, that plaintiffs delivered to Mike Zupan certain goods with an understanding or agreement that William Long or W. R. Gresham, his attorney in fact, would pay for such goods, etc.,"

—for the reason that it is claimed that there was no evidence whatever tending to show that Gresham was the attorney in fact of Long. But, even conceding that he was not, the designation of Gresham as an attorney in fact when the evidence admitted tended to show that he was the managing agent for Long would be a mere inaccuracy, which would not be reversible error.

It is further claimed that there was error in the court's instruction to the effect that the receipt of goods on the part of respondent would not of itself render him liable for the payment thereof, but that the jury must determine from all the facts and circumstances whether defendant agreed either expressly or impliedly to pay for them, and that, unless they so found by a preponder-

ance of the evidence, the verdict should be for the defendant. There is no error in this instruction, under the facts and circumstances here shown, and its form is not such as to invade the province of the jury.

Upon the record it appears that the cause was fairly submitted to the jury, that there was substantial evidence to support the verdict, and that no errors were committed by the trial court sufficiently prejudicial to warrant a reversal. The judgment should be affirmed, and it is so ordered, with costs to respondent.

RICE, C. J., and McCARTHY and DUNN, JJ., concur.

(28 N. M. 124)

BEZEMEK v. BALDUINI. (No. 2527.)

(Supreme Court of New Mexico. March 20, 1922. Rehearing Denied June 10, 1922.)

(Syllabus by the Court.)

1. Trial \S 383—Plaintiff's motion for judgment at close of defendant's testimony, calling for declaration of law, is in nature of demurrer to evidence.

A motion for judgment by the plaintiff at the close of defendant's testimony in a case tried by the court, which, as in this case, calls for a declaration of law from the court, is in the nature of a demurrer to the evidence.

2. Trial \S 417—Submitting requested findings held a waiver of objection that court could not pass on weight of evidence nor make findings.

The submission to the trial court of requested findings of fact on the evidence adduced is a waiver under the circumstances of this case of the objection that the court could only pass upon the legal sufficiency of appellant's evidence, and could not pass upon the weight of the evidence, nor make findings of fact.

3. Appeal and error \S 169—Matters not jurisdictional not raised or passed on below are not reviewable.

Questions, points, issues, and matters not jurisdictional, not raised, presented, or passed upon below, are not reviewable on appeal.

4. Evidence \S 123(3), 317(2)—Evidence of statements by defendant's agent made after termination of agency held properly excluded as hearsay, and not *res gestæ*.

The testimony of a witness that defendant's agent had made certain statements subsequent to the transaction, and after the agency had terminated, was properly excluded on the grounds that it was both hearsay testimony and not a part of the *res gestæ*.

5. Trial \S 56—Sustaining objection to question calling for cumulative evidence is not error.

The objection to a question to the defendant who had signed a contract of sale as to whether or not she knew what the contract

contained prior to its being read to her is properly sustained when the witness had previously testified to the fact sought to be elicited by the question, and the evidence, if received, would have been merely cumulative.

6. Trial \S 397(1)—Refusing findings diametrically opposed to proper findings supporting judgment is proper.

Requested findings diametrically opposed to those which support the judgment are properly refused.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by James Bezemek against Julia Catelani de Balduini. Judgment for the plaintiff, and the defendant appeals. Affirmed.

Simms & Botts, of Albuquerque, and Catron & Catron, of Santa Fe, for appellant.

A. B. McMillen and Lawrence F. Lee, both of Albuquerque, for appellee.

RAYNOLDS, C. J. This case was brought for the specific performance of a certain contract to sell real estate. The plaintiff relied upon a written contract signed by the defendant and her agent. The defendant pleaded fraud in the procurement of said contract. Upon trial of the issue plaintiff offered in evidence the written contract, and rested. Defendant then placed various witnesses upon the stand to prove the allegations in her answer. At the close of the defendant's evidence the plaintiff moved the court for judgment, which motion was sustained, and judgment entered for the plaintiff, from which the defendant appeals to this court.

[1] Appellant assigns many errors in regard to the exclusion of certain evidence and the refusal of the court to make findings of fact, but relies principally as a ground for reversal upon the action of the trial court in granting plaintiff's motion for judgment at the close of the defendant's case. The motion was as follows:

"Mr. McMillen: Not waiving the right to proceed further if the court should rule against the plaintiff, plaintiff at the close of defendant's evidence moves the court for judgment in favor of the plaintiff for the reason that the defendant has shown no evidence sufficient to break the written contract, or to account for or give an excuse for breaking a contract which she had signed."

Appellant contends that such a motion was in the nature of a demurrer to the evidence, the reservation therein limiting the court at that time to pass upon the question only as to whether or not the defendant had made a *prima facie* case. In support of his contention he cites the case of

Union Bank v. Mandeville, 25 N. M. 387, 183 Pac. 394.

In our former opinion in this case we held that the above motion was by its terms a motion for judgment, and called for the judgment of the court upon the case at that stage of the proceedings; that the reservation in the motion did not change the nature of the motion for judgment, nor limit its scope. Since handing down the original opinion our attention has been called in the motion for rehearing to the above case, Union Bank v. Mandeville, 25 N. M. 387, 183 Pac. 394, in which it is expressly held that a motion for judgment, although in terms a motion for judgment, when it calls for a declaration of law from the court is a demurrer to the evidence. Appellant urges that the same rule applies in this case; that the execution of the contract in question was admitted; that the defendant pleaded confession and avoidance, as to which the burden of proof was upon her; that at the close of her testimony a motion for judgment such as was made here was no more than a demurrer to the evidence, and the trial court could not weigh the evidence adduced or find the facts. Under the Mandeville Case, supra, we think the position of the appellant is well taken, and that such motion as was here made, although by its terms one for judgment, was in effect no more than a demurrer to the evidence, asking a ruling from the court in a matter of law as to the sufficiency of the evidence to sustain defendant's plea or defense in confession and avoidance.

[2, 3] Appellant, however, cannot avail herself in this court of the erroneous action of the trial judge. She not only failed to raise the point below, and object to the action of the trial judge, but by her request for findings of fact in her favor on the evidence adduced, waived any right to take advantage of such erroneous action. At no time was the point raised below that the trial court could not weigh the evidence and find the facts. The trial court refused the findings of the appellant and made those requested by the appellee. No opportunity was given the trial court to pass upon the question as to the effect of the motion for judgment which we are now considering, and the appellant raises the proposition for the first time in this court. It has been often decided that questions, points, issues, and matters which are not jurisdictional, not raised, presented, or passed upon below, are not reviewable on appeal. Palmer v. Farmington, 25 N. M. 145, 159, 179 Pac. 227; Prichard v. Fulmer, 25 N. M. 452, 455, 184 Pac. 529; Sandoval v. Unknown Heirs, 25 N. M. 536, 539, 185 Pac. 282; Kelley v. La Cueva Ranch Co., 25 N. M. 674, 678, 187 Pac. 547; Alvarado, M. & M. Co. v. Warnock, 25 N. M. 694, 701, 187 Pac. 542; Murphy v. Hall, 26 N. M. 270, 274, 191 Pac. 438; Mings v. Herring, 26 N. M.

425, 429, 193 Pac. 497; State v. Lindsey, 26 N. M. 526, 532, 194 Pac. 877.

[4] Appellant assigns as error the sustaining of an objection to a question asked of the witness Luigi Viviani as follows:

"Q. Now, what did you say to Joe Vaio, if anything, when he came in?

"Mr. McMillen: I object to that as incompetent and immaterial.

"Mr. Simms: By this conversation we propose to show that Joe Vaio, a few days after having consummated this sale, admitted in the presence of this man that Mrs. Balduini thought she was selling the chicken ranch, but he put all the Viviani ranch in, and that the paper covered it all, while she thought she was selling the chicken ranch only.

"Mr. McMillen: I object further on the ground it is an attempt to vary the terms of a written contract already signed, and for the further reason that any admission of Vaio's in regard to the contract is incompetent evidence against the plaintiff. And I make the further objection that it is an attempt to introduce hearsay evidence for the purpose of proving fraud, and not to contradict a witness.

"The Court: Objection sustained."

We believe the ruling of the court was proper for the reason, as stated by counsel for appellee in his objection, that it was hearsay, and for the further reason, as shown by the statement of counsel for the appellant, that the agency was shown to be terminated, and that the statements so made were not a part of the res gestæ. Jones on Evidence, § 255; 1 Ency. of Ev. 540.

[5] Appellant further assigns as error the action of the court in sustaining an objection to a question to the defendant as to whether or not she knew what the contract contained prior to its being read to her. We do not consider his assignment well taken. The error, if any, was harmless, and the evidence would have been only cumulative, as the witness had previously testified on cross-examination that she had had the contract read to her a day after signing it, and that the contract she thought she was signing was for the sale of the chicken ranch only. The court had before it from other evidence in the case the fact that she did not know what the contract contained when she signed it.

[6] As to the assignments of error in the court's refusing to make the findings requested by the defendant, it is sufficient to say that they were diametrically opposed to the findings which the court had made for the plaintiff in support of his judgment, and, if the latter findings for the plaintiff were correct, it was not error to refuse those requested by the defendant.

Finding no error in the record, the judgment of the trial court is affirmed; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate.

(71 Colo. 401)

BARNARD v. MOORE et al. (No. 10059.)(Supreme Court of Colorado. May 1, 1922.
Rehearing Denied June 5, 1922.)

1. Wills \S 692, 693(1)—Life tenant held empowered to sell fee.

Under a will devising a life estate to testator's widow with the power "to sell said place," in which case the proceeds should be "freed from her life estate" and equally divided among his children, to whom the remainder was devised in fee, the widow could sell the fee.

2. Powers \S 36(1)—Quitclaim deed of life tenant with power to sell fee of all her interest held to convey life estate only.

Since a power to convey creates in the donee no right, title, or interest in the premises to be conveyed, a deed from a life tenant in the ordinary quitclaim form, purporting to convey not the land, but all her right, title, and interest therein, conveys only her life estate, in the absence of anything in the deed indicating that she intended to exercise a power to sell the fee.

3. Powers \S 33(2)—Reference in deed power to sell is usually sufficient to indicate intent to use it.

A reference in a deed to grantor's power to sell under a will is usually a sufficient indication of intent to use such power.

4. Powers \S 33(2)—Quitclaim deed, containing no reference to power to sell, not regarded as exercise thereof.

A quitclaim deed, containing no reference to grantor's power to sell under a will, will not be regarded as an exercise of such power.

5. Powers \S 33(2) — Reference in deed to power to sell fee held insufficient to indicate intent to exercise it.

A quitclaim deed, reciting grantor's intention to sell and convey all her right, title, and interest in the described premises by virtue of the will of her deceased husband, and more particularly "the eighth paragraph thereof," which gave her the power to sell the fee, conveyed only the life estate granted her by such will; the reference to such power being insufficient to indicate an intent to exercise it.

6. Wills \S 608(3)—"Rule in Shelley's Case" inapplicable to devise of remainder after life estate to children and heirs of children dying before life tenant.

Under a will devising a life estate to testator's widow with remainder to his children and the share of any child dying before the widow to such child's heirs, the daughter of a son who died before the widow, on whose life estate, and not the estate of her father, her interest was limited, took a remainder in fee under the will, and not by inheritance, the rule in Shelley's Case that one to whom a freehold estate is limited with remainder to his heirs takes a fee simple, being inapplicable, where the word "heirs" is used, not as a word of limitation, but as a descriptio personæ to whom

the interest should pass on fulfillment of the condition which defeats the previous estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rule in Shelley's Case.]

7. Wills \S 625—Interest of heir of remainderman dying before death of life tenant is valid as an executory devise "shifting future interest."

Under a will devising a life estate to testator's widow with remainder to his children and the share of any child dying before the widow's death to the heirs of such child, the interest of the daughter of a son dying before the expiration of the life estate is a "shifting future interest" which defeats prematurely the preceding interest expressly created, and is valid as an executory devise when created by will, being a new estate created by fulfillment of the condition which defeats the previous estate.

8. Remainders \S 5—Life tenant's conveyance of interest to remaindermen held not to cut off interest of daughter of remainderman dying before life tenant's death.

Under a will devising a life estate to testator's widow with remainder to his children and the share of any child dying before the widow's death to the heirs of such child, a daughter of a son, who died before the widow, acquired a vested interest, which was not cut off under the doctrine of acceleration by the widow's quitclaim deed of her interest to the remaindermen and the deceased remainderman's conveyance of his share to a brother; his daughter taking under the will and not by descent.

9. Wills \S 20—Interest of daughter of remainderman dying before life tenant held not void as remainder limited on fee.

Under a will devising a life estate to testator's widow, with remainder to his children and the share of any child dying before the widow to the heirs of such child, the interest of a daughter of a son who died before the widow was not void as a remainder limited on a fee; her interest being a new estate created by the death of her father before the expiration of the life estate.

10. Wills \S 20—No repugnancy between interest devised to deceased remainderman's heir and remainder in fee devised to decedent.

There is no repugnancy between an interest devised to the heir of a remainderman dying before the expiration of a life estate and the remainder in fee devised to her father, nor any objection thereto since the statute of uses.

11. Powers \S 25—Life tenant's power to convey fee does not give it to her.

A power in a life tenant to convey a fee does not give her the fee.

12. Pleading \S 225(1)—Plaintiff could amend complaint without leave after demurrer sustained.

Under Code, §§ 79, 81, plaintiff had a right to amend her complaint without leave after demurrer thereto was sustained.

13. Appeal and error \Leftarrow 1041(2)—Error in refusal to permit amendment alleging matters provable under existing pleadings not prejudicial.

Erroneous refusal to allow amendment of complaint after demurrer thereto was sustained was harmless, where proof of matter sought to be alleged in the amendment was admissible under the pleadings.

Error to District Court, Montrose County; Thomas J. Black, judge.

Action by Mabel Moore Barnard against James A. Moore and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Catlin & Blake, of Montrose, for plaintiff in error.

Adair J. Hotchkiss and Millard Fairlamb, both of Delta, for defendants in error.

DENISON, J. Moore, by the eighth clause of his will, devised land to his wife, for life, remainder to his five sons and daughter "in fee simple," with a condition that if any son or daughter should die before the widow, then "the share of such child shall pass to the heirs of such child." Said eighth clause contained the following:

"In the event my wife shall desire to sell said place during her lifetime, the proceeds of such sale shall be at once freed from her life estate hereinbefore devised, and shall be equally divided between my five sons and Ida V. Prickett [the daughter] and none other."

After the testator's death the widow executed a quitclaim to the six remaindermen, in which she referred to the said eighth clause, but not expressly to the power; thereafter L. Wiley Moore, one of the sons, conveyed his one-sixth interest to his brother and cotenant, James A. Moore, by a deed of bargain and sale without warranty. L. Wiley Moore then died. The widow is still living. Plaintiff in error was plaintiff below, and is daughter and sole heir of L. Wiley Moore, and claims one-sixth of the said land by virtue of said will. A demurrer to her complaint was sustained. She asked to amend by alleging that the widow did not intend by the quitclaim deed to execute the power, but her request was denied, and judgment was rendered against her.

All agree that the will gave to the widow a life estate only.

The plaintiff in error claims: (1) That the power was to sell the life estate only; (2) that the power, if to sell the fee, was never exercised; (3) that the power, if to sell the fee, was to sell it only and distribute the proceeds to the remaindermen, not to convey to them; (4) that the sons and daughter by the terms of the will each took a determinable fee in remainder in one-sixth of the property, determinable on his or her death before

the mother; (5) that by the will the heir of such son took one-sixth by executory devise; (6) that, therefore, neither the deed of the widow nor that of her father could or did pass the interest of the plaintiff; and so upon his death before his mother it passed to plaintiff.

Defendant in error, on the other hand, claims: (1) That the power was to sell the whole estate; (2) that that power was exercised; (3) that the conveyance to the remaindermen was a substantial and proper exercise of the power; (4) that the sons and daughter, by the rule in Shelley's Case, took a vested remainder in fee simple absolute; (5) that if the widow's deed conveyed but a life estate yet by acceleration the grantees took a fee; (6) that therefore these remaindermen owned a fee simple absolute, and, plaintiff having no claim but by inheritance, is cut off by her father's deed to James A. Moore.

[1] 1. It will be convenient first to consider the above sentence granting a power. The defendant in error claims that it grants power to sell the fee, and to this we agree. The intention is clear. She may sell "the place," and the common understanding of these words is to sell the whole title. The proceeds are to be "freed from her life estate." It is not reasonable to suppose that the testator meant to say that the proceeds of a sale of the life estate were to be "freed" from the life estate. How could they be otherwise? *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780. Then, too, there was no occasion to grant power to sell the life estate.

[2] 2. A more difficult question is whether the widow, by her deed above mentioned, conveyed the fee or only her life estate. We think only the life estate. The deed, in the ordinary quitclaim form, purports to convey, not the land, but all her right, title, and interest therein, if any. *Valle v. Clemens*, 18 Mo. 486, 489; *Gibson v. Choteau's Heirs*, 39 Mo. 536, 566; *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491; *Frink et al. v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *Van Rensselear v. Kearney*, 11 How. 297, 322, 13 L. Ed. 703. A power to convey creates, in the donee thereof, no right, title, or interest in the premises to be conveyed. *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540; 21 R. C. L. 772-3. Her only right, title, or interest, then, was an estate for life; therefore she conveyed nothing more, unless, elsewhere in the deed, it appears that she intended to exercise the power. After the description and before the habendum is the following:

"The intention being to grant, bargain, sell and convey to the parties of the second part all right, title and interest of the party of the first part in and to the above-described premises by virtue of the last will and testa-

ment of Thomas M. Moore, deceased, more particularly the eighth paragraph thereof."

If this shows an intention to execute the power the fee passed.

[3] A reference to the power is usually considered a sufficient indication of intent to use it, but it should be noticed that the grantor does not refer in plain terms to the power granted by the will, but only to the eighth paragraph and to all her "right, title and interest * * * in and to the above-described premises."

[4] It seems that a deed containing no reference to the power will not be regarded as an exercise thereof, unless otherwise there would be nothing for the conveyance to operate on. *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177; *Towle v. Ewing*, 23 Wis. 336, 99 Am. Dec. 179; *Sugden on Powers* 477 (3d Am. Ed.); 4 Kent Com. 371. See *Bradley v. Westcott*, 13 Ves. Jr. 447.

[5] There are cases which go to the length of holding that a clause much like that above quoted is a reference to the power sufficient to indicate intent to exercise it (*Goff v. Pensenhafner*, 190 Ill. 200, 60 N. E. 110); but we cannot so construe this clause. The grantor, on the contrary, indicates an intent not to use the power, because, carefully using apt words to convey her interest only, she as carefully refrains from mentioning either any other interest or the power. It is, to say the least, an unusual method of expression for her to say that she intends to grant, bargain, sell and convey her right, title, and interest when she means to exercise a power to convey rights, titles, and interests of others. The obvious and natural thing to do, if Mrs. Moore intended to exercise the power, was to say so, and to convey the fee the least she could do was to make a deed, as Wiley did, not limited in terms to the interest she had. Our conclusion on this point is that the widow conveyed her life estate and no more.

3. That conclusion makes it unnecessary to consider whether a conveyance to the remaindermen by virtue of the power would have been a proper exercise thereof.

[6] 4. Did the sons and daughter, under the rule in *Shelley's Case*, take a fee simple absolute? We think not. We shall assume, without deciding, that the rule in *Shelley's Case* is in force in Colorado; i. e., if a freehold estate be limited to A., remainder to his heirs, he takes a fee simple and so can convey the whole estate free from claims by his heirs. Do the facts bring this case within that rule? No. It is the use of the word "heirs" that brings the rule in *Shelley's Case* into action. The word may be used as a word of limitation, as in ordinary deeds, or as a word of purchase. 2 Und. on W. §§ 602, 608; 40 Cyc. 1398.

If it is regarded as a word of limitation the heir takes by inheritance; if as a word

of designation or descriptio personæ, he takes by purchase; i. e., by force of the will.

We are unable to reconcile the cases or to construct a workable rule from them. On the one hand, it is said that the rule is one of property and not of construction. It follows that the intention of the testator is immaterial, and many cases so hold. On the other hand, it is said that if the context shows that the word "heirs" was used as a word of purchase, the rule does not take effect. "Used as a word of purchase" means used with that intent, and means nothing else. It follows that the intention of the testator in the use of the word is material. How he used it depends on his intention. It follows then that his intention is conclusive. With the intent the case goes one way, without it the other. If his intention is conclusive (of course we refer to his intention as revealed by the will) the question is wholly one of construction, and the rule as a rule of property is abrogated.

The probable explanation of this conflict is that, since the real reason for the rule has disappeared with the feudal system of tenures, the courts seek ways to avoid the injustice of attaching to a deed or will an effect contrary to its expressed intent. For that same reason we are not willing to ignore such cases as authority and revert to the unqualified doctrine that the word "heirs" with whatever intent used must import a fee simple. If by the word "heirs" the testator meant to indicate the persons who, upon the fulfillment of the condition, should take the land, it must be said that they take by purchase; that is, by force of the will, not by inheritance. 1 Tiffany, R. P. (2d Ed.) § 152, because then it was used not in the technical sense of heirs in succession forever, but as a description of the persons to whom the interest should pass. *Kales, Fut. Int.* § 422.

A fee simple having already been given to Wylie in terms, there could be no occasion or possibility for the operation of the rule if no further provision were made. The rule comes into operation, then, by virtue of the express condition of Wylie's death before his mother. The question then is, In what sense did the testator use the word "heirs" in connection with that condition? If in the technical sense it was a superfluity, since Wylie's interest upon his death would descend to his heirs anyhow, and so the fulfillment of the condition would produce no effect; but if as a descriptio personæ the condition becomes intelligible. We see a purpose in it.

The intention of the testator, it seems to us, was to direct by his will that the heir should take, and that the children's estate was not absolute. He did not give his children an estate for life, with remainder to heirs. He gave each of them a remainder

in fee simple, which should be absolute if that child survived the mother, but, if not, "the share of such child" should "pass to the heirs of such child." It is a definite expression of a determinable estate. On the expressed condition that the son dies before his mother, this remainder goes to his heir. It must be by force of the will, else why say it? The testator's idea is that at the death of his widow the land will go from her to his son; it will then be his, not before. But what if he dies first? "I wish it to go to his heirs and I will so provide." His idea is that he is controlling the matter, and that the land goes from the widow at her death. He was substituting the heirs for the remainderman, and so limiting their interest upon the life estate of the widow and not upon that of the remainderman. The rule in *Shelley's Case* can have no application.

The interest acquired by Wylie would seem to be of the class called by Prof. Kales "a fee simple subject to a conditional limitation" distinguished from a determinable fee. (Section 301, quoting Prof. Gray) in that the condition upon which it determined was in the nature of a condition subsequent, and not a limitation on the original estate. See *Burl. & Colo. R. Co. v. Colo. E. R. R. Co.*, 38 Colo. 95, 100, 88 Pac. 154. Mr. Tiffany seems to be of the same opinion. 1 *Tiffany*, R. P. (2d Ed.) § 163. It is not important which it was, however, because in either case it terminated with the death of Wylie and let in the plaintiff's right.

Such interests are familiar in this state (*Cowell v. Colorado Springs Co.*, 3 Colo. 82, affirmed 100 U. S. 55, 25 L. Ed. 547; *Brown v. State*, 5 Colo. 496; *Burlington & Colo. R. R. Co. v. Colo. E. R. R. Co.*, 38 Colo. 95, 88 Pac. 154; *El Paso County v. Colo. Springs*, 66 Colo. 111, 180 Pac. 301), and are frequently called determinable fees. Kales, § 301.

[7] The plaintiff's interest is of the class called by Mr. Kales "shifting future interests" because it defeats prematurely a preceding interest expressly created. Kales, *Fut. Int.* §§ 26, 442. Such an interest when created by will is called an executory devise and is valid. *Id.* §§ 442, 467, 472; 1 *Tiff. R. P.* (2d Ed.) § 157. It is regarded as a new estate created by the fulfillment of the condition which defeats the previous estate.

[8] 5. Did the conveyance of the life estate by the widow to the children make their title a fee simple absolute under the doctrine of acceleration? We think not. If we are right in our conclusions that the plaintiff takes by virtue of the will and not by descent, no acceleration can cut her off. It has been held, moreover, that a conveyance of the life estate will not accelerate the remainder. *Keir v. Keir*, 155 Cal. 96, 99 Pac. 487; *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264.

6. It follows that neither of the deeds before us passed plaintiff's right, and that she now has a vested interest in the land.

[9] 7. The defendant in error insists that the interest claimed by the plaintiff is a remainder limited upon a fee and therefore void. It is elementary that a remainder may not be limited on a fee simple, but an executory devise may. *Siegwald v. Siegwald*, 37 Ill. 430; *Bouv. L. D. tit. Ex Dev.*; 2 *Alex on W.* 1472, 1473. If however, we are right in what we have said above, plaintiff's estate is not limited on her father's remainder, but is a new estate created by the fulfilled condition.

[10] 8. Something is said about the repugnance of the plaintiff's interest to the remainder in fee devised to her father. There is no repugnancy, and there is no objection since the statute of uses. 1 *Tiffany*, R. P. §§ 157, 167, p. 574.

[11] 9. The power to convey the fee did not have the effect of giving the fee to the life tenant. 1 *Tiff. R. P.* 80; *Mulberry v. Mulberry*, 50 Ill. 67.

[12, 13] 10. The plaintiff asked to amend her complaint by alleging that the widow did not intend, by her deed, to convey more than her life estate. We are of the opinion that under the Code, §§ 79, 81, the plaintiff, after demurrer sustained, had a right to amend without leave, but we do not now see that such an amendment as she asked leave to make would have enabled her to prove anything that she might not prove under the pleadings as they stand.

Reversed and remanded.

SCOTT, C. J., not participating.

(71 Colo. 391)

WATSON et al. v. WOODLEY et al.
(No. 10006.)

(Supreme Court of Colorado. June 5, 1922.)

1. Principal and agent ⇨ 166(3)—Indorsement by payee of check held not a ratification of unauthorized sale of which check was proceeds.

Where the payee of a check bearing the notation, "Cash payment for 640 acres of land," indorsed it without knowing that it had been given to pay for land sold to the makers by his indorsee, acting without authority as his agent, he did not thereby ratify the contract, having received none of the proceeds of the check.

2. Witnesses ⇨ 148—Testimony incompetent against heir of representative of deceased party held not incompetent against other adverse parties.

In a suit for specific performance of an alleged contract to sell and convey land, held that, although the testimony of a party was

incompetent as against an adverse party, who was the heir or legal representative of a party who had died before trial, it was competent as against others who were not heirs or legal representatives, and appeared at trial personally and by counsel.

3. Appeal and error \Leftarrow 1056(2), 1057(2)—Exclusion of testimony held harmless.

Exclusion of testimony of a party which, although incompetent against one adverse party, was competent against others, was harmless error where most or all of such intended testimony related to facts admitted by the pleadings, and all of it was immaterial under the proof made by the latter.

En Banc.

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Suit by Dudley D. Watson and another against F. P. Woodley and others. From a judgment for defendants, plaintiffs bring error. Affirmed.

Murray & Ingersoll, John L. Schweigert, and Harry C. Riddle, all of Denver, for plaintiffs in error.

Jacob S. Schey, of Longmont, and Rothgerber & Appel and L. F. Twitchell, all of Denver, for defendants in error.

ALLEN, J. This is a suit in which the principal relief sought is the specific performance of an alleged contract to sell and convey land. On motion of defendants a nonsuit was granted against plaintiffs, and judgment was thereafter rendered for defendants. The plaintiffs bring the cause here for review.

Error is assigned to the granting of the nonsuit. The ultimate question of fact involved, so far as the motion is concerned, is whether the defendant F. P. Woodley, who is sued as the vendor under the alleged contract, ratified the contract upon which this suit is predicated.

[1] The contract in question purports to be one between vendor and vendees of land. The plaintiffs are the vendees, and sue as such. On the part of the vendor the contract was signed in the name of the defendant F. P. Woodley by one J. T. Sanderson, who assumed to act as Woodley's agent. Sanderson was not authorized to do so; hence arises the question of Woodley's subsequent ratification of the contract.

The contract provided for an initial payment of \$5,360 to Woodley, as vendor, by plaintiffs, as purchasers. The plaintiffs executed their certified check for that amount, making the same payable to F. P. Woodley, and delivered it to Sanderson. Sanderson was not a witness. There is no testimony by him as to what he or Woodley did with reference to the check. The check returned to the plaintiff's bank, having been paid in

the usual course. It bore Woodley's indorsement, as follows:

"Pay to the order of J. T. Sanderson.
"F. P. Woodley."

On the face of the check was the memorandum:

"Cash payment for 640 acres of land."

The foregoing facts are substantially all that was shown as evidence of Woodley's alleged ratification. It is true that, if a principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of an agent, he thereby ratifies such act (2 C. J. 493), but plaintiffs' evidence is insufficient to make out a case within this rule. We concur in the statement of the trial judge appearing in the record as follows:

"There is no testimony here showing that Mr. Woodley knew of the existence of that contract or its terms. It is a matter of mere conjecture to say that when he indorsed the check he received the money, or that he adopted or ratified the contract."

As a further observation, we may add that there is no evidence from which it may be determined whether Woodley indorsed the check in the usual course of accepting it, or indorsed it merely that it, being a certified check, might be returned to and cashed by plaintiffs. There is no evidence that he received any benefit on account of the check. The trial court, sitting without a jury, was warranted in regarding plaintiffs' proof as failing to show Woodley's ratification of the contract. There was no error in granting the motion for a nonsuit.

[2] Error is assigned to the court's sustaining an objection to allowing the plaintiff Dudley D. Watson to testify as a witness. The objection was sustained on the theory that the witness was incompetent for any purpose because an adverse party was defending as heir or legal representative of the defendant F. P. Woodley, who died prior to the trial of this cause. This was error. The plaintiff would be a competent witness against other defendants who are not legal representatives or heirs and who were present at the trial in person and by counsel. The witness was not incompetent for all purposes. *Nesbitt v. Swallow*, 63 Colo. 194, 164 Pac. 1163, followed in *Gabrin v. Brister*, 65 Colo. 407, 177 Pac. 134.

[3] The record shows, however, that this error was harmless, for the reason that most, if not all, of the evidence which would have been given by the witness was of facts admitted by the pleadings. Furthermore, the other defendants were interested as Woodley's subsequent purchasers, and proof of any facts affecting them would be immaterial unless plaintiffs establish a cause of action

against Woodley, and this they have not done. The judgment is affirmed. The former opinion is withdrawn, and this substituted in lieu thereof.

SCOTT, C. J., and BAILEY, J., not participating.

BURKE, J., agrees with the conclusion.

(63 Mont. 106)

CITY OF HELENA v. HELENA LIGHT & RY. CO. (No. 5033.)

(Supreme Court of Montana. April 5, 1922.
Rehearing Denied June 5, 1922.)

1. Street railroads ¶66—Company held not entitled to discontinue part of a unit of its lines.

A proviso, in an ordinance granting a franchise to a street railway company, that it should not be required to operate its lines or any "part or portion thereof at a loss," only grants permission to discontinue the entire system, or any entire unit, not any part of a unit.

2. Franchises ¶2—Grant of franchise construed strictly against grantee.

Grants by the government of rights, privileges, and franchises are construed most strongly against the grantee and most strictly in favor of the public.

3. Franchises ¶3—Public utility cannot be required to operate at a loss.

A public utility cannot be compelled to operate its entire business or a branch thereof at a loss, in absence of a statute or contract requiring it to do so.

4. Franchises ¶1—Grant and acceptance of franchise constitute contract.

A grant of a franchise and its acceptance constitute a contract.

5. Municipal corporations ¶71—Franchise of street railway, subject to regulatory power of state.

Although the accepted franchise of a street railway company from a city, constituting a contract, purports to require the company to operate its line for the entire term of the franchise, irrespective of loss, the city's right to enforce that requirement by injunction is subject to the power of the state, through the Public Service Commission, to relieve the company therefrom, notwithstanding Const. art. 15, § 12, requiring the consent of local authorities of the city for the construction of a street railroad therein.

6. Constitutional law ¶121(2)—City contracts not within provision as to impairment of contracts.

A city cannot assert, as against the state, that its contracts are protected by the inhibition of the federal Constitution against impairment of the obligation of contracts.

7. Municipal corporations ¶71—Regulatory power of state not surrendered by contract of city with public utility corporation.

While a state may preclude itself from exercise of its restrictive power over the contracts of a municipality by authorizing it to contract with a public utility for a given service for a definite period, the courts will not recognize such surrender of power, unless unmistakably expressed to be intended by the Legislature, or necessarily to be implied from powers expressly granted.

8. Constitutional law ¶134—Generally statute empowering city to make contracts not construed as permitting city to make contracts inviolable against state.

A general statute, such as Rev. Codes 1921, § 5039, conferring on a city the power to authorize the construction and operation of street railroads, grant rights of way to such railroads, and regulate them, and authorizing the city to make contracts necessary to carry out the powers granted, will not be construed as empowering the city to make contracts inviolable against the state.

9. Constitutional law ¶134—Ordinance provisions held not to relate to property rights free from legislative control.

Provisions in a city ordinance requiring a street railroad company to pave the streets between its tracks and to sell commutation tickets, and that cars make a minimum number of trips daily between designated hours, do not relate to property rights which are beyond legislative control.

Appeal from District Court, Lewis and Clark County; A. J. Horsky, Judge.

Suit by the City of Helena against the Helena Light & Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

E. C. Day and H. G. McIntire, both of Helena, for appellant.

Gunn, Rasch & Hall, of Helena, for respondent.

HOLLOWAY, J. On April 4, 1901, the city council of Helena enacted Ordinance 491, by the terms of which there was granted to George M. Brill and his associates, successors and assigns, the right to acquire, construct, operate, and maintain a street railway system over and upon the streets and avenues of the city then occupied by the tracks of the Helena Power & Light Company, which streets and avenues were particularly mentioned, and in addition thereto the right to use "such other streets and avenues as may hereafter be deemed needful by said grantee for the conduct of his said street railway business, upon written application therefor, by and with the consent of a majority of the members of the city council." The franchise was granted for the period of 25 years, fixed a schedule of fares, a minimum number of trips to be run daily

and the royalty to be paid by the grantee to the city. It provided, also, for acceptance in writing and for forfeiture for non-user. Other provisions will receive consideration later.

The defendant Helena Light & Railway Company succeeded to all the rights granted and became subject to all the liabilities imposed by the ordinance, and in 1906 applied in writing to the city council for permission to change one of its lines by abandoning the use of Clark street and small portions of other streets and by constructing and operating the line upon Lawrence street, a portion of Harrison avenue, and a portion of Knight street thereby again completing the unit which is designated the Kenwood Line. To this application the council responded by enacting ordinance 619, which expressed the council's consent to the abandonment of the designated parts of the old line and to the construction and operation of the new line, fixed the time for the removal of the old track and the construction of the new parts, and provided for an indemnity bond and for an acceptance of the terms of the ordinance. Other provisions will be referred to later.

Acceptance of the terms of the ordinance was filed with the city, the designated changes in the line were completed, and the line as thus changed has since been operated. Early in 1921 the railway company indicated its intention to abandon that portion of the Kenwood Line from the intersection of Park avenue and Lawrence street to Kenwood, and to remove its tracks and appliances from the streets and avenues occupied by them. To prevent such action, this suit was instituted, and a temporary injunction secured. Upon final hearing a permanent injunction was denied, and a judgment entered dismissing the complaint. From that judgment this appeal is prosecuted.

[1] It is the contention of the railway company that its right to abandon the portion of the Kenwood Line in question was expressly reserved to it in that portion of Ordinance 491 which reads as follows:

"But it is further understood and agreed that nothing in this ordinance contained shall be taken or construed as requiring the grantee to continue the operation of said railway lines or any part or portion thereof at a loss."

The language of this reservation is not well chosen and the meaning is somewhat obscure. In the granting portion of the ordinance, each of the lines constituting the defendant's railway system is described minutely; the Kenwood Line as commencing at the car barn, Cutler and Main streets, then traversing certain designated streets and avenues to the city limits. Does the reservation above authorize the railway company to abandon a part of one unit, or is it to be understood as granting permission to aban-

don the entire system or any entire line comprised in the system? That the latter is the correct interpretation of the provision we entertain no doubt.

[2] It is a rule of universal application that, in all grants by the government to individuals or corporations of rights, privileges, and franchises, the words are to be taken most strongly against the grantee, and one who claims a franchise or privilege in derogation of the common rights of the public must be able to establish his claim by a grant clearly and definitely expressed and he cannot enlarge it by doubtful or equivocal provisions or probable inferences. 12 R. C. L. 194. If the grant is susceptible of two meanings, one restricting and the other enlarging the powers under the franchise, that construction will be adopted which works the least harm to the public. *Blair v. Chicago*, 201 U. S. 400, 28 Sup. Ct. 427, 50 L. Ed. 801. In *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133, the Supreme Court of the United States expresses the rule as follows:

"Whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and * * * nothing passes but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such acts is taken to have been withheld."

Many of the decided cases affirming the rule as here stated will be found cited in the notes in 28 C. J. 1031, 1032. A cogent reason for the rule is stated in *Blair v. Chicago*, above, as follows:

"It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

That the railway company itself understood the reservation in the sense here indicated is evidenced by the fact that upon the hearing in the court below the testimony introduced by it in support of the defense that the line could be operated only at a loss related to the line in its entirety, and not to the particular portion sought to be abandoned, and common sense would seem to indicate clearly that under practically any conceivable circumstances, it would be impossible for the railway company to show that operation of any particular section of the line would necessarily result in loss. In our opinion, it is a fair construction of the reservation that it was intended only to authorize the discontinuance of any unit, the operation of which entails a loss, and that it was never intended to permit the abandonment of a part of one entire line. But, if the language employed in the reservation

is susceptible of two constructions, then it is incumbent upon us to adopt the interpretation most favorable to the public. Under this construction it becomes immaterial whether by the enactment of Ordinance 619 it was intended to grant a new franchise, or only a permit to exercise the franchise granted by the language quoted first above from Ordinance 491. In other words, it is immaterial whether we have for consideration two contracts, or one contract modified by the acceptance of the later ordinance.

[3-5] It is now settled beyond controversy that a public utility cannot be compelled to operate its entire business, or a branch of its business, at a loss, in the absence of a statute or contract requiring it to do so. *Brooks Scanlan Co. v. Railroad Commission*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *P. U. R. 1920C, 579*; *Bullock v. Florida*, etc., 254 U. S. 513, 41 Sup. Ct. 193, 65 L. Ed. 380. It is equally well settled that a grant of a franchise and its acceptance constitute a contract (*State ex rel. Billings v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799), and it is the contention of the city that it has a contract with the railway company, evidenced by the franchise under which the Kenwood Line was constructed and has since been operated, which imposes upon the grantee the obligation to operate the line for the entire term of the franchise, irrespective of the question of loss. In a qualified sense this contention may be granted in the first instance; but it does not follow that the city is entitled to a permanent injunction. Questions concerning the rights which a city may acquire in its proprietary capacity are not here involved. The grant of a franchise is distinctly an act of government—the parting of a prerogative belonging to the supreme governmental authority (26 C. J. 1013), and under our system that authority is lodged in the legislative department (*California v. Central Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150). The distinction between a franchise to operate a street railway system and municipal contracts for street lighting or water service is pointed out in *State v. Des Moines City Ry. Co.*, 159 Iowa, 259, 140 N. W. 437.

A city is but a political subdivision of the state for governmental purposes, owing its very existence to the legislative will, and capable of exercising only such powers as are granted, either directly or by necessary implication. *City of Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235. Primarily, the power to grant a franchise rests exclusively in the Legislature (*State v. Monroe*, 40 Wash. 545, 82 Pac. 888; 26 C. J. 1024), and though it may be doubted whether such power can be delegated, it is recognized generally that a franchise may be derived from the state indirectly through the agency which it may designate for that pur-

pose (*Western Union Tel. Co. v. Hurlburt*, 88 Or. 633, 163 Pac. 1170; *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742; *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687), and whenever a city assumes to grant a franchise, it acts merely as the agent of the state, and this is true in this jurisdiction, notwithstanding section 12, article 15, of our Constitution, provides:

"No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad."

Our constitutional provisions are limitations upon, and not grants of, power, and generally they are limitations upon legislative action. Section 12 does not grant any right or power to a city or town. In the absence of that restriction, the Legislature could grant a franchise directly to a street railway company to occupy and use a city's streets upon such terms as the lawmakers saw fit to exact, and that, too, without consulting the city authorities, and in utter disregard of their expressed opposition. The presence of that provision in our Constitution does not modify the principle that the grant of a franchise proceeds from the Legislature. *New York City v. Bryan*, 196 N. Y. 158, 89 N. E. 467. It only provides that a grant from the Legislature shall not be effective without the consent of the local authorities, but it does not withhold from the Legislature the power to say upon what terms the franchise shall be enjoyed. *City of Denver v. Merchants' Trust Co.*, 201 Fed. 790, 120 C. C. A. 100.

[6, 7] If, then, the right of the city to grant this franchise was subject to legislative restriction, as we hold that it was, the city cannot remove such right from the power of state regulation and control by merely designating the accepted franchise a contract, for the contract carries with it all the infirmities of the subject-matter. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560. Neither can the city insist that its contract with the railway company is inviolable, protected by the contract clause of the federal Constitution or by section 11, art. 3, of our state Constitution. Speaking generally, a municipal corporation does not stand in a position to assert as against the state the benefit of the constitutional provision against the impairment of the obligation of contracts. (*New Orleans v. New Orleans Water Works Co.*, 142 U. S. 798, 12 Sup. Ct. 142, 35 L. Ed. 943), although the state may preclude itself from exercising its reserve power by authorizing the municipality to contract with a public utility for a given service for a definite period.

[8] Since, however, the effect of such a grant of authority to the city is to extinguish pro tanto a governmental power of first importance, the courts will not indulge the presumption that such surrender of power has been made, unless the legislative intention is expressed in clear and unmistakable language, or is necessarily implied from the powers expressly granted, and all doubts will be resolved in favor of the continuance of the power in the state. *State ex rel. Billings v. Billings Gas Co.*, above. A general statute conferring upon the city the authority to regulate public utilities will not be construed to empower the municipality to make contracts inviolable as against the state. This doctrine has been invoked most frequently in rate-making cases, but upon principle it applies equally to other matters of regulation and control. For an elaborate discussion of the rule, reference is made to the notes in 3 A. L. R. 730, where the numerous decided cases are cited and analyzed.

Counsel for the city direct our attention to *Quinby v. Public Service Commission*, 223 N. Y. 244, 119 N. E. 433, 3 A. L. R. 685, *Interurban Railway Co. v. Public Utilities Commission*, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696, and *Cincinnati v. Public Utilities Commission*, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705, and they might have included *Virginia-Western P. Co. v. Clifton Forge*, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148, all to the effect that the state, through its public utilities commission, may not change an existing rate agreed upon between the public utility and the municipality. The Ohio and Virginia courts ground their opinions upon express provisions of the Constitution or statute deemed controlling, and acknowledge that the overwhelming weight of authority sustains the view heretofore expressed, while the New York court held only that the Legislature had not conferred upon the commission the power it sought to exercise. The *Quinby* Case was, however, greatly modified, if not overruled, in *State ex rel. South Glens Falls v. New York Public Service Commission*, 225 N. Y. 216, 121 N. E. 777.

Our statute (section 5039, R. C. M. 1921) confers upon a municipality power:

"To license and authorize the construction and operation of street railroads, and require them to conform to the grades of the street as the same are or may be established. * * * To grant the right of way through the streets, avenues, and other property of a city or town for the purpose of street or other railroads and to regulate the running and management of the same, and compel the owner of such street or other railroads to keep the street in repair when occupied by such street or other railroad. * * * To make any and all contracts necessary to carry into effect the powers granted by this title and to provide for the manner of executing the same."

Whether, in view of the provisions of section 5, art. 15, of our Constitution, the Legislative Assembly could delegate to a municipality authority to grant a franchise to a street railway company, the acceptance of which would constitute a contract inviolable as against the state, we need not stop to determine. For all purposes of this appeal it is sufficient to say that in our opinion it has not attempted to do so. The only authority claimed by the city to compel the railway company to operate the Kenwood Line during the entire period covered by the franchise rests in contract, which, as we have determined, is not inviolable as against the state. It follows that the state may, through the Public Service Commission, relieve the railway company of the burden thus imposed. *Worcester v. Worcester Consolidated Street R. Co.*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591. And this conclusion does not impinge upon the right of the inhabitants of a municipality to a measure of self-government with respect to matters of purely local concern. The streets of a city are public highways (section 1612, R. C. M. 1921), and though the city is charged with the duty of keeping them in repair, and the cost of maintenance is imposed upon the city, nevertheless jurisdiction over them is primarily in the state, and the city acts with respect to them subject to the general laws of the state (*State ex rel. Telephone Co. v. Red Lodge*, 30 Mont. 338, 76 Pac. 759).

[9] Our attention is directed by counsel for the city to provisions contained in Ordinance 619, either directly or by appropriate reference to the general ordinance of the city, and particular reference is made to the provisions requiring the railway company to pave the streets between its tracks and to sell commutation tickets, and to the provision that the cars shall be required to make a minimum number of trips daily between designated hours; but the rights referred to do not constitute property rights beyond legislative control. *Worcester v. Worcester Consolidated Street R. Co.*, above; *Dubuque Elec. Co. v. Dubuque*, 260 Fed. 353, 171 C. C. A. 219, 10 A. L. R. 495. It is our conclusion that the state may, through the Public Service Commission, relieve the railway company of its contract obligation to operate the Kenwood Line, or a part of it, during the entire period covered by the franchise, but that, until the state has acted in the premises, the obligation is a continuing one, which the city is entitled to have discharged. This being a suit in equity, jurisdiction over the subject-matter should be retained until final disposition upon the merits.

It is ordered that the judgment be reversed and the cause remanded to the district court, with directions to grant an interlocutory injunction restraining the defendant, its agents, servants, and employees, from

discontinuing the portion of the Kenwood Line in question until such time (if at all) as the Public Service Commission shall grant authority for such discontinuance, and to retain jurisdiction over the controversy for a reasonable time, until application is made to the commission and action had thereon.
Reversed and remanded.

BRANTLY, C. J., COOPER and GALEN, JJ., and H. H. EWING, District Judge (sitting in place of REYNOLDS, J., disqualified), concur.

(63 Mont. 337)

FLYNN et al. v. POINDEXTER & ORR
LIVESTOCK CO. et al.
(No. 4766.)

(Supreme Court of Montana. May 15, 1922.)

1. Trial \S 139(1)—Whether there is substantial evidence to support plaintiff's case is question for the court.

Under Rev. Codes 1921, \S 9317, providing for a dismissal or nonsuit for failure of proof, whether there is substantial evidence in support of plaintiff's case is always a question of law for the court.

2. Trial \S 139(1)—Competent evidence must be produced of all necessary facts to prevent nonsuit.

While, on motion for a nonsuit, every fact is deemed proved which the evidence tends to establish and must be viewed in the light most favorable to plaintiff, yet competent evidence must be produced of all facts necessary to a recovery upon which the jury can base a reasonably reliable conclusion, and nothing can be left to mere conjecture.

3. Animals \S 14—Evidence held insufficient to make case for driving cattle from range.

In an action for driving plaintiff's cattle which were running on the range on the public domain to a point near his inclosed field and leaving them without feed or pasture, causing them to break into plaintiff's grain field and destroy the crop, evidence held insufficient to support the allegations that the cattle were driven without food or pasture, that plaintiff's fence was torn down by defendants, or to show how the cattle got into the inclosed fields.

4. Animals \S 14—Burden of issue of proximate cause of injury by cattle driven from range is on plaintiff.

In an action for driving plaintiff's cattle from the range on the public domain and leaving them near his inclosed fields into which they broke, the burden of proof rested on plaintiffs to prove that the driving of the cattle by defendants was the proximate cause of the injury and damage complained of.

5. Animals \S 14—Driving cattle from range not actionable without causal connection between act and injury.

To support a recovery for driving plaintiff's cattle from the range on the public domain leaving them near his inclosed fields into which

they broke, destroying the crop, there must be a causal connection between the negligence alleged and the injury.

Appeal from District Court, Beaverhead County; Wm. A. Clark, Judge.

Action by Thomas Flynn and another against the Poindexter & Orr Livestock Company and another. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Walsh, Nolan & Scallon, of Helena, for appellants.

Callaway & Callaway, of Dillon, for respondents.

GALEN, J. This is an action to recover \$2,100, alleged damages for the injury and destruction of certain grain in shock, belonging to plaintiffs, on their land, by reason of a large number of cattle breaking into plaintiffs' inclosed grain field, feeding, and tramping upon such crops.

It appears that the plaintiff Rutledge leased from his coplaintiff certain lands in the valley of the Blacktail Deer creek, Beaverhead county, Mont., which were inclosed by fence, 150 acres of which were planted in oats; that such grain crop grown thereon had, on the dates complained of, November 3 to 5, 1918, been harvested and shocked; and that the crop was owned jointly by the plaintiffs. The defendant corporation also owned lands in this valley, and was at the time engaged in the business of raising cattle, horses, and sheep; the plaintiff Flynn conducting like business. About 12 miles from the lands owned by the plaintiff Flynn and contiguous to lands owned by the defendant company, there was a body of unsurveyed public domain, open for the use of the public in stock grazing; and that on the 3d day of November, 1918, there were grazing thereon cattle in large number belonging to the plaintiff Flynn, to the defendant company, and to other residents of Blacktail Deer Creek Valley. Bert Orr was employed by the defendant company and was one of its directors and its manager, and on the date mentioned it is alleged that the defendants, being desirous of excluding from such public domain cattle other than those belonging to the defendant company, drove off the range, where they were pasturing, such cattle to the number of about 1,200 head, the property of the plaintiff Flynn and others, against the will of the owners and without their consent, and over protest, and moved them a distance of 15 miles along the public highway without feed or pasture, during the prevalence of a snow-storm, leaving them in a hungry condition on a portion of the plaintiff Flynn's land, adjacent to the field where the grain harvested and shocked was injured and destroyed by them. It is alleged that the defendant

knew, or in the exercise of reasonable care should have known, that the cattle, left in the hungry condition in which they were, would break into the field of grain belonging to plaintiffs; that they were by the defendant so left without advice to the plaintiff as to their presence; and that, on the night of the 4th of November and the morning of the 5th, they broke into the inclosure containing the grain, and ate up and destroyed about 35 acres of grain.

By answer filed, the defendants admitted the corporate existence of the defendant company; that the defendant Bert Orr was in its employ and at the time was its manager and a member of its board of directors. Further it is admitted that the plaintiff Flynn and the defendant company were the owners of large numbers of cattle; that the plaintiff Flynn owned lands adjacent to the lands of the defendant company; and that contiguous to some of the lands owned by the defendant company "there is a body of unsurveyed public land open to the public without pay for grazing stock." All other allegations of plaintiffs' complaint are denied. By way of special defense it is alleged that, at the time stated in plaintiffs' complaint, the plaintiff Flynn and one Pat Laden were holding, in charge of their herders and employees, about 1,200 head of cattle in the valley of the Blacktail Deer creek, and attempting to pasture them upon about 300 acres of public domain, which was wholly insufficient; that they were so carelessly and negligently herded that they were permitted to break through the fences inclosing the lands of the defendant company, to overrun the same, and feed off the grass growing thereon; that the defendants demanded of the plaintiff Flynn that he take care of such cattle and prevent trespass by them on lands belonging to the defendant company, which the plaintiff Flynn failed, neglected, and refused to do.

It is then alleged by defendants, by way of "full and complete defense":

"That being otherwise unable to protect the fences and lands of the defendant company from the encroachments of said cattle, these defendants, as they had a right to do, gathered up said cattle so being in the charge of said plaintiff and those acting in conjunction with him, and drove the same down the county road through the valley of Black Tail Deer creek, a distance of some 10 miles, and left the same near the premises of the said plaintiff Flynn, and in the vicinity of the premises of said Laden. That the said plaintiff Flynn was present at the time said cattle were started from the lands of the defendant company, and well knew that the same were driven to and adjacent to his own premises in said valley, and that said cattle required the care and attention of their said owners, but knowing such facts said plaintiff Flynn made no effort whatever to care for the said cattle and made no effort to protect his own inclosures or the fences inclosing the lands of his coplaintiff Rutledge."

Issue was joined by plaintiffs' reply, wherein it is admitted that the plaintiff Flynn and Pat Laden were herding cattle on the public domain; that the cattle were being driven by defendants along the county road and were left near the premises of the plaintiff Flynn in a hungry condition. By way of further reply, plaintiffs deny that the fences of the defendant company were broken down by the cattle belonging to the plaintiff Flynn and his associates; that the public lands contiguous to defendants' lands embrace only 300 acres, and in this connection allege that such lands comprise several thousand acres. The allegations quoted above, set forth in defendants' answer as paragraphs IV and V, plead by way of full and complete defense, to the effect that the cattle were by the defendants driven down the county road a distance of about 10 miles and left in the vicinity of the premises belonging to the plaintiff Flynn, are admitted.

The case was tried to a jury, and at the conclusion of plaintiffs' case the defendants moved the court for a nonsuit, which was granted, and judgment thereupon entered for the defendants with their costs. The appeal is from the judgment.

But one question is presented decisive of the case, viz.: Did the court err in granting a nonsuit?

Thomas Flynn, one of the plaintiffs, testified on direct examination in part as follows:

"I live on Blacktail Deer creek, in Beaverhead county, Mont., about 7 miles south from Dillon. I have lived there over 40 years. My place is on both sides of Blacktail Deer creek. Blacktail Deer creek runs through about near the center of Blacktail Deer Creek Valley where I live; I join fences with the Poindexter & Orr Company for about 2½ or 3 miles. Blacktail Valley runs for 40 miles from Dillon up and down. It is not very thickly settled. It is settled pretty well down close to town; Poindexter & Orr Livestock Company owns it for about 18 or 20 miles of the creek on both sides. On the west side of the creek up until a few years ago since they took up dry farming, the Poindexter & Orr Livestock Company's possessions would not extend a mile on the west side of the creek any place. I range my cattle—Laden's and mine—on Blacktail on both sides of the creek. In late years Ernest Selway put a fence above so the cattle can't get across, but some gets across. There is some on both sides of the creek. Q. The range on the east side of the creek is known as what range? A. It is known as the Blacktail and Sweetwater. Q. Is that the west side? A. The west or southwest side. Q. The range on the west side is known as what? A. It would be the Blacktail and Sage creek. Q. How extensive is that range on the west side? How far does it extend? A. From the mouth of the canyon—the last place taken up—over to Sage creek, there is a strip of government land not less than six or seven miles wide. Q. In length what would it be? A. You could start in and go to the Centennial Valley on government land

without being fenced in in any place for 40 miles. . . .

"In 1918, I was engaged in farming, cattle raising, and horse raising. Along about the 3d of November, 1918, my cattle on the southwest side of Blacktail Deer creek was ranging from Jake Canyon up to Cottonwood and in the hills back towards the top of the range to Sage creek. At that time there were cattle on that range belonging to Pat Laden, and to Mr. Keenan, and to Orr & Poindexter. About the 3d of November, 1918, there must have been all of 700 head of my cattle on this range. Some of these cattle were on that range all summer. As they kept coming in, I drove a lot of them up and put them on the public range. Some of them come back down as far as the Poindexter & Orr ranch, and Mr. Orr and two of his men took them and put them out on Smallhorn Canyon. I went after them and asked them what they did with the cattle, and Mr. Orr told me he put them out on Smallhorn Canyon, and that if they come there at any time in the future he would do the same thing with them. So I went after the cattle and rounded them up and took them back to my ranch, and then I took them up again on the range, and I hired a man by the name of Cozad to herd them back on the range and not let them come down. I had been herding these cattle up there, I guess, about a month before the 3d of November, 1918. It must have been nearly a month before the 3d of November that I had this talk with Bert Orr that I have told about. He said that the cattle were in his alfalfa. Along the road his fence was down, and he had his gates open there on the place, none of them were closed, and the cattle that come down the road could walk right in there; there was no fence to keep them out, or anything else; they never closed their fence or gates while haying that fall; and I put a man to herd them so that they would not come down on the place. We talked it over several times that fall before November 3d, and I told him that I would not have them damaging him; that I would keep them up on the range and not let them come back down. I kept a herder there until the 3d of November. I had this man Cozad for a while, but he quit the job; and when he quit I went there myself and a man of Pat Laden's. Before the 3d of November, I should judge I had been there about 10 days; I did not keep track of the time, but I should judge about 10 days.

"Q. What, if anything, took place on the 3d of November in reference to these cattle? A. I went on up the road on the 3d of November in the afternoon after dinner, on horseback, and I met Mr. Bert Orr and five other of his men with the bunch, probably 1,200 head of cattle, in the mouth of the lane. They had them all rounded up. It is a lane of Orr & Poindexter's between the two places. He was on the open range just getting into it (the lane) when I asked him that he give me my cattle and I would take charge of them. At the time I found these cattle as I have told you, they were right within half a mile of the public range; they were right on the public highway that runs up and down the valley; he had them on the public highway. I told him that I would take charge of the cattle that were mine, I did not want him driving them, and he told me to step aside; and I got right in front of the cattle and kept

them back in the lane, and he told me the second time to step aside; and I rode ahead of the cattle until they come out of the lane off his land, and as soon as they come out of his land onto the dry farmers' property I demanded them again. I made another demand, and he made the same statement. He gave me the same order, to step aside. He had a gun on the saddle, and I thought the better thing to do was to step aside. There was five men with him and himself. Mr. Orr seemed to be directing the movements of the men there. It would be about 12 miles from my home place to where these cattle were thus driven or being held. This was on a Sunday. When I had this conference with Mr. Orr, it was somewhere between 1 and 3 o'clock. The cattle were only just rounded up when I first met Mr. Orr; he had them just rounded up when I met him. Before that, when I last saw the cattle, they were grazing on what I considered to be the public range, on probably 4 miles by 2 or 3 miles. In the talk I had with the defendant Orr on Sunday afternoon he did not tell me what he was going to do with the cattle; he told me to step aside. Then later in the evening he had the cattle rounded up when I come down the road in front of his place below Landon's, about three hours after, and I went again and made a demand on him for the price of the cattle in the presence of Pat Laden. I came down the road in the direction of my home ranch, and about 4 miles beyond where I last talked with him I met him again. The cattle were driven about 4 miles; he had them rounded up at this time, and I made a demand on him for the price of the cattle since he would not turn them over to me.

"On Monday morning the cattle was up in front of Orr & Poindexter's home ranch. I did not go up to see them there. I went up the road a little ways in my car, and I seen they were there; I suppose they were there. They were in there on the road where the men was working them, and I took my car and went to town and went over to Helena for to find out what remedy I had at law. That was the last I seen of the cattle. Where I saw the cattle up there at Poindexter & Orr's place, it would be 2 miles from where my fence was opened and the cattle run in, exactly. The cattle were being held stationary at the time I seen them on Monday. There was not a bit of feed for the cattle on the highway from the time I saw them on Sunday until Monday. It was a public road. In 1918 I did not have any crop in on my land myself; I had it leased. Patrick Rutledge and Ray Tash were the lessees. Patrick Rutledge had quite a lot of grain in; he had in somewhere about 150 acres. This grain field was inclosed by a fence, part of it with a two-pole jack fence, and part of it with a three-pole jack fence and two wires. When I went to Helena on Monday, the grain in that field was all stacked, but this 37 or 40 acres, that was in shocks. We allege no damage for the stacked grain, but just for the shocked grain, that was a total loss. Rutledge was to do all the raising and cutting and stacking of the grain, and we was equal partners in the results of the crop. I returned to my place from Helena on the following Sunday. When I returned this grain was a total loss. Every acre of the 37 acres was a total loss; that that was not in the stack was not worth stacking, and the straw

'tself was not worth gathering up, what was left of it. There was only a remnant of it left."

On cross-examination, he testified, in part:

"I don't know that my fences were down at the home place. The fence was open and torn down. I did not tell the jury that they were down. There was a gate there, and they could go down to the gate. The fences were torn down by the people who drove the cattle in there. The fences was up prior to that morning when I left. That morning the fence at that corner was not down. I went by it that Monday morning, and the fence was up, and when I come back the main fence was down. There was a couple of panels of the fence down. That is not the place where I used to have bars. When I left for Helena, this fence at the corner was up. It was a three-pole jack fence. I said the following Sunday morning the fence was down; I said that was the last I seen of it until the following Sunday morning. The fence was not down at that corner that morning where the cattle was put in, but it was down when I came back. There was places in the fence along my place when I saw it the last time before going to Helena that was not the best in the world, that is, of the pasture fence. There was places in that fence that they could drive cattle in if they wanted to drive them in. The first dozen panels of the fence along the road was up, from that corner. For that distance it was a two-pole jack fence and a rider; it is what I consider three poles. It is a pasture inside of that field. It runs down to my house. The cattle could get down to the house, but they could not get out to the main pasture until they broke the fence. There was not a pair of bars where they broke the fence. There was a place we used to go in at that corner to the creek where we made bars of the jack fence. Between the pasture and the grain field there was a three-pole jack fence and two wires; it was a four-pole jack fence with one wire, I believe. It was the average height of a jack fence. I did not measure it. It was high enough so that the cattle would not jump over it. It still turns cattle. It is right there and turns cattle yet. It was not five feet high. It was just a regular four-pole fence, the same size as any other jack fence. I can't give you the height in inches. The other fence was three poles and two wires. That is turning cattle yet. The fence I am now describing is the fence between the pasture and this grain field that was down. I first saw these cattle in charge of Mr. Orr at the mouth of the lane, between where Ernest Orr and Matt Orr's field is fenced above the road. I should judge that was about $2\frac{1}{4}$ miles from the Cozad ranch, south. They must have had 1,200 head of cattle in the bunch. Mr. Orr and I had no talk, only I demanded the cattle, I said, 'I will take care of them.'

"Q. Didn't he tell you at that time that he was taking these cattle because you were herding them on his leased lands, and that they were always breaking through the fence, and you were not stopping it? Answer yes or no. A. No. Q. And didn't you ask him where he was going to take these cattle, and didn't he tell you that he was going to take them down

home to your place? A. He told me he did not care if they went to hell, if you want to know what he told me. He did not say that he was taking these cattle down to my place. He told me to step to one side; that he would take charge of the cattle; that is what he said. That he had the cattle in charge and to step one side. You bet your life I stepped to one side. I did not fly very far down the country after that. He told me several times in the lane to step to one side. After that I went away from there—when he would not give them to me. After he got them off his land, I made a demand that he give me my cattle, and there was not any use for me to stand in front a gun. This time when I made the demand the cattle were on his land coming through that lane, all the way through for two miles. I waited until I got off of what he could consider his land and made another demand. They were not on the public road; they were on two dry ranchers' places. There was no road there; it was not fenced. When I came back with Pat Laden, these cattle were down at what we call the old Daly field of the company. I should judge that was about 7 or 8 miles from the home place. They had driven the cattle a distance of 5 miles. There was not quite as many as 250 head in Pat Laden's bunch; there was 50 or 75 head.

"Q. You just simply came and delivered this extra number of cattle, whatever there were, over to these people, didn't you? A. We could not do anything else, but drive them right in there; we could not get by. I knew they had possession of the cattle the last time I seen them driving them down the country. Notwithstanding that, I joined Mr. Laden in taking this other bunch of cattle along until we met this bunch coming down. I went back to make another demand, to see if I could get my cattle and take them with me. At that time I told him I turned the cattle over to him at \$90 a head. I would not say what price Mr. Laden demanded for his cattle; I won't say how much he demanded, but I told him \$90 was my price. Mr. Orr told us that the cattle and us could go to hell, if you want to know what he said, when he was through with them, but he was not through with them yet. I will swear positively on oath that I did not know that the cattle on Sunday night, on the 3d of November, were put in the company field at the home place and fed there and stayed there all night. I don't know what become of the cattle after I left that night until the next morning. The next morning I seen the cattle on the road somewhere about noon or the forenoon; I won't say exactly what time it was. I saw them in front of the house and the stables. I did not get close enough to make any estimates at all of the number of cattle that were there at that time; I would not get within range of the rifle any more. I was afraid, I will admit it. There was not any cattle in that vicinity only the bunch they were driving, and I come to the conclusion, from that, that they were mine. I don't know anything about the condition of the cattle that morning. It was starting to snow when I left home; it was snowing in Helena the next morning good and strong. It was not storming Monday morning at daylight, but it was storming at noon when I left home. There was a windstorm raging Sunday night all night,

noon until Tuesday night, I guess, and Wednesday but there was no snow; it snowed from Monday day. I left for Helena on the 2 o'clock train."

Patrick Laden testified, in part, on direct examination:

"I am related to Tom Flynn, one of the plaintiffs. I have lived in Beaverhead county about 26 years. My business has been farming, raising some cattle and a few head of horses. In connection with the alleged injury to some grain belonging to Mr. Rutledge and Mr. Flynn in 1918, I had something to do with cattle then. I owned some cattle in November, 1918. I owned in the neighborhood of 300 or 350 head, maybe more. I kept the cattle up on the range at the head of Blacktail during the summer months until the cattle were brought in in the fall. During the first part of November, 1918, these cattle were on the range. In order to keep them on the range, we were driving them up and keeping them up in the hills. By 'we' I have reference to the man I had there helping Mr. Flynn; I did not stay up there. On November 3, 1918, I was taking up some cattle up to the range. These cattle kept coming down from the hills. I saw Bert Orr on that day on the county road, I think 7 or 8 miles up the road from Tom Flynn's place; I could not say how far it was. I could not say exactly how many cattle I was taking up to place on the public range at that time, but maybe 70 or 80 head. In going up there I met Mr. Flynn. I was going up with the cattle, and he was coming on down towards home. I kept going on up. Mr. Flynn did not keep on going down; he come back with me. In going on up I saw the defendant Bert Orr, and as near as I know he and four or five men he had with him, I could not say which, had a bunch of cattle all rounded up in the center of the road, and he was cutting out cattle out of the bunch. It was a big bunch of cattle. There would be about 1,000 or 1,100 head. There was cattle belonging to me in that bunch; that is, cattle other than the cattle I was driving up there. The cattle I was driving up there went into the bunch in the middle of the road. I could not go on with the bunch I was driving because that whole big bunch was in front of me and I could not get through the bunch. There should be close to 300 head of my cattle in that bunch, without adding the bunch I was taking up. This bunch of 1,000 cattle belonged to different parties. At the time I encountered these cattle, they were standing still. They were bunched up, and the men was holding them in the road. Bert Orr was doing the cutting out; he cut out some cattle out of the bunch. Mr. Flynn did not have any conversation with Mr. Orr in my presence; I did not hear him have any at that time. I went over to Mr. Orr and asked him what he was doing with the cattle, and he said, 'I am going to get mine out of here, and turn them to hell down the road.' I said, 'You have my cattle in your possession,' and I said, 'You better take care of them.' He laughed and went on cutting out and kept a going. That is all the conversation I had with him that I remember. I believe I told him that I could have sold them cattle last spring for \$70 a head, and that he had better take care of them; that he had them now in his possession. The 60 or 70 head I was driv-

ing up got into that bunch. When I left there that afternoon I did not bring any of the cattle with me.

"The next time I saw these cattle was the next day, Monday. I saw them on the road about half a mile back of the company ranch, back of the Poindexter & Orr ranch. I think that would be about $2\frac{1}{2}$ miles or 3 miles from this pasture that they finally got into next to this grain field. At that time when they were on the road there there was four or five men around the bunch; they were rounding them up in a bunch on the road. I saw them there in the forenoon, probably between 9 and 10 o'clock, around that time. At that time I was going up in the hills. I was in the company's field. I next saw that bunch of cattle in the afternoon of that day, between 1 and 2 o'clock; it was after dinner. At that time the cattle were in Mr. Flynn's field. I don't know how they got in there. The fence was up that morning as I passed by the road. When I saw the cattle in the pasture, the fence was down at the corner where the roads cross each other; there was about two panels of the fence down. I have no personal knowledge as to how it came to be down. There were in the pasture about the same amount of cattle that was in the bunch, I would think from the looks of it. It started to rain a little bit about noon, and about 1 o'clock it started in to snow after that, later in the evening; it was a soft snow. It was a small field for a summer pasture along the road where the cattle went in; there was better than 100 acres in it. There was an oat crop being raised on some land close to where that pasture was. There was a fence between that oat field and that pasture. At the time I saw these cattle in the pasture I did not do anything that Monday afternoon; I went home. I next saw these cattle Tuesday morning right close to Mr. Flynn's house, standing up around his granary and corrals he had there. I believe it snowed all night that night. Tuesday morning I did not notice the condition of the oats in the oat field. Wednesday morning I went over there after the election. I come to town Tuesday evening here. It was election day, and I went back over there Wednesday morning, and I found that some of the cattle was in the oats, and some of them were breaking in, going through the fence when I got over there. I tried to drive them out. Pat Rutledge come up and helped me, and he had a man, but the man was afoot; he had no horse; and Mrs. Flynn was out there afoot, and there was the little boy, Mrs. Heavy's boy; he was out there. That was on Wednesday morning. There was about 200 or 300 head in there when we started to put them out. We did not put them out because we could not. I kept at it until half past 5 or 6 o'clock that evening, me and Pat Rutledge and his man and Mrs. Flynn and the boy. The first time I noticed these cattle in the grain was Wednesday morning, and at that time there was about 200 head in the grain. They went through the fence into the grain field. Pat Rutledge was trying to drive them out when I first noticed them in the grain field. That morning he was the only one that was there. We kept trying to get them out of there until Wednesday evening.

"In the meantime during that day Pat Rut-

ledge's man came to engage in the work of getting them out, but he was afoot; he had no horse; and Mrs. Flynn and Vincent Heavy, the boy that was stopping there, came also. We could not do a thing with them. While we were trying to drive them back, they got worse. They were coming down through the crop, and they were making better headway than we was. They were increasing right along until the whole bunch got in the grain. By Wednesday evening all that was in that bunch was in the grain, about 1,000 or 1,100 head. We worked at them until 6 o'clock that evening. I had three dogs and my saddle horse, and I was tired, and I went home. I had supper and got the man, and the two of us come back that evening, and I got a fresh horse. When we got back, Rutledge was in the field. We heard the dogs barking, and we went over to him, and we worked there, the three of us, until 12 o'clock at night. We finally succeeded in getting the cattle out the next day, Thursday. We could not do a thing with them all Wednesday night, and at 12 o'clock we made up our minds to leave them; we could not do a thing with them under any consideration. We did not have any trouble at all on Thursday to get them out; we just got them in the lower end of the field, and drove them to Flynn's corral. The reason we were able to drive them so easily on Thursday was they seemed to be filled up, and then we could drive them; that is my notion about it. The range where these cattle were herded was all the way from a mile, I would think, to a mile and a half from the county road. After you get up a mile from the county road I did not see any fences. There is a fence along the county road."

On cross-examination he testified:

"November 3d was Sunday. I saw Tom Flynn on the county road the first time that day, right above the company ranch, between the company ranch and Frank Landon's. Mr. Flynn was traveling towards home. I was driving up some cattle. I had gotten some of these cattle in Flynn's field and the rest of them on the road, on the road below the company lands. I was taking the cattle up the country. After I met Mr. Flynn, I drove these cattle probably a mile or a mile and a half before I met Mr. Orr with this other bunch. These cattle at that time were about three or three and a half miles, I would think, from the company ranch. When the two herds of cattle were joined, Mr. Flynn did not do anything. We did not stay there. I went in to see Mr. Bert Orr; he was in the herd. I wanted to see what he was going to do about the cattle. He told me that when he got through cutting his out he would turn them to hell down the road; and that is the time I told him he had my cattle, and he could take care of them at \$70 a head. Then I went home, and Mr. Flynn went with me, and Mr. Bobinack too. Mr. Flynn stopped at his house, and I went home. Mr. Flynn did not tell me then to keep an eye on what was being done with the cattle; he told me that on Monday, I believe. I was riding for cattle is why I went up that way Monday morning; not for these cattle, but for any strays there was. I did not notice any cattle down by Mr. Flynn's at that time Monday morning. I did not see any cattle down there. I went into the Poindexter & Orr field. Mr.

Flynn did not go with me that morning at all. After I saw Mr. Flynn there on Monday morning, I went alone up the country. Monday morning Mr. Flynn told me to see where the cattle was that was on the road above. That is what he told me at that time, to see where the cattle was. That is all I seen of Mr. Flynn for four or five days. I noticed some of these cattle on Monday afternoon in Flynn's field, but I don't know how they got there. I did not see anybody driving them Monday afternoon. There were none in there Monday morning when I passed by there on the road; there was no cattle in Flynn's field when I got back to Flynn's. I was home Monday evening. I next saw the cattle Tuesday morning. I went over to Flynn's, and I saw the cattle bunched up around Flynn's corrals on the outside of the corrals, and around his granary and potato patch. He had a potato patch back of the granary, and they were standing around there. A little farther up into the dry field there was one fence between the cattle and the grain field.

"Q. So they had to go through from the potato patch—they had to go through the opening in the fence, and then go through the lane up into the dry field, is that right? A. There was a short lane; yes, sir. At this opening there was a pair of bars. Q. If they had been up then, there would have been two fields to go through before they could get to the grain field? A. There was two fences to go through. On Tuesday morning there was just a fence to the left of where the cattle was. The grain was probably a mile from Mr. Flynn's house, maybe more; it might be a mile down in the lower end of the field where the grain was. The cattle did not have to go by Mr. Flynn's house in order to get down to the grain; they had to go out that lane into his dry field. We call it 10 rods from Mr. Flynn's door of his house over to the land. It was in plain sight of the house. After the cattle got up in the dry field, you could see them from the house, if you were outside. I don't know what time on Tuesday the cattle got out of the pasture and the potato patch and around the granary, up into this dry field. I did not stay there long Tuesday morning until I went home. I seen that the cattle was around there standing up around the fences, or at the granary, and around there. I could not say whether the bars were up at that time or not. At that time I did not see that any of the cattle had gotten out into this short land. I went back home and went to town. That was Tuesday, election day. I got back to the Flynn place Wednesday morning, and there was a few head of the cattle in Flynn's field in the grain. There was six or eight head down in the oats. There was six or eight head in the oats Wednesday morning, and the rest of the bunch was above in the same field. I did not chase these six or eight head at that time. I don't know whether any grain had been eaten up at that time or not; I was not out to the grain at all at that time. When I got there, there was about 200 head of the bunch in the same field, picking around the edges. The grain that was shocked on the land was maybe a quarter of a mile away. I made an effort to chase these 200 head out, but I did not get them out. We got the cattle out Thursday morning; we got another man, and we got them all out. Thursday morning I called up John Laden when

I went home, and he come over and helped us. We got them out easily Thursday morning. The four of us got them out. We put the cattle in Flynn's corrals. I cut mine out that day, and I had his cattle there and I put them in his field across the road. On Thursday we put the Flynn cattle across the lane into Flynn's field, on the other side of the road. I put all of the Flynn cattle across the road, and I took mine home."

The plaintiff Patrick Rutledge testified on direct examination in part as follows:

"In 1918, I had some of Mr. Flynn's land leased, and I had about 150 acres of that land in oats, besides some alfalfa I had to look after. This whole field of 150 acres of oats was fenced all around. I had a medium amount of a crop; I had what I call a fairly good crop. About the 4th or 5th of November, I had it all stacked, except around about 40 acres, I should judge, and that was in shocks. I had just finished cutting it about five days before, and it was not ready to put in stack yet. Figuring up what I threshed and what I sold, it went something around 60 bushel to the acre. The whole field was the same crop; it was the same kind and class of grain in that field. It went 40 pounds to the bushel; that is what I paid for threshing it; that is the way it is averaged. About that time other people sold oats for \$2.85 a hundred. Q. When, if at all, did you first learn that there were any cattle in this field? A. Well, the evening of the 5th; election day, I came to town to vote, and when I got home that evening it was just getting along towards dark; it was not quite dark, but it was getting along there, and just as I got to the house Mrs. Flynn was there. She come down afoot; she come down. It was about 8 o'clock on Tuesday evening that I first learned of it. Upon learning that, I got my saddle horse and went right out after them. There was a bunch of cattle coming down on this bench land above the grain, and I started working on them right there, and they kept getting more and more; they kept backing me up, and I worked with them until about half past 10 o'clock on Tuesday evening, and they got too much for me. I could not do anything with them alone. I got my horse pretty well run down, and I went back to the house. I had a hired man there, and he was in bed, so when I asked him if he would get up and help me he did. He come out with me. There was a saddle horse there, but I did not have any second saddle, and we changed off once in a while. When he got tired riding bareback, I would take it, and we worked there until half past 4 in the morning. On Tuesday evening these cattle on the bench were inside of the grain inclosure. At that time there was no grain damaged. I should judge, according to the way it looked, from what I threshed of it and everything, that there was between 35 and 40 acres still of the grain in shocks. I could not be exact about the amount. The grain field runs up quite a ways in the upper end, but then on Tuesday evening, from where the shocks were the cattle may have been better than a quarter of a mile away from there. The grain field runs along where the rest of it was stacked and joins this bench land; there is just an irrigating ditch between them. There was lots of snow on the ground

on Tuesday evening. The cattle seemed to be hungry; they were hungry and bawling; they were bawling with hunger, I don't know what else it could be. The cattle were forcing ahead all the time. The whole bunch of cattle got to the grain about 6 o'clock Wednesday evening. I was riding right along all day Wednesday with the cattle. During this period of time, in trying to get these cattle out of the grain field, I was assisted by Pat Laden. He was the first one that come there to help me, and him and I worked there from, I should judge, it was along about 8 o'clock on Wednesday morning when he come there, and he and I worked with them. We got them up a little ways until they saw where we were driving them, and then they started to break on us again. I think it was about 10 o'clock, or some place around there, on Thursday morning, when we succeeded in getting the cattle out of the grain. We did not have much trouble Thursday morning in getting them out. They were all lying down in a bunch when we got there, and they seemed to be satisfied, filled up. They ought to be; they ate 40 acres of grain up. After we got the cattle out of the grain field, this grain that was shocked I consider almost a total loss."

On cross-examination he testified:

"It is about a mile from where I live to Tom Flynn's house. I can see Tom Flynn's house from mine, and he can see my house from his. I have known Tom Flynn's whole ranch for about eight years, I guess. All the land I had leased of Tom Flynn was entirely within his fences in November, 1918. The land I had leased of Tom Flynn at that time was all in one field by itself. I know where this potato patch is they have been talking about, above Tom Flynn's. I know where that lane sort of comes down from the potato patch, by his granary, and then out into that field; there is a lane right from his gate going into his house; there is a lane leading up into this wire field, they call it. There is a pair of bars there across this lane. When these bars are up, there are two fences between the potato patch and my field. Q. I will ask you if it is not a fact that, when the cattle first got into your grain, you drove those cattle out and put them all across the road? A. No, sir; I did not put them all across the road. The first bunch I drove I got them to what they call the little field. There is 20 acres, I believe that is what is in it. It was adjoining Mr. Michaelson's. So I put this bunch of cattle across there, and I could not get them in over there, and I just opened that gate and pushed them across the road into the other field and closed up the gates, and then they broke out of that field. I did that Tuesday night. I did not put these cattle across into the Michaelson field; I put them into the field that belongs to Tom Flynn. I took these cattle and put them into the Tom Flynn field that joins the Michaelson field on Tuesday night. I should judge there was a couple of hundred head of them. There was cattle in the grain field after that. They were coming in from the other side all the time. They were coming in from this wire field; that is where they were coming from. I guess the cattle just jumped over the fence and broke it down. When I got back up close pretty well to the fence, I got a look at it, and it was broke

down in three or four places. When these 200 head were put in Tom Flynn's field, there was two fences between them and where the oats were. There was one on each side of the road. I put them across the road, and there was two fences between them and the grain. At the time these 200 head were put across there, there was not much damage done to the oats. It was on Tuesday night that I put these 200 head across into Tom Flynn's field. I did say that this other bunch of cattle did not get down to where the grain was until Wednesday night. There was no damage done until Wednesday night. I got this bunch headed off before they got to the grain, and I kept them above until I got them out in this gate across the road and put them in that field. Q. After you got these 200 head across there into Tom Flynn's field, which was on Tuesday night, there was no more trouble, no more grain damaged, until the following Wednesday night, was there? A. I held them all the time until then. I kept them out of the grain. I was riding right there in front of them and keeping them out."

The foregoing synopsis constitutes the gist of all of the plaintiffs' testimony offered in support of their complaint.

[1] Our statute, section 9317, R. O. M. 1921, provides:

"An action may be dismissed or a judgment of nonsuit entered in the following cases: * * * (5) By the court, upon motion of defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury."

Whether there is substantial evidence in support of plaintiffs' case is always a question of law for the court. *Brophy v. Idaho Produce & Provision Co.*, 31 Mont. 279, 78 Pac. 493; *Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, 127 Pac. 458, Ann. Cas. 1914B, 468; *Lee v. Stockmen's National Bank* (Mont.) 207 Pac. 623, decided May 8, 1922, and not yet [officially] reported.

[2] While, on motion for a nonsuit, every fact is deemed to be proved which the evidence tends to establish, and must be viewed in the light most favorable to the plaintiff (*Sprinkle v. Anderson*, 57 Mont. 226, 187 Pac. 908), yet it is elementary that—

"Competent evidence must be produced of all facts necessary to a recovery, upon which the jury can base a reasonably reliable conclusion; nothing can be left to mere conjecture." *Watson v. Colusa-Parrot Co.*, 31 Mont. 513, 79 Pac. 14; *Raas v. Sharp*, 46 Mont. 474, 128 Pac. 594.

[3] Plaintiffs allege that the cattle were driven and left "in a hungry condition on a portion of the land belonging to the plaintiff Flynn, adjacent to the field where the grain was shocked"; but the answer denies this specifically and admits only, by affirmative allegation, that they were by defendants driven down the county road "a distance of some ten miles and left * * * near the premises of the * * * plaintiff Flynn," and nothing further is established

by plaintiffs' proof. There is a failure of proof as to how the cattle got into plaintiff Flynn's pasture, and later into the grain field. This is left entirely in the realm of speculation. There is a complete failure of proof in support of the material allegations of plaintiffs' complaint in the following particulars: That the cattle were driven by the defendants, without food or pasture; that the fence inclosing the pasture of the plaintiff Flynn was torn down by the defendants; and that the cattle were driven by the defendants upon the plaintiff Flynn's land adjacent to the field where the grain was shocked. There is nothing in the evidence to show where the cattle were from Sunday afternoon until Monday evening, nor how they got into the grain field on Wednesday night. The cattle were last seen down the road at least two miles from the plaintiff Flynn's premises on Monday, and the oat field was not trespassed upon by them until Wednesday. Evidence is wholly lacking as to how the cattle got into Flynn's pasture on Monday night, although it is clear that, after they were in such pasture, they broke into the inclosed grain field within the pasture, on Wednesday. It will be noticed that the action is based entirely upon the trespass of these cattle upon plaintiff's land, occasioned through the tortious acts of the defendants, and no complaint is made on account of moving them from their accustomed range or for rough handling.

[4, 5] The burden of proof rested upon the plaintiffs in this case to prove that the moving of the cattle by the defendants was the proximate cause of the injury and damage complained of, and, failing so to do, a nonsuit was properly granted. There must be a causal connection between the negligence alleged and the injury. *Bracey v. Northwestern Impl. Co.*, 41 Mont. 338, 109 Pac. 706, 137 Am. St. Rep. 738; *Thompson on Negligence*, § 45.

"The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces an injury, and without which the injury would not have occurred." *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.

"It is not every negligent act that gives a cause of action; it is only such neglect of duty as bears a direct, proximate, and causal relation to the injury." (*Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549; *Andree v. Anaconda Co.*, 47 Mont. 554, 133 Pac. 1090; *Wallace v. Chicago, etc., Ry. Co.*, 48 Mont. 427, 138 Pac. 499); and negligence must be shown—it will not be presumed (*Reino v. Montana Mineral Land Co.*, 33 Mont. 291, 99 Pac. 853; 1 *Thompson on Negligence*, § 45).

"To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence—without intervening

efficient cause—so that, but for the negligence of the defendant, the injury would not have occurred.” 22 R. C. L. 113.

If the injurious act is wanton, the doer of it is liable for all consequences; but there is no essential difference between the measure of liability for willful and negligent torts. In both instances the injury complained of must be a natural and direct result. 22 R. C. L. 123.

In our opinion, the evidence does not disclose any causal connection between the driving of the cattle by the defendants and the destruction of plaintiffs' grain, and the nonsuit was therefore properly granted. The judgment is affirmed.

Affirmed.

COOPER and HOLLOWAY, JJ., and ROY E. AYERS, District Judge, sitting in place of REYNOLDS, J., disqualified, concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(304 Or. 296)

SARGENT v. FOLAND.

(Supreme Court of Oregon. May 31, 1922.)

1. Trial \Leftrightarrow 90—Irrelevant part of answer should be stricken and jury instructed to disregard it.

Where any portion of answer is not responsive nor relevant to any issue raised on pleadings, a motion should be made to strike the irrelevant part thereof, and the court requested to instruct the jury to disregard it.

2. Appeal and error \Leftrightarrow 1050(2)—Irrelevant part of answer held harmless error.

Where a witness, in response to a question asked as to the number of cows on a farm, after answering, detailed the purchase of other cows and feed, held harmless error notwithstanding the irrelevancy of that part of the answer.

3. Witnesses \Leftrightarrow 175(1)—Declaration of deceased agent held inadmissible, although evidence is offered by adverse party.

Or. L. § 732, providing that, when a party to a proceeding by or against an executor appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of deceased concerning the same subject-matter in his own favor may also be proven, does not include declarations of a deceased agent of deceased.

4. Executors and administrators \Leftrightarrow 227(1)—Verified claim against estate sufficient if showing substantial subsisting liability in favor of claimant.

As no particular form for a claim presented against an estate is prescribed, it is sufficient if the claim and affidavit show a substantial subsisting liability in favor of the

claimant and notify the representative of the estate of the character and amount of the claim, the facts of which may be asserted in general terms, and need not be stated with the particularity required in an action at law.

5. Work and labor \Leftrightarrow 2—Law implies promise to pay reasonable amount for services rendered.

The general rule is that, where valuable services are rendered by one for another, the law implies a promise to pay whatever sum the services are reasonably worth.

6. Work and labor \Leftrightarrow 7(2)—Burden on child to prove express agreement of parent to pay for services.

The general rule that the law implies a promise to pay the reasonable worth of services does not apply to a parent and child, and the law not only refuses to imply a promise to pay where one serves the other, but, on the contrary, it presumes that such service was rendered gratuitously, and this presumption can only be overcome by evidence of an express agreement, or its equivalent, to pay.

7. Work and labor \Leftrightarrow 7(4)—Stepfather merely because of relation does not stand in loco parentis to stepson.

The relation of stepfather and stepchild does not of itself impose any duty upon one to the other, or create any right assertable by one against the other, and the mere fact that one is the stepfather and the other a stepson does not impose upon the one the duty to support or upon the other the duty of service.

8. Parent and child \Leftrightarrow 14—Stepfather receiving stepson as member of family places himself in loco parentis.

Where a stepfather receives a stepson into his family and treats the child as a member of his family, he places himself in loco parentis, and the reciprocal rights and duties of parent and child are thus created, and will continue to exist as long as the stepfather continues to stand in that position.

9. Work and labor \Leftrightarrow 22—Stepson living with stepfather as member of family must prove express contract for payment of services.

Where a stepson lives with the stepfather as a member of his family, and by reason of that fact the stepfather stands in loco parentis to the stepchild, it is necessary for the stepchild to allege and prove an express contract, or its equivalent, to recover for services rendered.

10. Work and labor \Leftrightarrow 7(4)—Bare fact of relationship of stepfather and stepson not sufficient to overcome implication of promise to pay for services.

The bare fact of the relationship of stepfather and stepson is not enough to overcome the implication of a promise to pay for valuable services rendered by the stepson.

11. Executors and administrators \Leftrightarrow 221(2)—Where necessary to prove express agreement for services, not essential that claimant show agreement as to the amount.

Where a claim was filed against the executor of deceased for services rendered by step-

son, even though the relation of stepfather and stepson existed, and for that reason it became necessary for plaintiff to prove an express agreement to pay, it is not essential that claimant show that the parties agreed upon the amount of the compensation.

12. Executors and administrators ¶449—Action on quantum meruit for services held within rule that claimant must sue on claim presented.

Complaint in an action against an executor on a verified claim for the reasonable amount of services held within the rule requiring that the claimant must sue on the claim which he presented to the executor.

13. Appeal and error ¶1064(1)—Charge held not prejudicial.

In an action against an administrator for services rendered under alleged agreement with deceased, where the answer admitted the services, but alleged payment, charge that the jury might consider admissions in the answer as to the amount due the plaintiff held not prejudicial to defendant.

Department 2.

Appeal from Circuit Court, Tillamook County; Geo. R. Bagley, Judge.

Action by Robert Sargent against Harley Foland, executor of the estate of Walter Kinnaman, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter Kinnaman and his wife resided in Tillamook county. The plaintiff, Robert Sargent, a son of Mrs. Kinnaman and a stepson of Walter Kinnaman, resided in Eastern Oregon. On about November 1, 1916, Walter Kinnaman became blind, and caused a letter to be written to the stepson, who was an unmarried man, stating that he "wanted me to come to Tillamook." Sargent complied with the request, and went to Tillamook, arriving there about December 1, 1916. As we understand the record, Walter Kinnaman and his wife lived in the city of Tillamook until about March 15, 1917, when they and Sargent moved upon a 20-acre farm owned by Walter Kinnaman and located in Tillamook county near a place called Beaver. There was a house, but no barn, on the land in March, 1917. After Kinnaman and his wife and the plaintiff moved to the farm, a barn was built.

Sargent, who had not seen the farm prior to moving there, says that his stepfather told him that he had 20 acres near Beaver; "that the place would run eight cows by fixing it up;" and that "he told me he would give me half of the proceeds of the farm and I could go out and work if I wished to do so." Such was the arrangement, Sargent says, before they moved to the farm. Sargent states that he repaired fences and helped to build the barn. The plaintiff testified that when they "went out there" his stepfather had only two cows and a stripper;

that he (Sargent) "traded this stripper off for another cow and paid \$17 to boot out of my own money. That gave us three cows, and later on we bought another cow, * * * and I had four cows then." According to the testimony of the plaintiff, his stepfather concluded that it would be too expensive to build a barn large enough for eight cows, and for that reason the stepfather told the plaintiff "we better wait awhile, and we better keep the cows we had." Sargent testified that after they had been on the farm for a time his stepfather "told me that the milk wasn't very big, and the place was quite an expense, and when he got the place fixed up and paid the taxes there wasn't anything left, and he told me that he would pay me better than wages, and he told me that more than once." Sargent worked on the farm until October 4, 1917, when he quit and left.

Walter Kinnaman died in July, 1919; and on August 1, 1919, Harley Foland was appointed executor of the estate. Sargent presented to the executor a verified claim against the estate for \$1,000 for "labor on the Walter Kinnaman ranch near Beaver, Tillamook county, Or., for about two years beginning December 1, 1916, and ending December 1, 1918." This claim was rejected by the executor, and thereupon Sargent brought this action against the executor to recover \$1,000. In the complaint it is alleged that Walter Kinnaman employed the plaintiff "to operate, conduct, and work upon" the farm, "and in pursuance of said employment plaintiff operated, conducted, and worked upon said farm" from December 1, 1916, to December 1, 1918, "and that the reasonable value of the services of plaintiff" is \$1,000.

The defendant answered by denying that Sargent had been employed by the decedent as alleged in the complaint and denied that the estate was indebted to the plaintiff. The defendant also pleaded an affirmative defense and counterclaim. The defendant avers in his counterclaim that on about March 15, 1917, the plaintiff entered upon the farm under an agreement with the decedent whereby—

"The plaintiff might run said farm and care for and milk said cows and do whatever outside work he might be able to do or saw fit to do after attending to said farm and said cows, and that the said Walter Kinnaman and the said plaintiff should share equally and divide equally the proceeds derived from the milk produced by said cows each to receive one-half of said proceeds and the plaintiff to be independent of any supervision or control of the said Walter Kinnaman, in any manner whatsoever."

The defendant avers that the plaintiff continued to work under the terms of this agreement until some time in October, 1918, when he abandoned the agreement, that the plaintiff milked four cows, and that—

"During the times that the plaintiff attended the same under said agreement there was produced and sold milk from said cows to the amount of about \$500, the exact amount this defendant is unable to state, and that the plaintiff never at any time paid over to the said Walter Kinnaman his one-half of the proceeds of said milk, or any part thereof, and that there has been due and owing and is now due and owing from the plaintiff to the estate and this defendant as executor of said estate the sum of \$300 or more."

The answer concludes with a demand for a judgment against the plaintiff for \$300.

The jury returned a verdict for \$300 in favor of the plaintiff; and the defendant appealed from the consequent judgment.

Webster Holmes, of Tillamook (T. H. Goyme, of Tillamook, on the brief), for appellant.

Geo. P. Winslow, of Tillamook (Botts & Winslow, of Tillamook, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). The theory of the plaintiff, as shown by the record, is that he and his mother and stepfather moved to the farm with the understanding at first that the plaintiff would do the work of operating the farm in consideration of one-half of the proceeds derived from sales of milk. Originally it was the purpose to milk eight cows, but because of the expense the decedent concluded not to attempt to keep more than four cows. Apparently because of this change of plan as to the number of cows to be kept and milked, a change was made in the agreement as to Sargent's compensation for his work, and so it was understood, according to the testimony of Sargent, that Kinnaman would pay the plaintiff "better than wages." The plaintiff therefore says that he is entitled to recover the reasonable value of the work done by him, and he fixes the amount at \$1,000.

The theory of the defendant is that all the work done by the plaintiff was done under an agreement whereby the plaintiff was to receive one-half of the proceeds derived from the sales of milk. In the answer it is alleged that about \$600 was received for milk sold, and it is impliedly charged that all the proceeds from the sales of milk were received by Sargent, and that he did not pay any of the proceeds to the decedent; and for that reason the defendant demanded a judgment against the plaintiff for \$300. However, it was stipulated "between the plaintiff and the defendant by their attorneys that all of the milk checks that were received during the operation of the farm by the plaintiff were made to Mrs. Kinnaman."

There is no evidence whatever indicating that the plaintiff received even a cent in cash; and therefore, in view of the stipulation, it is accurate to state that all of the proceeds derived from the sales of milk were received by Mrs. Kinnaman. Some milk

checks were received in evidence, and, although we do not find the checks among the papers presented for our examination, we understand from the record that these checks bear the indorsement of Mrs. Kinnaman only. Sargent testified that he never received any of the moneys derived from the sales of milk, and there is no evidence indicating or even suggesting that Mrs. Kinnaman or her husband paid to the plaintiff any of the moneys received from sales of milk. The plaintiff was the first witness to testify. He had explained about his coming from Eastern Oregon, about moving to the farm, about the original agreement, about the repairing of fences and the building of the barn, when he was asked the following question and gave the following answer:

"Q. When you went out there how many cows were there? A. Three—two cows and a stripper. And I traded this stripper off for another cow and paid \$17 to boot out of my own money. That gave us three cows. And later on we bought another cow. And I gave \$50 for that cow; and I had four cows then. And that fall I bought three loads of hay from a man called Swartz down below Beaver."

[1, 2] The defendant objected "to any evidence about his buying cows and hay." The portion of the answer to which objection was made was not responsive to the question asked the witness; nor was it relevant to any issue raised by the pleading. The defendant ought to have moved to strike out the irrelevant part of the answer and requested the court to instruct the jury to disregard it. Notwithstanding the irrelevancy of part of the answer, it could not, in view of all the circumstances, as we read the record, have injured the defendant at all.

[3] The defendant complains because the court refused to permit Mrs. Blanche Broughton to testify that she heard Mrs. Kinnaman say to Walter Kinnaman:

"You know we can't get any one else to do the work for half the milk checks."

Mrs. Kinnaman died before the trial in the circuit court. There was evidence from which the defendant could have argued that Mrs. Kinnaman "was transacting business for" her husband; and for that reason the defendant contends that Mrs. Broughton ought to have been permitted to testify. The inference to be drawn from the proffered testimony is that Mrs. Kinnaman was endeavoring to persuade her husband to pay the plaintiff something in addition to one-half of the proceeds from the milk sales, and that the declaration attributed to her was in effect the declaration of Walter Kinnaman for the reason that she was attending to his business as his agent. Section 732, Or. L., provides that:

"When a party to an action, suit, or proceeding by or against an executor * * * appears as a witness in his own behalf, or offers

evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject-matter in his own favor may also be proven."

If the declaration had been made by Walter Kinnaman, it would be competent under section 732, Or. L., but the language of that section does not include the declaration of an agent.

[4] The court received as evidence, over the objection of the defendant, the verified claim which the plaintiff had presented and the executor rejected; and the defendant insists that this ruling was erroneous. The statute does not prescribe any particular form for a claim presented against an estate. It is sufficient if the claim and affidavit show a substantial subsisting liability in favor of the claimant and notifies the representative of the estate of the character and amount of the claim. The facts constituting the claim may be asserted in general terms and need not be stated, with the particularity required in an action at law. *Wilkes v. Cornelius*, 21 Or. 348, 350, 28 Pac. 135; *Tharp v. Jackson*, 85 Or. 78, 85, 165 Pac. 585, 1173; *In re Andersen's Estate* (Or.) 198 Pac. 236, 238; *Branch v. Lambert* (Or.) 205 Pac. 995, 1002.

[5] The defendant insists that the verified claim was insufficient, and therefore inadmissible, because it fails affirmatively to declare that the services were rendered pursuant to an express promise by the decedent to pay for them. Indeed, the verified claim is based, so far as it appears on its face, upon an implied promise inferred by the law. It is also argued that the complaint is vulnerable because it fails to allege an express promise by the decedent to pay; in other words, the defendant contends that, because one was a stepson and the other was the stepfather, services rendered by the former are presumed to have been gratuitous, unless the services were rendered under an express agreement or unless the circumstances show that the one expected to receive and the other expected to make payment.

[6] The general rule is that, where valuable services are rendered by one for another, the law implies a promise to pay whatever sum the services are reasonably worth. But this general rule does not apply to a parent and child. It is so usual and so natural for a parent, prompted only by parental love and the instincts common to the human race, to serve the child, and it is likewise so usual and so natural for the child, moved solely by filial affection and the common human instincts, to serve the parent, that the law not only refuses to imply a promise to pay where one serves the other, but, on the contrary, it presumes that such service was rendered gratuitously. And this presumption can only be overcome by evidence of an express agreement, or its equivalent, to pay. *Wilkes v. Cornelius*, 21 Or. 348, 28 Pac. 135; 29 Cyc.

1630. The relation of parent and child of itself creates the presumption of gratuitousness; and, since this presumption cannot be overcome except by force of an express agreement, or its equivalent, it logically follows that the burden of proof is on the child to allege and prove an express contract, or its equivalent. *McGarvey v. Roods*, 73 Iowa, 363, 35 N. W. 488; 29 Cyc. 1620, 1621.

[7] If the relation of stepfather and stepchild, like that of parent and child, of itself raises a presumption of gratuitousness, then the verified claim presented by the plaintiff to the defendant was insufficient, and the complaint, although it alleges that the decedent "employed plaintiff," is at least subject to criticism, even though it might not be fatally defective. The relation of parent and child of itself creates reciprocal rights and duties. On the contrary, the relation of stepfather and stepchild does not of itself impose any duty upon one to the other or create any right assertable by one against the other. The mere fact that one is the stepfather and the other a stepson does not impose upon the one the duty of support or upon the other the duty of service. *Gerber v. Bauerline*, 17 Or. 115, 117, 19 Pac. 849; *Wilson's Guardianship*, 40 Or. 353, 358, 68 Pac. 393, 69 Pac. 439; *State v. Langford*, 90 Or. 251, 267, 176 Pac. 197; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; 20 R. C. L. 594; 29 Cyc. 1667.

[8] A stepfather does not, merely because of the relation, stand in loco parentis to his stepson. If, however, a stepfather receives a stepchild into his family and treats the child as a member of his family, he places himself in loco parentis, and the reciprocal rights and duties of parent and child are thus created and will continue to exist as long as the stepfather continues to stand in that position. *Gerber v. Bauerline*, 17 Or. 115, 117, 19 Pac. 849; *Daniel v. Tolon*, 53 Okl. 668, 157 Pac. 756, 4 A. L. R. 704; *People v. Porter*, 287 Ill. 401, 123 N. E. 59, 7 A. L. R. 1041.

[9] If the stepson lives with the stepfather as a member of his family, and by reason of that fact the stepfather stands in loco parentis to the stepchild, then it necessarily follows that in such circumstances the stepchild is required to allege and prove an express contract, or its equivalent, for the same reason that a child is required to allege and prove such a contract.

But suppose that the stepchild does not live with the stepfather as a member of his family. The bare fact of the relation of stepfather and stepchild does not create any duty or give rise to any right as between them; and consequently it would be illogical and inconsistent to say that any presumption of gratuitousness arises out of the single fact that services are rendered by a stepson for a stepfather. It is entirely possible for a stepson to render services to a stepfather

or for a brother to perform work for a brother or sister on a promise implied by the law to pay for the services, just as in the case of services rendered by one stranger for another; and therefore it was not necessary for the stepson to allege or prove an express contract or its equivalent. Nor was it necessary for the plaintiff to state in his verified claim or to aver in his complaint that he had not lived with his stepfather as a member of his family. If the verified claim had shown that the stepson lived with the stepfather as a member of his family, then it would have been necessary for the claimant to show an express contract, or its equivalent, in order to meet the requirements of the rule announced in *Wilkes v. Cornelius*, 21 Or. 348, 28 Pac. 135. But the verified claim did not show a family relationship; nor can it be said that the evidence undeniably establishes such a relationship. The evidence is meager upon the subject. We know from the record that the stepson, the mother, and the stepfather moved to the farm, and that they lived there; and this is substantially all that the record shows. We do not know and cannot know from the record the circumstances surrounding them, except as already stated. Moreover, the defendant did not at the trial nor does he now claim that the decedent stood in loco parentis to the plaintiff.

The implication which ordinarily arises where one person accepts valuable services rendered by another is overcome where the parties are parent and child, or perhaps it is more accurate to say that, where the parties are parent and child, the law, instead of presuming a promise to pay, presumes that service rendered by the child was gratuitous; but, where the relationship is more remote than that of parent and child, the relationship is not of itself sufficient to overcome the implication which the law ordinarily raises where one party renders valuable services for another. Where one is a stepfather and the other is a stepson, the fact of the relationship unaccompanied by any other fact does not create a presumption that service rendered by one for the other was gratuitous; but, if the fact of such relationship is accompanied by the fact that the stepson lived with the other as a member of his family, the presumption arises that the service rendered by the stepson was intended to be gratuitous; and when this presumption arises the claimant must show an express contract, or its equivalent. The moment it appears that the stepson lived with his stepfather as a member of the latter's household, then at that moment it devolves upon the stepson to show an express contract, or its equivalent, to pay for services rendered; but, if it does not appear from the showing made by the stepson or from that made by the stepfather that the family relation subsisted, then the stepson is not necessarily required

to show an express contract, or its equivalent, to pay for services rendered. There are some precedents, as, for example, *Hudson v. Lutz*, 50 N. O. 217, and *Sharp v. Cropsey*, 11 Barb. (N. Y.) 224 (see, also, 13 R. O. L. 1189), where the language used by the court might seem to lay down the rule that, if a stepchild renders service for a stepparent, the service is presumed to have been rendered gratuitously; but an examination of those cases and others employing like language will disclose that one party lived with the other as a member of his family, and therefore, as applied to the actual facts, the language employed by the court was not only appropriate, but a correct statement of the rule acknowledged everywhere.

[10] Our conclusion that the bare fact of relationship of stepfather and stepson is not enough to overcome the implication of a promise to pay for valuable services rendered is, it seems to us, logical and consistent; and, furthermore, it is supported by the following precedents: *Smith v. Milligan*, 48 Pa. 107; *Horton's Appeal*, 94 Pa. 62; *Curry v. Curry*, 114 Pa. 367, 7 Atl. 61; *Gerz v. Demarra*, 162 Pa. 580, 29 Atl. 761, 42 Am. St. Rep. 842; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; *Williams v. Williams*, 114 Wis. 79, 89 N. W. 835; *Wence v. Wykoff*, 52 Iowa, 644, 8 N. W. 685; *Callahan v. Riggins*, 43 Mo. App. 130; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936; *Cowell v. Roberts*, 79 Mo. 218. See, also, *Briggs v. Briggs*, 46 Vt. 577; *James v. Gillen*, 3 Ind. App. 472, 30 N. E. 7; *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678; note in 11 L. R. A. (N. S.) 873.

[11] If the family relation did not subsist between the plaintiff and the defendant, the law may imply a promise to pay for valuable services. But, even though the family relation did exist, and for that reason it became necessary for the plaintiff to prove an express agreement to pay, or an expectation on the part of one to receive and an expectation on the part of the other to pay, it was not essential that the plaintiff show that the parties agreed upon the amount of the compensation. *McGarvy v. Roods*, 73 Iowa, 363, 35 N. W. 488.

[12] It is true that the claimant must sue on the claim which he presented to the executor, but it is also true that the plaintiff complied with this rule. It is true that the verified claim is for the reasonable value of the services; but it is also true that the complaint does not depart from the verified claim, for the complaint is based upon the theory that the plaintiff is entitled to recover the reasonable value of his services. The plaintiff testified that the decedent promised to pay "better than wages"; but the plaintiff is not seeking to recover "better than wages," for he is endeavoring to recover only the reasonable value of his serv-

ices. Indeed, if the plaintiff was not a member of the decedent's family and the parties had agreed upon a fixed amount as compensation, the plaintiff could, after the completion of the work, have presented his claim and filed his complaint based on quantum meruit and proved an express contract fixing the price. *Tharp v. Jackson*, 85 Or. 78, 165 Pac. 585, 1173; *Toy v. Gong*, 87 Or. 454, 461, 170 Pac. 936.

[13] The defendant assigns as error the giving of the following instruction:

"The main question here is: Was the plaintiff employed by Kinnaman, and, if employed, what were the terms of the agreement? And you must determine that from the evidence. And before the plaintiff can recover he must be corroborated. But you have a right to take into consideration any admissions you may find in the answer as to the amount due the plaintiff."

The defendant excepted to that part of the quoted instruction "which speaks of the admissions in the answer, as to the amount of money received." The instruction to which objection is made was the last instruction given before the giving of the statutory instructions, which in this instance, as in most cases, constitute the concluding portion of the charge to the jury. The court had previously told the jury that the answer alleged that milk worth \$600 had been sold, and that the plaintiff had not only been paid by reason of having received and retained \$300, but that he had not paid over to the decedent the remaining \$300, and that because of such failure the plaintiff was indebted to the defendant in the sum of \$300. In substance, the court instructed the jury that the defendant admitted that the plaintiff had earned \$300, but alleged that the plaintiff had been paid. The defendant did not except to any of these instructions which preceded the one now under examination.

The instruction challenged by the defendant could not in any possible view have injured him. The plaintiff says he worked on the farm; the defendant also says that the plaintiff worked on the farm. The plaintiff says that he did the work for compensation to be paid; the defendant also says that the plaintiff did the work for compensation to be paid. The plaintiff says that he earned \$1,000; the defendant denies that the plaintiff earned \$1,000, but the defendant does in effect say that the plaintiff earned \$300. The plaintiff says that he has not been paid; the defendant says in his answer that the plaintiff has been paid by reason of having received \$600 from the sales of milk, and that he is entitled to retain \$300 as payment, but that he owes the remaining \$300 to the defendant. However, during the trial the defendant stipulated that "all of the milk checks that were received during the operation of the farm by the plaintiff were made

out to Mrs. Kinnaman"; and the uncontradicted evidence is that she received the milk checks as agent of the decedent. The record shows that Sargent did not indorse any of the milk checks, and, on the other hand, Mrs. Kinnaman did indorse all of them. The uncontradicted evidence is that the plaintiff did not receive any of the proceeds from the milk checks. In brief, the defendant did, in the final analysis, admit that the plaintiff earned \$300, and that no part of that sum had been paid to him. The inference to be drawn from the verdict is that the jury agreed with the defendant, for they allowed the plaintiff only \$300.

Our conclusion is that the record is free from reversible error, and therefore the judgment is affirmed.

BEAN, BROWN, and McCOURT, JJ., concur.

(104 Or. 313)

LOUGH v. STATE INDUSTRIAL ACCIDENT COMMISSION.

(Supreme Court of Oregon. June 6, 1922.)

1. Master and servant \S 373 — Occupational disease not compensable as "injuries" from accident.

In view of Or. L. \S 6632, subd. "d," declaring that no claim for workmen's compensation shall be enforceable unless filed within a certain period "after the date upon which the injury occurred" and section 6626, allowing compensation for personal injury by "accident caused by violent or external means" recovery can be had only for injuries referable to a certain fixed time not for occupational diseases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury.]

2. Master and servant \S 398—Time for filing compensation claim runs from date of accident.

Or. L. \S 6632, subd. "d," providing that no claim for workmen's compensation shall be enforceable in nonfatal cases "unless filed within three months after the date upon which the injury occurred" refers to the date of the accident and inception of the injury, not the date of appearance of a consequent physical condition.

3. Master and servant \S 398 — Compensation lost by delay in filing claim, though caused by mental incapacity.

Under Or. L. \S 6632, subd. "d," providing that no claim for workmen's compensation shall be valid or enforceable "unless filed within three months after the date upon which the injury occurred" the claimant, who by the injury for which he seeks compensation was rendered mentally incapable of filing such claim until after such time had elapsed, cannot recover, as the statute, having created the right of recovery, does not merely limit the remedy and, being general, allows of no exceptions.

In banc.

Appeal from Circuit Court, Multnomah County; John McCourt, Judge.

Petition by Fred V. Lough to the State Industrial Accident Commission for compensation. From denial of his petition he appealed to the circuit court, which rendered judgment confirming the decision of the commission, and he appeals. Affirmed.

A. M. Crawford and W. C. Campbell, both of Portland, for appellant.

James West, Asst. Atty. Gen. (I. H. Van Winkle, Atty. Gen., and J. A. Benjamin, Asst. Atty. Gen., on the brief), for respondent.

BURNETT, C. J. Claiming to have been injured on October 1, 1919, while at work for a shipbuilding corporation in Multnomah county, Or., the plaintiff presented his petition for compensation to the State Industrial Accident Commission on April 3, 1921. The Commission refused to allow him any compensation, and he appealed to the circuit court. A trial by jury was had in that court, resulting in the finding of a special verdict describing the injury and stating that, as a result thereof, plaintiff became partially demented, so that he was mentally incapable of filing a claim prior to the time when it was filed. Basing its action upon the fact that the claim had not been filed before the Commission for more than a year after the happening of the accident by which he was injured, the circuit court confirmed the decision of the State Industrial Accident Commission rejecting it. The claimant appeals to this court.

The sole question presented for our consideration is the regularity of the order of the Commission rejecting the claim, and the affirmance of that order by the circuit court. The ruling complained of depends upon the construction of subdivision "d" of section 6632, Or. L., reading thus:

"No application shall be valid or claim thereunder enforceable in nonfatal cases unless such claim is filed within three months after the date upon which the injury occurred, nor in fatal cases unless such claim is filed within one year after the date upon which the fatal injury occurred."

[1, 2] The petitioner asserts that, while he was working on board a hull then in process of construction, a bolt fell upon his head from above, causing the injury, on October 1, 1919. Compensation is allowed to a workman, when injured under circumstances contemplated by the act, if he shall sustain "a personal injury by accident arising out of and in the course of his employment caused by violent or external means." Or. L. § 6626. As pointed out in *Iwanicki v. State Industrial Accident Commission*, 205 Pac. 990, decided by this court April 18, 1922, the injury for which recovery can be had is one referable to a certain fixed point of time, and the law is not intended to, and does not cover what are termed "occupational diseases," the approach of which is gradual and insensible

before they culminate in death or restoration to health. The words "date upon which the injury occurred" plainly indicate a certain point of time, and not an extended period. Having in view the element of suddenness of the untoward event, we must say that, under our statute, the language refers to the date of the accident and the immediately consequent injury.

There are precedents, notably from Nebraska, Indiana, and Massachusetts, where the court construes the occurrence of the injury to mean, not its inception when the complainant was hurt, but the consequent progress and culmination of the injury received at the time of the accident. There are cases which hold under such statutes that the injured workman is entitled to wait until the culmination of his hurt, through its development and final progress to recovery, before making any claim to the Commission. In other words, such cases fix the occurrence of the injury at least at the climax and not at the beginning of the physical debility consequent upon the accident. They arise, however, under statutes differing largely from our own. Mainly they are instances where the employer is made directly liable to the injured employé under a schedule prescribed by the statute, and provision is made for giving notice as soon as practicable or as soon as the disability or insanity consequent upon the injury has been removed.

But there are no such provisions in our statute. Without equivocation it is said that the notice must be given within three months after the date upon which the injury occurred. Something occurred or came into existence on October 1, 1919. The injury happened at that time. True, it may not have developed instantly its full effect. But the injury which had no existence prior to that date came into existence at that time. In other words, it occurred at that date.

[3] The question then is: What is the effect, under this statute, of failing to present a claim to the Industrial Accident Commission for compensation until more than the three months had elapsed from the date mentioned? The state, in pursuit of its public policy, by virtue of its police power, has formulated its bounty, to quote from the title of the act, "for the benefit, compensation and care of workmen." Whatever it be, whether a contract or a mere financial benefit created by the state, it had no existence prior to the enactment of the original workman's compensation act so called, approved on referendum, November 17, 1913. An injured workman has no cause of action against the Industrial Accident Commission any more than a suitor would have an action against a court which decided an issue adversely to his interests. It is true, the statute has provided an appeal from the decision of the Commission to the circuit court and thence to the Supreme Court. Whatever it

may be, the statute makes a provision before unknown to our laws. It is as though the state had made an offer to injured employes upon certain terms, so that, even if we consider it as a contract, the party who would avail himself of the offer must accept it in the manner, at the time, and on the terms it is made.

The three months mentioned are not a limitation on the time for commencing an action, within the meaning of the general statute of limitations. Whether it be a contract or a mere offer, that period of three months within which the claim must be presented is one of the essential ingredients of the contract or of the offer of the gratuity, and he who would avail himself of its benefits must pursue the statute as it is written. The rule of construction applicable to such a statute is well stated in *Van Steenwyck v. Washburn*, 59 Wis. 501, 17 N. W. 289, 48 Am. Rep. 532. In that case the statute provided for an election by a widow between the statutory dower and the provision made for her by the will of her deceased husband. It was claimed for her that, because she was insane, she was incapable of making an election, and hence was excused from doing so, although the statute creating the right made no mention of any exception on that account. The court said:

"Where the widow is sane, is *sui juris*, capable of making contracts, competent to bind herself by a legal obligation, the way is plain. She can elect whether she will take the devise or other provision made for her in the will of her husband, or whether she will claim that interest in his estate which the law gives to her. But when we come to apply the statute to an insane widow, a *non compos mentis*, one who can exercise no intelligent judgment or choice, one who is not responsible for her acts, then it goes against our notions of right and justice. Still, the law is well settled that, in the construction of statutes, general words are to have a general operation, unless something is found in the statute itself which affords grounds for qualifying or restraining them. 'No exceptions can be claimed in favor of particular persons or classes unless they are expressly mentioned.' *Dixon, C. J., in Woodbury v. Shackleford*, 19 Wis. 60. The same principle was recognized and enforced in *Lindsay v. Fay*, 28 Wis. 177, and it is doubtless in accord with the great weight of judicial opinion on this subject. As the Legislature has made no exception in the statute, the courts have no right to make one, because to do so would be legislation. Were we to hold that the statute does not include a widow of unsound mind, we should certainly be making an addition to it which the Legislature has not seen fit to enact. The ill effects of holding that the statute did include an insane widow were most ably presented in the argument of respondents' counsel. These evil consequences, however proper for the consideration of the Legislature, can really have no weight in giving construction to a statute which is plain and unambiguous in its language. The doctrine of an inherent equity, creating an exception as

to any disability where the Legislature has made none, must be abandoned, particularly in a country where the legislative power is distinct from the judicial. The result, therefore, on this point, is that we must hold that the general words in the statute have a general application, and, since there is no exception as to an insane widow, the court can create none."

An analogous principle was applied by Mr. Justice Bennett in *Bailey v. O. W. R. & N. Co.*, 97 Or. 471, 191 Pac. 782. In that case Henry Ploch in an early day settled upon a tract of land now within the limits of the city of Portland. The land had not then been surveyed by the general government, for want of which he could not make definite description in his notice of claim to the land. Before the survey was made he died, without having given notice of his claim. His heirs, the plaintiffs in the suit, were not aware of this situation for many years afterwards. Meanwhile other parties had settled upon the land, and, by means of conveyances, the defendant company had become the owner thereof. Commenting on this situation, Mr. Justice Bennett said:

"The plaintiffs offer, as an excuse for their failure to comply with the law, the death of the claimant and their lack of knowledge of his claim. This may be a moral excuse which would relieve them from a charge of negligence, but it is not a compliance with the law, which would give them title to the land."

The opinion goes on to quote with approval the language in *Frisbie v. Whitney*, 9 Wall. (76 U. S.) 196, 19 L. Ed. 668, as follows:

"The argument is urged with much zeal that, because complainant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done. To this we reply, as we did in the case of *Rector v. Ashby*, 6 Wall. 142, that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

With these general principles of statutory construction and application in mind, we proceed to the consideration of cases more directly applicable, illustrating the principle that the terms of a statute creating a right hitherto unknown, although some of those terms be couched in matters of time, are all constituent elements of the right itself and not mere limitations upon the exercise of that right. In *Cooke v. Holland Furnace Co.*, 200 Mich. 192, 166 N. W. 1013, L. R. A. 1918E, 552, as in this case, the complainant was injured by being struck upon the head by a bolt which fell from above. This occurred on October 6, 1915, but he did not make claim for compensation until October 9, 1916. The statute there provided that no

proceedings for compensation for an injury should be maintained, unless "notice of the injury shall have been given to the employer three months after the happening thereof and unless the claim for compensation shall have been made within six months after the occurrence of the injury." The court there held that, although the terms "accident" and "injury" are not synonymous, yet because the accident produces the injury they are concurrent in point of time, thus fixing the happening of the accident as the date of the occurrence of the injury. The court reviews the authorities at length and concludes with the declaration that:

"We are compelled to hold, must hold, unless we resort to judicial legislation, that the Legislature, by these two sections, fixed the date of the injury at the date of the accident, and not some remote date thereafter when the injured employé became definitely satisfied that he was disabled as a result of the accident."

A like case is *Kalucki v. American Car & Foundry Co.*, 200 Mich. 604, 168 N. W. 1011, L. R. A. 1918F, 860. Similar cases are *Bushnell v. Industrial Board*, 276 Ill. 262, 114 N. E. 496; *Halselden v. Industrial Board*, 275 Ill. 114, 113 N. E. 877; *O'Eau v. E. W. Bliss Co.*, 188 App. Div. 385, 177 N. Y. Supp. 203; *Poccardi v. Ott*, 83 W. Va. 168, 98 S. E. 69. The reason for the rule is given by Mr. Justice Waite in *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 147 (30 L. Ed. 358), as follows:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

A like case is *Lewis v. Pawnee Bill's Wild West Co.*, 6 Pennewill (Del.) 316, 66 Atl. 471, 16 Ann. Cas. 903, where it is said, to quote from the syllabus:

"The Delaware statute of 1897 * * * providing that no action for personal injuries shall be brought after the expiration of one year from the date when the injuries were sustained, being a special or independent statute of limitations, complete in itself, is not subject to

the exceptions contained in the general statute of limitations, * * * and consequently the absence from the state of the person whose negligence caused the injuries does not extend the time limited for the commencement of such action."

The subject is treated at large and well annotated in the last-named publication. See, also, *Pomeroy's Petition*, 33 Mont. 69, 81 Pac. 629; *Rodman v. Missouri Pacific Ry. Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704; *Boston & Me. R. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; *Brunswick Terminal Co. v. National Bank*, 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625; *Rainey v. Grace*, 216 Fed. 449, 132 C. C. A. 509, L. R. A. 1916A, 1149, note 47 at pages 1166 and 1167; *Osborne v. Ry. Co.*, 87 Vt. 104, 88 Atl. 512, Ann. Cas. 1916C, 74; *Swisher v. Ry. Co.*, 76 Kan. 97, 90 Pac. 812; *Richards v. Carpenter (C. C. A.)* 261 Fed. 724.

Without making any exception in favor of the insane, the disabled, or the infant, the Legislature has seen fit to prescribe the terms upon which the bounty of the state may be enjoyed. Those who would avail themselves of the privilege thus extended must comply with its terms, and it does not lie within the power of any judicial tribunal, however beneficial it may be, to add terms that have not been put there by the law-making power. We may well regard this case as one of great misfortune, and yet we are powerless to extend relief where none is awarded by the statute. The judgment of the circuit court must be affirmed.

McCOURT, J., did not participate in this decision.

(24 Ariz. 151)

STATE v. SMITH. (No. 538.)

(Supreme Court of Arizona. June 9, 1922.)

1. Game \S 8—Penalty for unlawful possession of game animals or parts thereof recoverable only where possession resulted from unlawful taking, killing, or injuring.

In an action authorized by Pen. Code 1913, \S 668, as amended by Laws 1919, c. 169, to recover a penalty for unlawfully wounding or killing certain animals or unlawfully having them or parts thereof in possession, a cause of action for having such unlawful possession can only arise where there has been an unlawful taking, killing, or injuring of such animals, making consequent possession thereof unlawful.

2. Game \S 8—Mere possession of game animals or parts thereof presumed lawful under statute authorizing penalty for unlawful possession.

In an action brought under Pen. Code 1913, \S 668, as amended by Laws 1919, c. 169, authorizing an action to recover a penalty for having possession of certain animals or parts thereof unlawfully by reason of having unlawfully taken, killed, or injured such animals,

mere possession of such animals or parts thereof is presumed lawful.

3. Game — Mere possession of antlers not sufficient to prove unlawful taking or injuring of deer.

In an action brought under Pen. Code 1913, § 668, as amended by Laws 1919, c. 169, authorizing an action to recover a penalty for having possession of certain animals, mere possession of deer antlers is not sufficient to prove that defendant had unlawfully taken or injured deer, especially where the only evidence adduced supports the presumption that such possession was lawful.

Appeal from Superior Court, Navajo County; J. E. Crosby, Judge.

Action by the State of Arizona against Tom Smith to recover a statutory penalty. Verdict for defendant. From an order denying its motion for a new trial, the State appeals. Order affirmed.

W. J. Galbraith, Atty. Gen., and W. E. Ferguson, Special Counsel, of Holbrook, for the State.

Weldon J. Bailey, of Phoenix for appellee.

FLANIGAN, J. This is an appeal by the state of Arizona from an order denying its motion for a new trial, in an action brought in its name to recover a statutory penalty under the game laws. The action was brought under the provisions of section 668 of the Penal Code, Revised Statutes 1913, as amended by chapter 169, Laws 1919, Regular Session, Fourth Legislature. The relevant portion of said section reads:

"The state game warden, if he so elect, or any other officer charged with the enforcement of the laws relating to game and fish, if so directed by the state game warden, may bring civil action in the name of the state against any person unlawfully wounding or killing, or having unlawfully in possession, any game quadruped, bird or fish, or part thereof, and recover judgment for each such animal or part thereof, the following minimum sums as damages for the taking, killing, or injuring thereof, to wit:

For each elk.....	\$200 00
For each deer.....	50 00
For each antelope.....	100 00
For each mountain sheep or goat.....	200 00
For each bird.....	10 00
For each fish.....	1 00"

The complaint alleges that on March 10, 1920, in Navajo county, Ariz., the defendant was in unlawful possession of eight pairs of deer horns or sets of horns; that the possession of such eight pairs of deer horns is unlawful and in accordance with the statute the defendant thereby became indebted to plaintiff in the sum of \$400, by way of damages.

The only proof adduced to support the allegations of the complaint was the testimony of the defendant himself, who was called as

a witness by the state. This testimony was that on the day in question, at Holbrook, in said county, he was in possession of four locked sets of deer horns and about ten single sets that were not locked, making "eighteen pairs altogether" of deer horns. Defendant admitted that he had no permission from the state game warden to possess the horns, but testified that he had permission from the forest supervisor of the Grand Canyon game preserve to possess certain of them, and that the others were brought from Utah.

Upon this testimony the jury returned a verdict for the defendant.

[1] The question we shall consider is whether the facts so established show a cause of action under the statute. The statute provides for a civil action, in the name of the state, against any person unlawfully wounding or killing or having unlawfully in possession any of the animals mentioned, or parts thereof, in which action judgment for damages may be recovered for the taking, killing, or injuring of such animals. The plain import of the section is that a cause of action against one in unlawful possession of such animals, or parts thereof, can only arise where there has been an unlawful taking, killing, or injuring of such animals, so that the possession of the animals so taken, killed, or injured, or of parts thereof, is likewise unlawful.

[2] There was no proof that the defendant had unlawfully taken, killed, or injured the animals from which these horns came, unless his possession of these horns carried with it such presumption. The statute in speaking of unlawful possession recognizes that there may be a possession which is lawful, so that, if nothing but possession is shown, such possession is to be deemed lawful.

[3] The case for the state must therefore be based upon the supposition that the lawful possession of these sets of antlers was sufficient to prove that the defendant had unlawfully taken, killed, or injured the animals which at one time bore them; and that this conclusion may be drawn not only where the possession is presumably lawful because there is no evidence to the contrary, but also where, as in this case, the presumption of lawful possession and that there was no unlawful taking, or killing, or injuring of such animals is confirmed by the only evidence adduced. To state these propositions is of course to refute them.

The evidence was utterly insufficient upon which to base any judgment against the defendant, and the verdict of the jury in his favor and the order of the court denying the state's motion for a new trial were right. The order is affirmed.

ROSS, C. J., and McALISTER, J., concur.

(24 Ariz. 116)

ROWLANDS v. STATE LOAN BOARD OF ARIZONA et al. (No. 1998.)

(Supreme Court of Arizona. May 26, 1922.)

1. States \S 124—Term "remit" in statute for remission of interest on loans by state defined.

Whether the term "remit," as used in Laws 1921, c. 49, permitting interest on loans to erect the Lyman reservoir dam is construed according to its popular meaning or its "peculiar and appropriate meaning in law" pursuant to Civ. Code 1913, par. 5552, it means forgiven or pardoned, and does not simply mean "to defer."

[Ed. Note.—For other definitions, see Words and Phrases, Remit.]

2. Schools and school districts \S 18—Inability to pay interest on loans from common school fund held not to result in deficit and authorize transfer of funds to cover it.

Inability of mortgagors to pay interest due the state on loans to erect the Lyman reservoir dam made from proceeds of the sales of land granted the federal government for common schools, etc., did not result in a deficit in the common school fund, and transference of moneys by the state from the general fund to cover such deficit pursuant to Laws 1921, c. 49, remitting interest on such loans, is not authorized by Const. art. 11, § 10, providing for appropriations in addition to income from investment of such proceeds to insure the maintenance of all state educational institutions.

3. States \S 119—Remission of interest on loans of institutional funds held invalid as a "donation to individuals."

The remission by Laws 1921, c. 49, to mortgagees of interest on loans of institutional funds is a donation to individuals in violation of Const. art. 9, § 7.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Donate—Donation.]

4. Public lands \S 57—Remission of interest on loans of institutional funds held invalid as breach of trust under Constitution.

The remission of interest on loans of funds derived from sale of lands granted to the territory and state by the federal government for common schools and other institutions is a violation of Const. art. 10, § 2, making it a breach of trust to dispose thereof for any object other than that for which they were granted, or contrary to the Enabling Act.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action for injunction by William E. Rowlands against the State Loan Board of Arizona and others to restrain defendants from carrying out terms of Laws 1921, c. 49. Injunction denied, and plaintiff appeals. Reversed and remanded.

Baker & Whitney, of Phoenix, for appellant.

Armstrong, Lewis & Kramer, of Phoenix, for appellees.

ROSS, C. J. During the years 1914, 1915, 1916, 1917, 1918, 1919, and 1920, the State Treasurer, by and with the approval of the Governor and the Secretary of State loaned various sums aggregating \$637,600 to various persons, under the Lyman dam project in Apache county, and took mortgages on such persons' lands situated in said county, as security for such loans. The moneys loaned were the proceeds of sales of institutional lands granted to the territory of Arizona and to the state by the Federal government for the common schools and charitable and penal institutions of the state. The loans bear interest at 6 per cent. per annum, and on July 1, 1921, there was due to the state about \$30,000 in interest. The annual interest for the subsequent years, up to and including 1924, will be about \$38,400.

The Fifth Legislature (see chapter 49, Laws 1921) passed an act the title and context of which has to do with the interest on said loans, and, as its own language explains quite clearly its purpose, we give it in full:

"An act for the relief of natural persons owning land in Apache county whose property was damaged or destroyed by floods occasioned by the breaking of the Lyman reservoir, and making an appropriation therefor. Be it enacted by the Legislature of the state of Arizona:

"Section 1. That because of the construction company's not completing the Lyman dam, and the resulting failure to obtain water which has prevented the growing of crops on the Lyman dam project during the past five years and which will limit the growing of crops for at least another year, the interest due the state of Arizona on the money loaned for the purpose of erecting said dam is hereby remitted until the year 1925, as hereinafter provided.

"Sec. 2. The State Loan Board shall ascertain the amount of interest due on the loan made on the farm lands within the Lyman dam project up to the time this act becomes effective and shall make a claim for the amount so determined upon the State Auditor, who will issue his warrant upon the receipt of such claim for a like amount to be credited to the permanent funds invested on such loans. At the end of each calendar year up to and including 1924 the State Loan Board shall ascertain the amount of interest due and if, in their judgment, similar action is necessary, shall have authority to grant the same relief to said mortgagors for the calendar year next preceding.

"Sec. 3. There is hereby annually appropriated out of the general fund, a sufficient sum to carry out the provisions of this act.

"Sec. 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

The appellant, Rowlands, as a taxpayer of Maricopa county, in his own behalf, and in behalf of others in like situation, brought an action alleging that the above-named appellees, officials of the state, were threatening to, and would, if not enjoined, take from the general fund of the state the moneys be-

longing to the state, raised by general taxation, and apply the same in payment of the interest due from the mortgagors up to July 1, 1921, and subsequent years as the interest became due and payable. It is further alleged that said chapter 49 violates various provisions of the Constitution of the state of Arizona (enumerating them) and the Fifth and Fourteenth amendments to the Constitution of the United States, and is unconstitutional, null, and void, and prayed that the appellees be enjoined and restrained from carrying out the terms of said chapter 49. At a hearing upon the merits of the case, at which the allegations of the complaint were treated as "an agreed statement of facts," the court made and entered its judgment dismissing the complaint. From this judgment the appellant prosecutes this appeal.

The question for decision is apparent from the above statement of the case. It is contended by appellant that the Legislature exceeded its powers as limited by the state Constitution in the legislation contained in chapter 49, *supra*. It is obvious that the Legislature in passing the act intended to accomplish one of two things, either: (1) To cancel and forgive the payment of the interest due and becoming due on the mortgages the state holds against the various persons under the Lyman dam project up to 1924, inclusive; or (2) to lend these debtors out of the state's general fund enough money to pay said interest due and to become due until 1925 in case it was needed. It is the contention of appellant that the act forgives the interest to the debtors, and he bases his reason for so claiming upon the meaning of the word "remitted" and the absence of any provision in the act for the repayment to the state of any advances made by it out of the general fund to meet such interest. That the legislative purpose was to relieve the debtors from ever paying the interest for those years in which the state paid it we have no doubt.

[1] Appellees contend that the word "remit" as used in the text means "to defer" the payment of interest. Webster defines the word:

"* * * To forgive; to pardon; to remove; to refrain from exacting or enforcing; as, to remit the performance of an obligation."

He gives as synonyms:

"To relax; release; abate; relinquish; forgive; pardon; absolve."

Funk & Wagnall's New Standard Dictionary defines "remit":

"* * * To refrain from exacting as a penalty; discharge from; countermand the exaction of; as, to remit a fine * * * to defer or put off; postpone."

34 Cyc.:

"To forgive, to pardon, to release from punishment or penalty."

Bouvier:

"To annul a fine or forfeiture."

And the same author defines its derivative "remission" as "a release of a debt." In our statute (paragraph 5552, Civil Code) it is provided:

"In the construction of the statutes of this state, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature, that is to say:

"(1) All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

This we believe to be the general rule, and, taking it as our guide, we think the word "remit," whether construed according to its popular meaning or according to its "peculiar and appropriate meaning in law," was employed in the act to convey the idea that the interest was forgiven or pardoned. Though, according to one of the lexicographers, one of its meanings is "to defer," we do not think it was employed in that sense by the Legislature in the above act, because, if that was the intention, it seems that the Legislature would have provided or stipulated in the act that when, if ever, the interest was collected or collectible from the Lyman dam debtors, it should be paid into the general fund to cover the advances made by the state from that fund in payment of interest. The absence of such a provision was doubtless intentional, conclusively evidencing the purpose of the Legislature to relieve the debtors from the obligation ever to repay the state the moneys it might advance in discharging the interest on the mortgages.

Had it been the intention of the Legislature to forego the collection of interest for the time being only, and not to forgive it, it is reasonable to assume more apt language would have been used to indicate such intention. It would have empowered the state's agent "to defer, put off, or postpone" the payment of interest to a time certain, in direct and express language.

For another reason, it does not seem that it was the intention simply to give the debtor more time in which to pay the interest, as the state's agents are given some discretion in the matter, and would doubtless use it, if by doing so the debtors' ability to meet their obligations would be enhanced or improved. In section 116, Land Code (Laws 2d Sp. Sess. 1915, c. 5), it is provided that the Governor and Secretary of State shall place the collection of any loans of institutional funds made by the state in the hands of the Attorney General for appropriate action, "whenever it shall seem to be for the best interests of the state to do so." In view of

this authority already possessed by the state's agents, there was no occasion to repeat it, as is contended by appellees was done, by chapter 49, *supra*.

[2] Appellees intimate, without pressing it very hard, that since the mortgagors are unable to pay the interest on loans, a deficit to that extent in the common school fund is the result, and that the transference of money by the state from the general fund to cover such deficit is authorized by section 10, art. 11, State Constitution, wherein it is provided that—

"In addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all state educational institutions, and shall make such special appropriations as shall provide for their development and improvement."

This contention is not sustainable. Chapter 49 by its title and contents conclusively negatives any such idea. It was enacted "for the relief of natural persons" therein described, and not for the common school fund.

[3] The purpose and intent of chapter 49 being, as we have seen, to relieve the mortgagors of land under the Lyman dam project from ever paying or repaying any sums advanced by the state to care for the interest on their mortgages, it only remains to see if such a thing may be done without violating the fundamental laws of the state or nation. Without deciding whether it violates the federal Constitution or other provisions of the state Constitution, as contended by appellant it does, we think it must be conceded that it runs counter to, and is in conflict with, section 7, art. 9, of the state Constitution. This section reads as follows:

"Sec. 7. Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law."

No refinement of reasoning will permit the proposed transaction to pass muster as against this inhibition. When a mortgagee forgives the interest for no other reason than the inability of the mortgagor to pay it, it is a donation, a pure and simple gratuity, unsupported by any consideration, moral or legal. *Patty v. Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744; *McClure v. Nye*, 22 Cal. App. 248, 133 Pac. 1145; *In re Stanford's Estate*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788. While the object had in view may be a worthy one, the people, by their Constitution, have said in language, plain and unmistakable, that the public moneys

shall not be appropriated by the Legislature for that purpose. This restriction upon the power of the Legislature cannot be ignored.

[4] The relinquishment of the interest on loans of institutional funds cannot be reconciled with section 2, art. 10, of the state Constitution, which reads as follows:

"Sec. 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust."

The interest and principal must be used for the specific purpose for which institutional lands were granted to the state, or to the territory, before it became a state. The Legislature would have as much right to appropriate such funds or the interest thereon for road-building purposes as it would have to give such funds away. Being convinced that the provisions of chapter 49 cannot be carried out, without violating the two sections of the Constitution above quoted (and perhaps others), we must hold that the judgment of the trial court was in error in refusing to enjoin the defendants-appellees from carrying out the terms of said chapter.

The judgment of the lower court is reversed, and the cause remanded, with directions that a permanent injunction and restraining order be issued as in the complaint prayed for.

McALISTER and FLANIGAN, JJ., concur.

(24 Ariz. 123)
MORNING GLORY MINING CO. v. BENDER.
(No. 1940.)

(Supreme Court of Arizona. June 5, 1922.)

1. Master and servant \S 228(3)—Miner blasting held not guilty of violation of statute.

Where some of the holes which a miner had charged for blasting misfired, his return to them after a lapse of 20 minutes from the lighting of the fuse for the purpose of taking care of the next shift, according to custom, was not a failure to report misfire holes to the mine foreman in violation of Civ. Code 1913, par. 4071, precluding recovery for injury by a blast occurring when he reached the holes.

2. Trial \S 296(3)—Error in use of word "employee" for "employer" in instruction held not misleading.

In an action by a miner under the Employers' Liability Law for injuries received in blasting, an instruction containing the statement that under specified circumstances an employee may recover for injuries, whether the "employee" was to blame or not, in view of the fact that the instruction clearly showed that it was

meant to be whether the "employer" was to blame or not, and a subsequent instruction that, in order to enable the employee to recover, the injury must be received by him without fault or negligence on his part, did not mislead the jury, and was not prejudicially erroneous.

Appeal from Superior Court, Santa Cruz County; Samuel L. Pattee, Judge.

Action by Francisco Campillo Bender against the Morning Glory Mining Company. From judgment for plaintiff, and denying defendant's motion for a new trial, defendant appeals. Affirmed.

Leslie C. Hardy, of Nogales, for appellant.
S. F. Noon, of Nogales, and A. A. Worsley, of Tucson, for appellee.

McALISTER, J. This is an action under the Employers' Liability Law, in which the plaintiff seeks to recover damages for personal injuries suffered by him as a result of an accident, and from a judgment for him in the sum of \$15,000, and the denial of its motion for a new trial, defendant appeals.

[1] The complaint properly alleges a cause of action under the Employers' Liability Law, but the answer denies that the injury was caused by an accident due to a condition of the occupation, and alleges affirmatively that it resulted from appellee's negligence in failing to obey and comply with the orders and instructions of the defendant regarding such occupation, as well as the laws of the state of Arizona prescribing the duties of one engaged therein, and from his failure to exercise ordinary care, caution, and prudence for his own safety.

Appellee, Francisco Campillo Bender, was employed by the Morning Glory Mining Company as a miner, and while in the discharge of his duties was injured on June 1, 1920, by a blast or explosion which threw rocks and dirt against his body, resulting in the total loss of his sight. The accident occurred in this way: At 3:35 that afternoon appellee and his partner, Francisco Torres, lighted the fuse in five holes which they had just charged for blasting, and immediately withdrew to a tunnel some 300 or 400 feet away. Within five minutes thereafter they heard three explosions, but remained in their place of safety 15 minutes longer waiting for the other two, and, not hearing them, returned to the holes at 3:55 in order, as appellee testified, to ascertain which two had missed, so they could "take care of the next shift," and just as they "got to the place the holes went off," with the result that both were injured, appellee suffering complete loss of both eyes. The evidence shows that Chris B. Wilson was foreman at the mine, and that he was known to appellee, who had been both hired and directed where to work by him.

The essential facts of the case are not disputed, hence it is a question of the proper

application of the law. The assignments, with one exception, are based on subdivision (e) of paragraph 4071, Civil Code 1913, which provides that "misfire holes shall be reported to the mine foreman, or shift boss, in charge of the locality of such holes." It is contended that under this statute it was the duty of appellee to report the misfire holes to the foreman, and that his failure to do so, being the proximate cause of the injury, was negligence per se which prevents a recovery. In substantiation of this proposition the following excerpt from volume 3, § 1278, of Labatt's Master and Servant, is cited:

"There can be no question that, where a servant's injury was proximately caused by the fact that he was violating a statute or municipal ordinance, the meaning and effect of which are perfectly clear, he cannot recover damages. This doctrine is applied regardless of the fact that the employer may have directed his servants to violate the law, or may have sanctioned the growth and continuance of a custom which amounts to a contravention of the law."

It is true that it was appellee's duty to report to the foreman or shift boss having charge of that part of the work that two holes had misfired; but was his return to them after a lapse of 20 minutes from the lighting of the fuse in each hole, for the purpose of taking "care of the next shift," a failure to comply with the statute? We think not, because it is clear from the evidence that fuse of the character of the three-foot lengths used in each of these holes burns at the rate of one foot per minute, and necessarily each of these pieces would burn to the powder in less than 5 minutes from the time they were lighted if there was no defect in them, and a number of witnesses experienced in mining testified that it is considered perfectly safe to approach misfire holes after a lapse of 20 minutes, and that it is customary for the miner to do this unless otherwise instructed by his employer. In this case appellee testified that no other instructions had been given him, and that his purpose in returning was "to see which holes were missed" because that was "the customary thing to do to report missed holes to the next shift." By a personal inspection he could ascertain which holes had misfired, as well as the reason for the failure of the others, and also whether two had exploded simultaneously, leaving only one, and thus place himself in a position to give the next shift exact information. Instead of violating the statute, he was endeavoring to comply with it completely, and the fact that he did it in a way that was considered safe by those following that occupation and in compliance with the custom of the mining industry in that section relieves him from any charge of negligence.

It is claimed that it was error to admit testimony proving it to be the custom among miners to return to the locality of the misfire

holes in 20 minutes because such a custom could not relieve appellee of his duty to comply with the statute. This contention, however, is disposed of by the statement just made that in returning to the holes appellee was not violating the statute, but attempting to gain, in the only way open to him, information which would enable him to perform his statutory duty in a satisfactory manner. The statute was enacted for the benefit of the next shift, not for those having knowledge of the situation, and the custom, instead of conflicting with it, in practice supplements it by enabling the workman to report more accurately the conditions.

[2] The only other error complained of is the giving of the following instruction:

"It is unnecessary to go into the reasons for the passage of such a law, it is unnecessary to dwell upon the fairness or unfairness of such a law, but it is the law that under those circumstances that an employee may recover for injuries to his person while engaged in hazardous occupation, whether the employee is to blame or not, and that, under the facts shown by the evidence, is claimed to be one of those occupations."

The part objected to is the use of the word "employee" in the [seventh] line, which, it is claimed, conveyed to the jury the impression that under the employers' liability law an employee may recover for injuries to his person while engaged in a hazardous occupation whether he is to blame for the injury or not. The remainder of this instruction is in these words:

"The occupation is undoubtedly hazardous, and if other facts exist he is entitled to recover whether the employer is at fault or not. So the Legislature has enacted this act to protect the safety of employees in hazardous occupations, such as mining, smelting, etc., and any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, or due to such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases where such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

It is clear from a reading of the entire instruction that the word "employer" was intended, and that the jury must have so understood it. In the very next sentence the jury is told that the employee is entitled to recover whether the "employer" is at fault or not, and at the end of the instruction that the employer is liable, when the proper facts exist, in all cases where the death or injury shall not have been caused by the negligence of the employee killed or injured. In the succeeding instruction the statement is made that five things must be proven before appellee can recover, and the fifth is that the

injury was received by him without fault or negligence on his part, and this idea is repeated several times in the instructions. What is meant by negligence of the employee as a defense is defined as follows:

"By negligence on his part is simply meant the want of ordinary care, as I have defined it, and in order to bar a recovery it must be shown that it was his negligence that caused the injuries; but it must be proven by him, he must prove that the injury he received was not caused by his own carelessness or negligence."

It is clear from the entire instructions that it was a mere lapsus linguae or slip of the tongue and that the jury could not have been misled by it. But, even if it did not understand that the reference was to the employer instead of the employee, appellant was not injured, because the evidence, which is undisputed, shows conclusively that under the custom prevailing in that section the injury was not due to appellee's alleged negligence in returning to the holes within 20 minutes after lighting the fuse, but that it resulted from an accident due to a condition of the employment. No facts are disclosed indicating that appellee was in any way to blame; hence the jury could not have been misled or appellant injured by it. If there had been any evidence pointing to the contrary, and it were not so plain that it was a mere slip of the tongue, which the jury understood, appellant might be able to argue this assignment with plausibility.

The judgment is affirmed.

ROSS, C. J., and FLANIGAN, J., concur.

(24 Ariz. 161)

SMITH v. STATE. (No. 521.)

(Supreme Court of Arizona. June 10, 1922.)

Municipal corporations \S 642(1)—Jurisdiction of Supreme Court on appeal from justice or police court does not extend to refusal of continuance or to pass on insufficiency of complaint.

Under Pen. Code 1913, \S 1156, providing that the only questions coming from a justice, police, or recorder's court through the superior court to the Supreme Court, that the latter has jurisdiction of on appeal, are such as involve the validity of a tax, impost, assessment, toll, municipal fine, or statute, on an appeal from a city court from a conviction for violating a city ordinance against selling liquor, the Supreme Court has no jurisdiction to pass on the insufficiency of the complaint and the refusal to postpone trial for absence of witnesses.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

John Smith was convicted of violating a city ordinance against selling or attempting to sell intoxicating liquor, and he appeals. Appeal dismissed.

Spencer B. Pugh and J. C. Niles, both of Phoenix, for appellant.

W. J. Galbraith, Atty. Gen., and R. E. L. Shepherd, Co. Atty., of Phoenix, for the State.

ROSS, C. J. Appellant was tried and convicted in the city court of the city of Phoenix, upon a charge of violating a city ordinance against selling or attempting to sell intoxicating liquor within the city. He appealed to the superior court, where the case was tried de novo and was again convicted. From the judgment of conviction, he appeals.

The only errors assigned are the insufficiency of the complaint to state a crime, and a refusal to postpone the trial upon a showing of the absence of material witnesses. These are questions we have no power to pass on in a case appealed from "a justice, police, or recorder's court." The only questions coming from such courts through the superior court to the Supreme Court, that the latter has jurisdiction of on appeal, are such as "involve the validity of a tax, impost, assessment, toll, municipal fine, or statute." Section 1156, Penal Code. The validity of the ordinance under which appellant was tried and sentenced was not raised in either of the inferior courts and is not raised here. The same is true of the fine or punishment.

It appearing that this court is without jurisdiction to pass upon the assignments of error here presented, the order will be that the appeal be dismissed.

McALISTER and FLANIGAN, JJ., concur.

(24 Ariz. 141)

PRATT-GILBERT CO. v. HILDRETH.
(No. 1898.)

(Supreme Court of Arizona. June 8, 1922.)

1. Sales \S 284(3)—Parties can fix time for test of tractor, or buyer has reasonable time.

The parties to a contract for the sale of a tractor had the right to fix their own time within which it should be practicable to determine its conformity to the guaranty, and, in the absence of a provision fixing such time, the buyer is entitled to a reasonable time under the circumstances.

2. Sales \S 441(1)—Statement buyer would have tractor for use in spring does not sustain finding he had until spring to test.

A statement by the seller's agent that, if the buyer ordered a tractor then, he would save money on the purchase price and would have the tractor for use in his fall or spring plowing when he wanted it, does not sustain a finding by the trial court that the buyer was given until the time for spring plowing within which to test the tractor to ascertain whether it conformed to the guaranty.

3. Sales \S 284(3)—Reasonable time for test depends on all the circumstances.

A reasonable time within which a buyer can test the article to ascertain its conformity to the guaranty is such as to give him a fair and sufficient opportunity, all circumstances considered, and the buyer of a tractor would have until the following spring to make the test if the conditions on his land were such that it could not be made before that.

4. Sales \S 284(3)—Knowledge by buyer in fall that guaranty was broken prevents rescission in spring.

Even though a buyer may have had until spring to test a tractor to ascertain its conformity to guaranty, he could not rescind his contract in the spring if he knew, in the fall before, that the tractor did not conform to the guaranty.

5. Sales \S 284(3)—Immaterial whether knowledge of breach of guaranty was acquired by specified test.

In determining whether the buyer of a tractor rescinded promptly after finding that it did not conform to the guaranty, it is immaterial whether such knowledge was acquired by the tests specified in the contract of sale, if the buyer in fact had such knowledge.

6. Sales \S 285(2)—Buyer must promptly notify seller of rescission for breach of guaranty.

A buyer must promptly notify the seller of a breach of guaranty, so that the seller will not be deprived of the use of his money or required to pay interest to the buyer and will not be deprived of opportunities for resale.

7. Sales \S 397—Evidence held to show tractor could not be returned in such condition as to restore the status quo, so as to justify rescission.

In an action to recover the purchase price paid for a tractor, evidence that extensive repairs had been made by the buyer on the tractor, for which he paid, thereby indicating they were due to improper handling of the tractor which would prevent his right to have the repairs made free by the manufacturer, and that some of the repairs consisted in welding a cylinder head, held to show that the tractor was in such shape that the seller could not be restored to status quo, so that rescission could not be had.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Action by Fen S. Hildreth against the Pratt-Gilbert Company, a corporation. Judgment for the plaintiff, and defendant appeals from the judgment and from an order denying its motion for a new trial. Reversed, and case remanded, with directions to dismiss the complaint.

Chalmers, Stahl, Fennemore & Longan, and W. E. Ryan, all of Phoenix, for appellant.

Gandy & Cunningham, of Phoenix, for appellee.

McALISTER, J. This is an action by Fen S. Hildreth against the Pratt-Gilbert Company, a corporation, in which he seeks to recover the purchase price of a Monarch tractor sold him by the latter. From a judgment for plaintiff in the full amount asked for, \$1,856.70, and an order denying its motion for a new trial, Pratt-Gilbert Company appeals.

It appears from the complaint that in the latter part of June, 1917, appellee, Hildreth, ordered from appellant a Monarch tractor which arrived in Prescott, Ariz., the latter part of July, 1917, and a few days thereafter was driven to appellee's ranch in Yavapai county; that it was purchased for the express purpose of plowing, disking, and preparing the land on appellee's ranch for planting to crops, a fact then well known to appellant, who at the time of making the sale to appellee warranted that the said tractor was fully adapted to the particular purpose for which appellee desired it and that it would "develop eighteen (18) brake horse power at the drawbar and thirty (30) horse power at the crank shaft, and that said tractor would handle and pull four fourteen-inch plows in the soil on plaintiff's said ranch, the condition of which said soil and the position and location of said ranch were to defendant company well known"; that appellee, relying upon said warranty, ordered and received said tractor and paid therefor the sum of \$1,650 and for freight thereon from the factory at Watertown, Wis., to Prescott, Ariz., the further sum of \$206.70; that appellee was unable to use the tractor for plowing at the time he purchased it because of the hardness of the soil on his ranch due to the drought, and that he kept said tractor on his premises properly housed and protected from the elements until the condition of the soil was such that the tractor could be used, which was in the spring of 1918, and that upon a trial of it in the work for which it was purchased it failed to fulfill the conditions of the warranty above set forth, in that it did not and could not pull 4 14-inch plows as aforesaid and did not and could not develop 18 brake horse power at the drawbar and 30 horse power at the crank shaft, which said fact was immediately thereafter, to wit, on April 20, 1918, communicated to appellant, together with a demand for a return of the purchase price, including the freight, notice at the same time being served on appellant that appellee was ready to return the tractor, which was then at its disposal on his ranch in Yavapai county, in as good condition as when purchased.

The answer admits the sale and delivery of the tractor and the payment of the purchase price, but denies the warranties claimed, and alleges that the sale was made upon an agreement that if, after a three-days' test by appellee, the tractor did not work well, he would give appellant written

notice thereof stating wherein it failed, whereupon the latter would send a competent man to put it in shape, and, if this could not be done appellee should then immediately return the tractor to appellant; that the failure to give notice that the tractor did not work well after a trial as above stated or its use by appellee after three days from the time it was delivered to him without giving notice as to wherein it failed should operate as an acceptance thereof and a fulfillment of all warranties pertaining to the sale; that the tractor was delivered on July 29, 1917, a trial thereof had in behalf of appellee by his agent, Bob Southers, who accepted it, whereupon appellee on August 8, 1917, paid the purchase price; that at no time previous to April 20, 1918, did appellee notify appellant that said tractor did not work well nor offer to return the same; that the notice and offer on said last-mentioned date were not within a reasonable time from August 7, 1917, the day of acceptance.

[1] It appeared from the evidence that about a week after the tractor had been delivered and, according to appellant, tested, and accepted by appellee through his representative, a request for the payment of the purchase price was made, but appellee, declining to accept the guaranty of the factory people whom he did not know, refused payment unless appellant, a local company, would guarantee that the tractor would do the work at his ranch. Consequently the following letter was delivered to appellee, whereupon he gave appellant his check for \$1,650, having paid the freight when the tractor was unloaded in Prescott:

"Pratt-Gilbert Company.

"Phoenix, Arizona, 8-7-17.

"Mr. Fen S. Hildreth, Fleming Bldg., Phoenix, Ariz.—Dear Sir: As per your verbal conversation with our Mr. Doe this afternoon regarding the work the tractor purchased from us recently will do, we hereby guarantee said tractor to handle four fourteen-inch plows, and will develop 18 brake HP. at the drawbar, and 30 brake HP. at the crank shaft.

"Hoping that this will meet with your approval, and thanking you for your very many courtesies, we beg to remain.

"Yours very truly, Pratt-Gilbert Co.,
"Cyril S. Gilbert."

Attached to this letter was the guaranty of the Monarch Tractor Company, evidently in the form given with all its machines, which contained the warranties alleged in the answer and signed by appellant as well as by the manufacturer. These guaranties were delivered to appellee and the purchase price paid August 7 or 8, 1917, nine or ten days after the delivery of the tractor. Hence it would seem to be clear that it was not then understood by either party that the three days' test required by the factory guaranty had been made, or, if so, that the

tractor was accepted in consequence of it; otherwise, appellee could have had no purpose in demanding and appellant none in giving its separate guaranty. But even if it had been made appellant, in order to satisfy appellee completely as to the tractor's fitness for his purpose, guaranteed in its letter of August 7, 1917, reliance upon which prompted the payment of the purchase price, that it would "handle four fourteen-inch plows, and will develop 18 brake HP. at the drawbar, and 30 brake HP. at the crank shaft," though no definite time for ascertaining whether it would do this was given, and appellant contends that from August 7, 1917, the date of payment, to April 20, 1918, the date of the letter of rescission, a period of over eight months, is unreasonable and as a matter of law constitutes a waiver of any breach of warranty and an acceptance, and bars appellee's right to rescind. This is true unless there was a definite agreement fixing the time, or, in the absence of such an agreement, that there were conditions over which the parties had no control rendering it impossible to make the test within a reasonable time, for there is no question as to the right of the parties to fix their own time, and under all the authorities when none has been fixed the purchaser is allowed a reasonable time. 35 Cyc. 439.

[2] Appellee alleged, however, and the court so found, that appellant through its agent gave him until the fall or spring plowing to make the test, but the sufficiency of the evidence to support this finding is challenged, and in support of its position appellant cites the following excerpt from the testimony of appellee, which is all the record contains on the subject:

"Q. At the time that you bought this tractor, was there any time specified when you were to try it? A. Yes, in a way.

"Q. State what that was, and when? A. In my talk with Mr. Doe in the St. Michael Hotel, in July, 1917, I told Mr. Doe I didn't want the tractor right then. He says, 'You give me the order for the tractor, because you will save some money by it, and then you can use it this fall or the spring when you are going to use it, and you will save this much money.'

"Q. Did he say how much? A. I think it was about \$170 he said I would save."

The purport of Doe's statement is that by purchasing the tractor at that time appellee would save money and then have it for use in the fall or spring, or whenever he intended to use it. The word "use" is not synonymous with the words "test" or "try," and there is nothing in the context indicating that it was intended to convey that idea. But it is only by giving it this meaning that the finding can be sustained, and without passing upon the objection to the admissibility of this testimony, urged upon the ground that it was oral and that, when an agreement "made in parol is afterwards reduced to writ-

ing, the writing is presumed to contain the contract in its entirety" (*Lanham v. Louisville & Nashville Railroad Co.*, 120 Ky. 351, 86 S. W. 681), it sufficiently appears that the evidence does not justify the finding.

[3] No time for determining whether the tractor would fulfill the warranties having been agreed on by the parties themselves, it was incumbent upon appellee to ascertain this fact within a reasonable time, and by this is meant a "fair and sufficient time and opportunity, all the circumstances considered, including his own, to test and examine the property and ascertain whether it corresponds with the warranty or not." *Boothby v. Scales*, 27 Wis. 626; *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. 95.

[4] It is contended in behalf of appellee that he met this requirement by alleging in his second amended complaint on which the case went to trial, and proving to the satisfaction of the court which found it to be a fact, that on account of the hardness of the soil on his ranch as a result of the drought his first opportunity to make the test was in the spring of 1918. If it be true that he was prevented by the condition of the soil from ascertaining before spring whether the tractor would do what it had been guaranteed to do, it might be held that he had acted within a reasonable time, because to have required earlier action under those conditions would have rendered his warranty useless, since it would have been demanding the impossible, and this the law does not do, but whether he was able to test the machine under the proper conditions before rescinding, as he claims was both his privilege and duty, is immaterial, since it appears from the testimony of appellee himself that he learned as early as October, 1917, that the tractor would not do the work it was warranted to do, or, to use his own words, "they (referring to his employees) said I was stuck; that it wouldn't work"; "that the tractor was used in October and was not able to pull more than two plows," and also from his original complaint in this action in which he alleged as follows:

"That immediately thereafter (August 7, 1917) said plaintiff placed said tractor in operation in work for which it was purchased and which it was intended to do as above set forth, and plaintiff alleges that said tractor never at any time fulfilled the conditions of the warranty set forth in that the said tractor, the same being then and there properly and carefully handled, did not and could not pull four fourteen-inch plows as aforesaid."

[5, 6] It is immaterial whether appellee tested the machine under the conditions called for by the agreement if he learned from a test under any circumstances that it would not do what it had been guaranteed to do. It is plain that if it would not pull two mold-board plows, a test to demonstrate

whether it would pull four was unnecessary, and when he ascertained this fact it became his duty to notify appellant promptly of his decision to rescind, because, as very appropriately and correctly said in *Boothby v. Scales*, above:

"It is inconsistent with the nature of the right or privilege thus given the purchaser, that there should be any unnecessary delay in the exercise of it. The seller in the meantime is deprived of the use of his property and perhaps of the opportunity for resale. He is liable to refund the purchase money with interest from the time of sale, or, if it has not been paid, he loses the interest on it. These considerations are sufficient to require promptness and forbid needless delay on the part of the purchaser. If it appears that he had ample time and opportunity to test and examine the article, and ascertain its quality or capacity with reference to the warranty, and might have conveniently done so, but neglected to do it, such neglect should be regarded as a waiver of the right to rescind, and as an election on his part to retain the property, subject to such claim for damage as he might subsequently establish."

See *Cookingham v. Dusa*, above; *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 324, 26 Pac. 703; *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653; *Southern Gas & Gasoline Engine Co. v. Adams & Peters* (Tex. Civ. App.) 169 S. W. 1143; *Northern Electrical Mfg. Co. v. H. M. Benjamin Coal Co.* 116 Wis. 130, 92 N. W. 553; *Black on Rescission and Cancellation*, vol. 2, par. 542.

[7] The evidence discloses that the tractor was used many times by appellee's employees before the letter of rescission was written, though it is claimed that each instance was merely an effort to test it; but, whether this be true or not, a number of repairs became necessary as a result and were made by appellee at a cost of several hundred dollars, notwithstanding the Monarch Tractor Company agreed in its warranty, signed also by appellant and delivered to appellee at the time of payment, "to furnish free of charge, any part that may prove defective within one year," though in the same instrument it reserved the right to "require the return of such defective part, freight or express prepaid, to the factory for inspection and examination," and assumed "no responsibility when the machine or part returned indicates misuse or neglect or alteration or repairs made outside its factory." None of the parts needing repair or replacement, however, among which was a cracked cylinder head, was sent to the company for that purpose; but whether this was prompted by the fact that they were not defective but broken as a result of misuse or negligence does not appear. If they had been merely defective, it would seem as if appellee would have called upon the warrantor to "make them good," appellant's special warranty not

covering repairs, because a purchaser would not willingly pay for replacing or repairing a defective part when the seller had agreed to do this free of charge. That his failure in this respect was prompted by his belief that the injuries were not due to a defective part, but to misuse or neglect of the tractor after its delivery to him, is strengthened by the testimony of C. H. Pratt, one of the owners of appellant company, that appellee stated to him in the spring of 1918 that the water had frozen in the cylinder and cracked it, and by that of the witness R. J. Freestead that C. H. Pratt repeated this statement to him in the presence of appellee who did not deny it. The cylinder head had been repaired in Kingman by welding, and the opinion of Freestead, a farm implement expert and tractor demonstrator, as to whether it would be all right in the future, was sought; but the witness was unable to answer, not knowing the exact character or place of the break. The evidence further discloses this condition of the tractor: A connecting rod burned out, a cylinder scored, an oil pipe and cylinder rods broken, and the tracks worn and out of line. It follows from this that it was in such shape that appellee could not restore the status quo, and where this is the case a rescission cannot be had. *Cookingham v. Dusa*, above; *Burnley v. Shinn*, 80 Wash. 240, 141 Pac. 326, Ann. Cas. 1916B, 96; *Bradley v. Palen*, 78 Iowa, 126, 42 N. W. 623; 35 Cyc. 440.

The judgment of the lower court is reversed, and the case remanded, with directions to dismiss the complaint.

ROSS, C. J., and FLANIGAN, J., concur.

(24 Ariz. 138)

GENARDINI v. KLINE. (No. 1987.)

(Supreme Court of Arizona. June 5, 1922.)

Landlord and tenant §—129(4)—Rental value fixed by judgment for tenant in action for possession is basis for damages accruing after such judgment and before delivery of possession or after its affirmance on appeal.

Under Civ. Code, par. 1646, providing that in actions for recovery of real property the plaintiff may have judgment for the rental value which accrues after judgment and before delivery of possession by motion in the court in which judgment was rendered, in an action by a tenant against a landlord to gain possession of leased premises, where the court found the damage of the tenant from being excluded from possession was \$60 per month, and entered judgment for him on that basis for damages to the date of judgment on judgment for the tenant being affirmed on appeal, granting judgment on motion of the tenant for \$60 per month damages from the date of judgment to the termination of the lease, which had been extended

by a notice of the tenant according to the provisions of the lease, without taking evidence as to the rental value during the period over which the lease was extended, was proper.

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

Action by Mose Kline against D. J. Genardini. From judgment for plaintiff on motion, defendant appeals. Affirmed.

See, also, 19 Ariz. 558, 173 Pac. 883, and 21 Ariz. 523, 190 Pac. 568.

Doan & Stephenson, of Douglas, for appellant.

Boyle & Pickett, of Douglas, for appellee.

ROSS, C. J. The appellee, Mose Kline, in 1915 leased some Douglas, Ariz., business property from appellant, Genardini, for three years, with the privilege of renewal for two years, at the agreed rental of \$140 per month, or \$1,680 per year. Genardini having refused to give over possession, Kline brought suit upon the lease and recovered judgment for the possession of the property. The case was appealed to this court, and the judgment of the lower court was affirmed. 19 Ariz. 558, 173 Pac. 883. In the suit for the possession of premises the rental value thereof was assessed at \$200 per month from July 1, 1916, to January 25, 1917, entitling Kline to recover from Genardini as damages the difference between the rent he had agreed to pay and the rental value as fixed by the jury, or \$60 per month. When the cause was remitted to the trial court in August, 1918, Kline moved for judgment against Genardini for such difference of \$60 per month, which was granted, and judgment was entered, in favor of Kline against Genardini, on that basis up to August 31, 1918. From this judgment Genardini also appealed to this court, and in an opinion reported in 21 Ariz. 523, 190 Pac. 568, the judgment was affirmed.

The present controversy is over the rent of the premises from August 31, 1918, to July 20, 1920, and it arose in this way: Kline, before the expiration of the term of his fixed lease of three years, served Genardini with written notice of his election to have it extended two more years as stipulated. Thereafter, on July 20, Kline made a motion, entitled in the original action, for judgment against Genardini for the difference between the rent reserved in the lease and the rental value of \$200, or for \$60 per month, and after a hearing upon said motion judgment was entered for the sum of \$1,358.60.

From this judgment Genardini appeals, and assigns two reasons why the judgment should not be permitted to stand. The first one is that he offered, when or about the time he was served with notice by Kline of his election to have the lease extended, to turn over

possession of the premises; and, second, that the court, in entering judgment in favor of Kline at \$60 per month, denied him his day in court, and in doing so denied him due process of law.

It may be well to state that, although Kline has been entitled, during the whole term of his lease, to the possession and use of said leased premises, the same, and the possession thereof, has been retained and occupied by Genardini and his leasees continuously. He has ignored his contract obligation to turn the property over to Kline, and has been, all the time, a tenant at sufferance of Kline. He now contends that he offered to deliver possession to Kline, and he sets that up in his answer to motion for judgment, and supports it with his affidavit and the affidavit of another. But taking what is contained in affidavits as true, they do not establish a legal tender of possession, and this evidently was the view the trial court took. Of course, if Genardini turned over the possession of leased premises, or in good faith made a sufficient tender to Kline of the possession under the former decision of this court in this case, Genardini would have been relieved from paying the rent claimed. 21 Ariz. 523, 190 Pac. 568.

The contention that the proceeding by motion is not due process of law, and may not be availed of by successful plaintiff in a possessory action of this kind, is completely answered in our former opinion.

We are satisfied that where the rental value of premises is an issue in such proceeding, and is ascertained and fixed by the judgment therein, such rental value, under paragraph 1646, Civil Code, becomes, and is, the basis for a judgment, upon motion, for damages "which accrue after the judgment and before delivery of possession," or which accrue "after affirmation thereof" in case the judgment is stayed by appeal. In this case, instead of entering judgment in favor of Kline for \$200 per month, the rental value as found by the jury, the judgment was for the sum of \$60 per month, which correctly represents Kline's loss, as under his lease contract he was to pay only \$140 per month for the premises. We do not think it was ever intended, as appellant seems to contend, that the owner of premises might lease them, and thereafter refuse to deliver possession, and because perhaps rental values fluctuate require the successful lessee, in an action for possession of the premises wherein the rental value of the premises is litigated and determined, to establish by evidence the monthly rental value of premises that has accrued pending the litigation, or subsequent thereto.

The judgment of the lower court is affirmed.

McALISTER and FLANIGAN, JJ., concur.

(188 Cal. 765)

PERCY v. PERCY. (L. A. 7109.)

(Supreme Court of California. May 25, 1922.)

1. Divorce \Leftrightarrow 184(10)—Except that plaintiff's testimony must be corroborated, findings on conflicting evidence not disturbed.

Rule that findings of fact on conflicting evidence may not be disturbed on appeal is applicable in a divorce case, with the single exception that, before a divorce can be granted, plaintiff's testimony must, under Civ. Code, § 130, be corroborated.

2. Divorce \Leftrightarrow 127(4)—What is sufficient corroboration of plaintiff stated.

The corroboration of plaintiff's testimony, which, under Civ. Code, § 130, is necessary for divorce, is not of every act of which there is testimony, but it is enough that there is evidence, circumstantial or direct, substantially tending to confirm the party's testimony on a considerable number of material facts.

3. Divorce \Leftrightarrow 127(4)—Corroboration of plaintiff's testimony as to residence held sufficient.

Corroboration of testimony of plaintiff in divorce as to his residence in county of suit held sufficient.

4. Divorce \Leftrightarrow 62(6)—Plaintiff could establish residence while on military duty in an army camp.

Plaintiff in divorce was not precluded from establishing his residence in the county of suit because, at the time in question, he was there on military duty in an army camp.

5. Divorce \Leftrightarrow 254—Judgment awarding community property unauthorized by pleadings or submission.

The issue of division of the community property not having been submitted to the court by the pleadings or otherwise, but the evidence of, and reference to, the value of such property having been incidental to the issue of cruelty, predicated on extravagance and the allowance of costs to the wife, judgment so far as awarding to the husband the balance of the community property, after payment of costs awarded to the wife, was unjustified.

6. Divorce \Leftrightarrow 322—Rights in community property may be left for subsequent action.

The rights in the community property need not be litigated in an action for divorce, but may be left for determination in a subsequent action, in which the court may exercise its discretion where divorce was awarded on the ground of extreme cruelty.

7. Divorce \Leftrightarrow 194—Right to costs on appeal to be determined by Supreme Court.

Under Code Civ. Proc. §§ 1027, 1084, and the rules of court, the determination of whether appellant in a divorce action is entitled to her costs on appeal is for the Supreme Court.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for divorce by James Fulton Percy against Josephine Levina Percy. Judgment for plaintiff, and defendant appeals. Modified.

Lucien Gray, of Los Angeles, for appellant. Gordon Gray and Dwight D. Bell, both of San Diego, and Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

WILBUR, J. The plaintiff husband was granted an interlocutory decree of divorce on the ground of extreme cruelty and desertion, and the defendant was awarded \$1,000 as her share of the community property, payment of which was ordered forthwith. The defendant appeals upon the ground that the evidence is insufficient to justify the findings of the trial court as to residence, cruelty, and desertion, and predicates such contention in part upon the statutory requirement that the evidence of the parties in a divorce action must be corroborated. Civ. Code, § 130. It is conceded that the evidence on most of the contested points is contradictory, but it is nevertheless claimed that there is not sufficient corroboration to justify the respective findings attacked.

[1, 2] Appellate courts are powerless to interfere with the findings of fact, where the evidence is conflicting. This rule applies to divorce cases as well as to any other, with the single exception that, before a divorce can be granted, the testimony of the plaintiff must be corroborated. Civ. Code, § 130. The rule in this regard is correctly stated in the respondent's brief, as follows:

"Corroboration of every act sworn to by the plaintiff is not required. Evidence, circumstantial or direct, substantially tending to confirm the plaintiff's testimony upon a considerable number of material facts, is sufficient." *Cooper v. Cooper*, 88 Cal. 45, 48, 25 Pac. 1062; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *Avery v. Avery*, 148 Cal. 239, 82 Pac. 967.

Without a discussion of the evidence or of the findings in detail it is sufficient to say that the record shows ample corroboration of the plaintiff's testimony.

As to the finding of desertion, appellant claims that the plaintiff's testimony concerning her refusal to have reasonable marital intercourse is not corroborated, except by her admission, and that therefore the evidence is insufficient to justify a decree upon that ground. In view of our conclusion that the evidence is sufficient to support the finding of the trial court upon the issue of extreme cruelty, it is immaterial whether or not the testimony with reference to desertion is corroborated.

[3, 4] It is claimed that there is not sufficient corroboration to sustain the testimony of the plaintiff as to his residence in the county of San Diego for more than a year

before the action was commenced. It is conceded that the plaintiff actually lived within the county of San Diego for more than a year before the commencement of the suit. He testified that he lived there with the intention of making California and, for the time being, the county of San Diego, his permanent residence. He was at that time in the United States army, serving as a physician in the military hospital at Camp Kearny. His actual presence within the county of San Diego for more than a year immediately prior to the bringing of the action was amply corroborated by the testimony of others, and his intention to make California his residence was corroborated by various circumstances indicating his intent to establish his residence in California. Plaintiff's testimony as to his intention to remain in California was corroborated by the application to the state medical board for a license to practice; by his investigation concerning his right to practice in California; by his conference with physicians with a view to establishing a partnership here; by his declarations from time to time of his intention to remain in California; by his application to join a secret order which required a residence for six months in California as a condition to initiation; by his registration to vote, wherein he took the usual oath that at the next election he would have been one year within the state of California. The fact that, at the time in question, he was on military duty in an army camp did not preclude him from establishing his residence there if he so desired. *Stewart v. Kyser*, 105 Cal. 459, 464, 39 Pac. 19; *Budd v. Holden*, 28 Cal. 124, 127; *Estate of Gordon*, 142 Cal. 125, 75 Pac. 672.

[5] Appellant contends that the portion of the decree awarding her \$1,000 as her proportion of the community property and directing its payment forthwith is premature and beyond the issues, and for that reason the case should be reversed. It is conceded by the respondent that the order directing the immediate payment of the \$1,000 is premature and therefore erroneous, but that the appellant is not aggrieved by that portion of the order which directs the immediate payment to her of the \$1,000. This is undoubtedly true. The serious question in the case is whether or not the rights of the parties as to the community property was submitted to the court for decision. This issue was not raised in the pleadings. It is claimed by the appellant that all the evidence in regard to the community property and the parties was introduced, not with a view of ascertaining the character and extent of this property for purposes of division, but merely as incidental to the issue of extreme cruelty which was in part predicated upon the extravagance of the defendant. The appellant therefore claims that she is not bound by the

rule which requires that judgments shall be affirmed even though the formal issues are not raised by the pleadings, where the parties in fact litigated the question in the lower court, and the judgment determined the actual questions litigated.

Immediately upon the court orally announcing its conclusion that the plaintiff was entitled to a divorce upon both grounds stated in the complaint and that the findings would be prepared by the plaintiff in the usual way, the defendant asked the court to take into consideration the question of costs. It was suggested to the court that no preliminary motion had been made by the defendant for costs and that the plaintiff had furnished no money for costs for the defendant. Defendant's attorney thereupon stated: "It seems to me there should be some allowance to cover her costs and expenses at least." The court thereupon discussed the value of the community property as shown by the evidence. This included the value of the plaintiff's office at Galesburg and its equipment and \$3,000 in liberty bonds. The court then asked counsel if they wished to be heard further on the question of costs before it was decided. Plaintiff's counsel replied that he did. In the course of the discussion as to the costs counsel agreed that, under the law, the court had power to award all the community property to the plaintiff where the divorce was granted upon the ground of cruelty. The court then stated that the defendant had made a clean cut defense which was justified and that he felt that he "might well take into account what she had expended in making that kind of a defense, and deduct it from the community property." Thereupon the following occurred:

"Mr. Lucien Gray: It is before your Honor that the doctor has \$76,000 insurance and from his insurance he expects to receive an income when he is 64 years of age, besides this other property. I simply call that to the attention of the court. It is only approximate. All the expenses of the defendant have to be met; she made a trip back to take depositions and so forth. If the court wants to take that up now or at any other time we will be glad to take it up and make any suggestions or recommendations about it. I would like to have it all settled, if I could, while we were here, particularly as both Mr. Cosgrove and myself are going back to Los Angeles.

"Mr. Cosgrove: We think the court ought to decide it now.

"The Court: I will tell you, it is a purely arbitrary thing with me. I think she is financially on a safe footing; it, however, does not occur to me when the suggestion is made that it would not be out of keeping with the situation to indemnify her to some extent against the costs made in the kind of a defense that she has conducted here. I suggest that she be allowed a thousand dollars, and that it be arranged so that it may be paid within the possibilities of the plaintiff.

"Mr. Lucien Gray: Of course a thousand

dollars would hardly cover her actual court expenses, her depositions and actual costs in court, to say nothing of her personal expense or counsel fees.

"The Court: Well, it is an endeavor to help out in the court costs, and in the actual expenditures that I had that in mind; I had no idea of what they were, or anything of that kind."

After further discussion as to the expenses of the litigation the court stated:

"Mr. Lucien Gray: I understood him to say he had all his insurance so that at 64 years of age he would receive an income.

"The Court: I did when I heard him, but I do not see how he figured it. He would have a very meager income from anything the testimony shows he had in the way of life insurance. I think I will let it go at a thousand dollars and try and arrange it in the matter of the judgment how it should be paid."

This colloquy does not justify the conclusion that the parties submitted to the court an issue which is not contained in the pleadings, namely, the division of the community property. Neither plaintiff nor defendant has alleged the nature nor extent of the community property. The colloquy occurred after the court had announced its decision and is directed wholly to the question of cost which was a matter in the discretion of the trial court. Code Civ. Proc. §§ 1022, 1025. The statement about the division of the property was wholly incidental to the question of costs under discussion. Under section 137 of the Civil Code the court was authorized, during the pendency of the action, to require the plaintiff to pay for the support of the defendant and her expenses in prosecuting the action. As no such preliminary order had been made and as the court at the time of the rendition of its judgment had a right to require the plaintiff to pay the defendant's costs (Code Civ. Proc. § 1025), it is apparent that the whole matter referred to by counsel, as submitted to the court at that time for its decision, was the matter of costs, and that the order of the court, as announced at the hearing, was one for the payment of these costs to the defendant from the community property, thus diminishing the total amount of community property. That portion of the decree which directs the plaintiff to pay defendant \$1,000 from the community property is in accordance with the request of the parties that the court fix the costs to be paid by the plaintiff and the manner of its payment, but the judgment, in so far as it awards to the plaintiff the balance of the community property, is justified neither by the pleadings nor by the subsequent conduct of the parties. It was a decision upon an issue not presented to the court, namely, the division of the community property.

[8] The parties were entitled to litigate their marital status without reference to

their community property and to leave their rights in the community property to be determined by a subsequent action in which the court might exercise its discretion as to a proper division thereof, inasmuch as the divorce was awarded to plaintiff upon the ground of extreme cruelty. *Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168. The judgment must be modified.

[7] Under the statute and rules of the court it is necessary for this court to determine whether or not the appellant is entitled to her costs (Code Civ. Proc. §§ 1027, 1034) upon appeal. The bulk of the transcript, containing 846 pages, is taken up with a presentation of the conflicting evidence with relation to the various acts of cruelty and residence, and therefore is unnecessarily long.

The trial court is directed to modify its fifth conclusion of law to read as follows: "That defendant is entitled to \$1,000 to be paid to her as costs from the community property of said parties," and to modify the last paragraph of the interlocutory decree to read as follows: "It is further ordered, adjudged, and decreed that plaintiff pay to the defendant the sum of \$1,000 costs out of the community property of said parties." It is further ordered that appellant have one-half of her costs of printing transcript on appeal, the costs of printing her briefs, not exceeding the statutory allowance of \$100, and her other costs on appeal.

We concur: SHAW, C. J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

(188 Cal. 762)

Ex parte NEWELL. (Cr. 2460.)

(Supreme Court of California. May 23, 1922.)

1. Counties' \S 55—Court may determine existence of facts on which declaration of necessity of immediate effect of ordinance based.

The determination of the board of supervisors that facts existed which made it necessary for an ordinance to take effect immediately on its passage, as provided in Pol. Code, §§ 4057, 4058, are not conclusive, and the court may determine for itself the existence or nonexistence of the facts on which the declaration of necessity was based.

2. Counties' \S 55—Ordinance held not effective until 30 days after passage.

Ordinance declaring it to be unlawful for any person to ship or offer for shipment citrus fruits, showing evidence of 15 per cent. of frost injury, is not to be interpreted as a measure for preservation of public health, which under Pol. Code, § 4058, could be made to take effect immediately and it could not take effect till 30 days after its passage, as provided in section 4057.

In Bank.

Application of Hugh Newell for a writ of habeas corpus against the Sheriff of Los Angeles County. Writ granted.

Leonard, Surr & Hellyer, of San Bernardino, for petitioner.

U. S. Webb, Atty. Gen., and Thomas Lee Woolwine and Tracy Chatfield Becker, both of Los Angeles, for respondent.

SHAW, C. J. The petitioner, by a proceeding in habeas corpus, seeks release from custody on a charge that he has violated the provisions of an ordinance of the county of Los Angeles, passed by the board of supervisors on January 22, 1922.

The provision of the ordinance, which he is charged with having violated, declares it to be unlawful for any person to ship or offer for shipment—"citrus fruits in boxes or other containers or in bulk if the contents of any package or of the fruit in bulk contains fifteen per cent. or more of citrus fruits showing in two or more segments of each fruit marked evidence of frost injury."

The Political Code (section 4057) provides that, except as provided in section 4058, no ordinance "shall take effect within less than 30 days after its passage." Section 4058 provides for a referendum and that such referendum may be initiated by a petition presented to the board of supervisors within 30 days after the final passage of the ordinance, with respect to all ordinances, except, among others, any "ordinance for the immediate preservation of the public peace, health, or safety."

The ordinance in question declares that it shall take effect immediately upon its passage, and that this declaration is made "because the adoption and the enforcement hereof is necessary for the immediate preservation of the public peace, health and safety by reason of the fact that the public peace, health, and safety is now being endangered by the transportation and sale of frozen citrus fruits."

[1] It is a settled rule, applicable to such powers given to a board of supervisors by statutes of this character, that the determination of the board that the facts exist, which make it necessary for an ordinance to take effect immediately, is not conclusive and that the court may, and when a case requires it to do so must, inquire into and determine for itself the existence or nonexistence of the facts upon which the declaration of necessity is based. *San Christina, etc., Co. v. San Francisco*, 167 Cal. 772, 141 Pac. 384, 52 L. R. A. (N. S.) 676; *Josselyn v. San Francisco*, 168 Cal. 441, 143 Pac. 705; *Keyes v. San Francisco*, 177 Cal. 317, 173 Pac. 475; *Burr v. San Francisco* (Cal. Sup.) 199 Pac. 1036, 17 A. L. R. 581.

The ordinance was passed on January 22, 1922, and the complaint against the petition-

er, filed in March, 1922, charges that he did, on February 10, 1922, ship and offer for shipment to the Southern Pacific Railroad Company, three boxes of oranges, more than 15 per cent. of which oranges showed, in two or more segments of each orange, marked evidence of frost injury. It will be seen that, at the time the alleged offer was made, the ordinance was not in force, unless the declaration aforesaid that it was necessary for it to be immediately effective was valid for that purpose, that is, unless such enforcement was necessary for the immediate preservation of the public peace, health, or safety. It is conceded that the date charged is the true date of the act charged. Hence the rule that the date is not material in a criminal complaint and that the commission of the act can be proven to have occurred at any time within the period of limitation need not be considered.

[2] It will not be contended that the shipment of partly frozen oranges could in any manner endanger the public peace or the public safety. The only branch of the provision of the statute providing for the immediate taking effect of an ordinance, which it is necessary to consider, is the one referring to the public health. We are of the opinion that the ordinance should not be construed as intended to preserve the public health. The effect of frost upon an orange makes it become tasteless and unpalatable. We are not advised, and it is not suggested, that such frozen oranges are more detrimental to health than other tasteless and unpalatable substances. The outside appearance is calculated to deceive the eye of the buyer, especially if he has had no experience with frozen oranges. But no ordinance is necessary to inform the eater that such an orange is unpalatable or unfit to eat. His sense of taste will impart that information to him at once. Before the process of fermentation begins, such an orange is palatable. The purpose of preventing the sale of frozen oranges is not to protect health. The sale and shipment of such oranges, as is well known, constitutes a menace to the interests of the orange growers of the state. It injures the reputation, and impairs the market value of California oranges, and is likely to cause all orange growers direct and great financial injury. It is for this reason that precautions are taken by them to prevent the sale of such fruit. We do not doubt that, on that account, reasonable regulations for the prevention of such sales and shipment are within the scope of police power, and we are satisfied that the ordinance was adopted for that purpose alone, and that it was valid as a police regulation as soon as it became effective. For these reasons we are convinced that the ordinance should not be interpreted as a measure for the preservation of public peace, health, or

safety. The result is that, under section 4068, aforesaid, it could not take effect immediately, but would take effect within 30 days after its passage, that is, on February 21, 1922. This was after the act in question had occurred, and therefore at the time the act was done it was not unlawful. Consequently the complaint states no valid charge against the defendant.

Let the petitioner be discharged.

We concur: WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.; RICHARDS, Justice pro tem.

(133 Cal. 772)

ROWLAND et al. v. HORST. (S. F. 9151.)

(Supreme Court of California. May 25, 1922.)

1. Parties \S 21—Party from whom agent collected account not necessary party in action by principal against agent for the money collected.

In an action by a principal against his agent for the payment of money claimed to have been received by the agent for the principal's benefit but retained by the agent, the person by whom the sum was paid to the agent was not a necessary party.

2. Parties \S 21—Persons interested in resisting demands necessary parties to action for enforcement.

In view of Code Civ. Proc. \S 389, necessary parties to an action in the capacity of defendants are those who are interested in resisting the demands of the plaintiff, either immediately or consequently, and whose rights would be prejudicially affected by the controversy.

3. Principal and agent \S 78(1)—Agent appointed to collect cannot rely on his refusal to collect balance due to defeat settlement.

Where an agent was appointed to settle and adjust a claim against a carrier, in an action by his principal for the sums collected, the agent could not be permitted to occupy the position of one refusing or failing to make the collection of a balance to which he had long been entitled and yet at the same time refuse to settle with his principals, on the sole ground that such collection had not been made.

4. Principal and agent \S 78(6)—Evidence sustained finding of principals' proportion of proceeds turned over to agent by carrier.

Where an agent was appointed to adjust and settle a claim for damage to barley in shipment, in an action by the principals against the agent for sums collected, evidence held to sustain a finding of the principals' proportion of the sums turned over to the agent by the carrier.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by John Henry Rowland and another, copartners doing business under the firm name and style of John Westrope & Co., against E. Clemens Horst. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. McCutchen, Olney, Willard, Mannon & Greene, of San Francisco, for respondents.

RICHARDS, Justice pro tem. This action was commenced by the plaintiffs as copartners, doing business under the firm name and style of John Westrope & Co., to recover from the defendant the sum of \$42,812.50, with legal interest and costs, claimed to have been received by the defendant as the agent of said firm in certain transactions which are set forth in detail in the plaintiffs' amended complaint. Said complaint is in three counts, which all relate to the same matter. The first count in brief alleges that the plaintiffs, who, under their said firm name, are engaged in the business of buying, selling, and shipping grain in the city of Hull, England, but with a local office or agency in the city and county of San Francisco, which had, during the months of July and August, 1915, delivered to the Southern Pacific Company at various points in California 35 carloads of barley, aggregating 30,754 sacks, of the total weight of 3,240,944 pounds, for shipment to said plaintiffs, as consignees, at Hull, England, via the Sunset route of said railroad; and that, while said barley was in course of transit, at or near the city of Galveston, Tex., it was damaged by the Galveston Flood, which occurred in August of that year, through the negligence of the carrier, from which the plaintiffs had sustained a large loss. That the local agent of the plaintiffs in San Francisco had secured the services of the defendant to act as the plaintiffs' agent, and, on their behalf, in presenting the claim of said plaintiffs to the Southern Pacific Company for such loss and in conducting negotiations for the purpose of securing a settlement of their said claim; and that said defendant, acting as the plaintiffs' said agent, had entered into an agreement of settlement with the said Southern Pacific Company, whereby the claim of the said plaintiffs had been settled in full and by which the said defendant, as such agent of the plaintiffs, had received the sum of \$42,812.50, which he had failed and neglected to account for or pay over to the said plaintiffs. The second count of the plaintiffs' amended complaint repeats in the main, but with somewhat more of detail, the averments of the first count, but relates more particularly to a specific payment of \$12,500, which was to be made and which was alleged to have been made by the Southern Pacific Company

in final adjustment and settlement of a balance remaining unpaid upon the claims of the plaintiffs and certain other shippers whose barley had also been damaged in said flood, and of which sum the plaintiffs claim that, after making certain deductions, they are entitled to a balance of \$3,700 from the defendant, but which he had failed and refused to pay over to the plaintiffs. The third count was in the form of a common count upon an alleged indebtedness of \$42,812.50 due from the defendant to the plaintiffs and unpaid. This amended complaint was unverified. There was no demurrer.

The defendant's answer consisted of a general denial of each of the counts in the amended complaint, to which was added a counterclaim for services alleged to be of the reasonable value of \$50,000. An amendment to this answer was later filed containing three additional defenses, the first that of an alleged nonjoinder of the E. Clemens Horst Company, alleged to be a necessary party defendant; the second being that of an alleged nonjoinder of the Southern Pacific Company, alleged also to be a necessary party defendant; and the third being a plea to the effect that the plaintiffs, doing business as partners under a fictitious name, had not complied with the statutes of California having reference to such partnerships, so as to be entitled to maintain their present action. The first and third of these special defenses appeared to have been waived during the trial, but the second thereof, viz., the nonjoinder of the Southern Pacific Company, is still insisted upon on this appeal. The cause went to trial upon the issues as thus framed, and upon its submission the trial court made and filed its findings of fact, going into much of detail as to the history of the transaction, and arriving at its legal conclusion that the defendant was indebted to the plaintiffs in the sum of \$23,789.43, for which sum judgment was ordered and entered. Upon the special defense of the defendant as to the nonjoinder of the Southern Pacific Company, the court found that the said corporation was not a necessary party to the action. In order to determine the correctness of the aforesaid findings and judgment of the trial court it will be necessary to review somewhat the evidence upon which its determination rests.

The plaintiffs were, as has been seen, the shippers of 35 carloads of barley by the Sunset route of the Southern Pacific Company to themselves at Hull, England, in the summer of 1915, which barley was damaged in transit by the occurrence and effect of the Galveston Flood. There were a number of other shippers of barley of about the same quality by the same route and at the same time, whose shipments were also damaged in the same flood and were largely intermingled with the plaintiffs' barley, in the effort to save these cargoes from complete loss in said flood. The

aggregate of such intermingled shipments of barley was 56 carloads. One of these other shippers was the E. Clemens Horst Company, of which the defendant is the manager, and its shipment was one carload of barley. The defendant, being interested in the matter of the claims for compensation arising out of the damage to these aggregated and intermingled carloads of barley, came into touch with the plaintiffs' local representative, with the result of his selection as the plaintiffs' fully authorized agent to make an adjustment and settlement of its claim against the Southern Pacific Company. During the course of such adjustment the defendant also came to represent another of said shippers, George W. McNear & Co., which had shipped 20 of said carloads of barley, but, before the negotiations with the Southern Pacific Company were completed by him, the defendant had acquired by transfer to himself the ownership of the claims of the E. Clemens Horst Company and the George W. McNear Company in respect to said intermingled carload lots of barley, and to the damages which had been occasioned thereto by said flood; so that, in the month of October, 1916, when the final memorandum of adjustment and settlement of these aggregated claims was signed by the defendant representing the claimants and by the duly authorized representative of the Southern Pacific Company, the defendant occupied the dual relation of agent of the plaintiffs in respect to their claim and of principal in so far as the claims of E. Clemens Horst Company and of George W. McNear Company were concerned. He assumed, in making said settlement, to act in his own name as to all of said claimants. The agreement of settlement is in full as follows:

"San Francisco, October 6, 1916.

"Mr. Durbrow: Without prejudice I respectfully submit to you the following offer of adjustment of any and all disputes relative to the shipment of 56 cars of barley from California during July and August, 1915, and which are claimed to have been involved in Galveston Flood, August, 1915.

"The above-mentioned shipment shipped in the name of

20 cars by George W. McNear, Inc., to Christiansa, Copenhagen and New York;

1 car by E. C. Horst & Co. to New York.

35 cars by John Westrope Co. to Hull.

56 cars.

"The offer of settlement is as follows:

"(1) E. C. Horst & Co. to get for S. P. Co. from owners of the barley, clean releases of all liability on all 56 carloads involved in the dispute.

"(2) S. P. Co. to deliver Horst free alongside their dock to Horst's vessels, all unsold barley now in New York on docks and in warehouses, originally shipped by Westrope, McNear and Horst, as principals or agents, upon surrender to S. P. Co. bills lading covering said shipment.

"(3) S. P. Co. to pay Horst the gross proceeds of all barley sold by S. P. Co., ex. above 56 cars, upon receipt of releases from Horst.

"(4) Horst to pay freight to New York on point of origin weights, on entire 56 carloads, less whatever amounts of freight have already been paid to S. P. Co. upon delivery of said shipments by S. P. Co.

"(5) S. P. Co. to waive reconditioning charges in event Horst fully performs all conditions.

"(6) S. P. Co. to repay Horst freight prepaid from New York to Christiana, Copenhagen and New York transfer charges on barley not transferred, plus interest thereon from date of payment until repayment of 6 per cent. per annum.

"(7) S. P. Co. to pay Horst \$12,500.00 whenever and at such time as Horst has fully performed all conditions.

"(8) S. P. Co. shall pay Horst nothing for his services in making adjustments.

"San Francisco, October 9, 1916.

"E. C. Horst,
"G. W. Luce."

Prior to the completion of the foregoing negotiations, the plaintiffs had received about one-third of the total amount of their original shipment as the same had been disentangled from the intermingled aggregate, the same having been shipped to them by the Southern Pacific Company at Hull. The remainder of this original shipment was, shortly after the making of the foregoing agreement of settlement, sold by the defendant to certain European buyers, receiving therefor the sum of \$29,335.24. He was also, by the terms of the settlement above set forth, entitled to receive from the Southern Pacific Company the sum of \$12,500 whenever he had performed on his part the terms of the aforesaid agreement, which required him to get for the Southern Pacific Company from the owners of the barley clean releases of all liability on all 56 carloads involved in the dispute. These releases were prepared by the attorney for the Southern Pacific Company and were executed by the defendant on November 13, 1916, acting on behalf of the plaintiffs as their attorney in fact. The evidence shows these releases to have been satisfactory to the Southern Pacific Company, and no other or further releases have ever by it been required. Having thus come into possession of a large sum of money belonging to his principal derived from his sales of their remaining barley to said European buyers, and having thus become entitled to receive from the Southern Pacific Company the sum of \$12,500, less the sum which was to be paid as freight charges under the terms of said agreement, and having informed the plaintiffs of his said acts, the latter began seeking to make a settlement with him as their agent, by which they should receive such balance as might be due them after payment of the defendant's commissions for his services and his claims for expenses incurred, and after making such deductions from the gross sum

which was or should have been in his hands as he might be obligated to pay in the way of the freight charges under the terms of his foregoing agreement with the Southern Pacific Company. After repeated efforts to obtain such settlement, the plaintiffs commenced the present action, with the result which has been above noted. The defendant appeals from the judgment which determines the net amount which plaintiffs were entitled to receive as a deduction from the foregoing facts.

[1, 2] The appellant's first contention upon this appeal is that the trial court was in error in deciding adversely upon his defense of nonjoinder of the Southern Pacific Company as a necessary party defendant in this action. We discover no such error. The action was one strictly between the plaintiffs as principals and the defendant as their agent for the payment to them of money claimed to have been received by their said agent for their benefit and retained by him. The Southern Pacific Company had no interest in that relationship nor in the plaintiffs' said claim. It may be conceded that one of the defenses which the defendant might urge to his payment to the plaintiffs of the sum claimed was that he had not yet received all or a portion of said money from the Southern Pacific Company; but this would not require the joinder of the latter in the action either originally or latterly as a necessary party thereto, since it was in no wise concerned in the dispute between the plaintiffs and their agent as to the settlement of their accounts. Necessary parties to an action in the capacity of defendants are those who are interested in resisting the demands of the plaintiff either immediately or consequently and whose rights would be prejudicially affected by the controversy. Pomeroy, Code Remedies, pp. 320, 321; Code Civ. Proc. § 389. It might be possible that the Southern Pacific Company would have been a proper party to this action had the defendant suggested by his pleadings or succeeded in showing, as one of his defenses, that the reason he had not paid over to his principals some portion of the moneys claimed from him was that he had not been able to collect the same from the said corporation under the agreement which he had made with it on the plaintiffs' behalf, but, if he had such a defense and if the presence of the said corporation as a party to the action was necessary to enable him to make it, the court upon his motion, or even of its own motion, might have ordered the said corporation brought into the action. But this evidently is not the fact, since the evidence discloses that the Southern Pacific Company has received from the defendant, acting as the plaintiffs' agent, full releases of their claims on account of their said barley, and is satisfied therewith and stands

and has long stood ready to pay over to the defendant whatever balance of the \$12,500 referred to in its agreement with him, is due, after deducting the freight charges mentioned in said agreement.

[3] The defendant herein cannot be permitted to occupy the position of one refusing or failing to make the collection of said balance to which he has long been entitled, and yet at the same time refusing to settle with his principals upon the sole ground that such collection has not been made. Under such circumstances his dilatory plea that the Southern Pacific Company has not been joined as a defendant in the action does not meet with favor, and is wholly without the semblance of merit.

[4] The next contention of the appellant is that the evidence is insufficient to support the finding of the trial court that the plaintiffs' share of the net total of \$34,545.64 received by the defendant from the sale of the portion of said barley turned over to him by the carrier and sold to European buyers was 84.9 per cent. thereof, or the sum of \$29,335.24. This contention is based upon several elements, all of which are elaborately discussed in the briefs of counsel for appellant. He argues that there was insufficient evidence to support the court's finding that 1,777,555 out of the total of 2,093,704 pounds of barley so sold to European buyers belonged to the plaintiffs. The basis of this finding was the so-called Price-Waterhouse & Co.'s report. This firm of experts were requested by the defendant himself to make a careful examination of the barley on the New York piers for the purpose of determining what proportion thereof belonged to each of the original shippers. They made such examination and report, and the latter was offered in evidence by the plaintiffs and was admitted without objection on the defendant's part. It is conceded that the report embraced matter which would suffice to uphold the finding of the trial court in this regard. The present objection of the defendant that it was hearsay was waived by its admission in evidence without objection. In addition to this evidence upon this point there was also offered and admitted certain letters, telegrams, and reports of the defendant, wherein he has stated that an even larger proportion of this barley belonged to the plaintiffs than that found by the court. These declarations eke out the report of the experts and supply, we think, ample evidence to justify the finding as to the amount of said barley shipped to European buyers which belonged to these plaintiffs. The appellant further argues that the evidence was insufficient to show that the plaintiffs' barley so sold on their account was of equal quality to that of the other shippers with which it had been intermingled, so as to entitle the plaintiffs to the same percentage of share in

the proceeds of these European sales as the bulk of their barley bore to that of their fellow shippers; but upon this subject also the Price-Waterhouse & Co. report speaks sufficiently to show that the plaintiffs' barley was fully up to the quality which would entitle them to the same proportionate share in the proceeds of such sales as the weight of their barley bore to that of their fellow shippers. We conclude, therefore, that the contention of the appellant that the plaintiffs were not entitled to recover the full amount of \$29,335.24 as their share of the proceeds of the European sales of their barley is without merit.

The appellant's next and main contention is, first that the evidence does not sustain the finding of the trial court to the effect that the plaintiffs were entitled to receive \$7,125 of the \$12,500 to be paid the defendant by the Southern Pacific Company pursuant to their aforesaid agreement. The defendant himself, however, testified that the value of the plaintiffs' barley amounted to 57 per cent. of the value of the entire barley shipment damaged in the Galveston Flood. This percentage would give the plaintiffs precisely the sum of \$7,125 out of said \$12,500 which the trial court awarded them and would also furnish sufficient proof to justify the court's finding to that effect. Besides there was abundant evidence that the loss to the plaintiffs by reason of the damage caused by said flood was much greater in proportion than that suffered by the other shippers. While the exact proportion of such damage was difficult of ascertainment and while the evidence in the case reflects the extent of this difficulty due to the confusion caused through the intermingling of the consignments of the several shippers, still we think the evidence taken as a whole shows that the trial court rather underestimated than enlarged the proportion of said \$12,500 which the plaintiffs were entitled to receive. The second contention of the appellant under this head is his claim that the plaintiffs were entitled to recover no part of this sum of \$12,500 from him, for the reason that he had not received the same from the Southern Pacific Company and hence he could not be required to account for or pay over any portion of said sum to the plaintiffs. It appears to be a fact, and the court so found, that the defendant has not yet received said sum of \$12,500 from the Southern Pacific Company. But this fact standing alone would not be sufficient to bar the plaintiffs' right to recover from the defendant its due share of said sum, unless it should also appear that the failure of the defendant to collect and receive this money was due to no fault or hindrance of his own. Upon this subject the evidence shows quite convincingly that the terms of settlement with the Southern Pacific Company were fix-

ed by the above-quoted agreement between itself and the defendant as of the date of October 6, 1916; that within a few weeks after that date the defendant consummated the sale of the remainder of the plaintiffs' barley then on the New York piers to European buyers, receiving therefrom the sum of \$29,335.24, money belonging to the plaintiffs; that from that time forth the defendant had in his possession ample funds with which to pay the railroad company whatever freight or other charge on account of these barley shipments were coming to it by virtue of said agreement; that not long thereafter the defendant, assuming to act for the plaintiffs, gave to the Southern Pacific Company the full releases which were required from all the shippers of said barley to be given to it by them, and that these releases so executed had at all times been satisfactory to the Southern Pacific Company. Nothing thereafter remained for the defendant to do but to get from the Southern Pacific Company the said sum of \$12,500, or whatever balance would be coming to him upon the adjustment of the predetermined and undisputed account. The defendant did not, however, do this but began delaying his settlement with his principals upon various pretexts and by the making of claims for compensation in the form of commissions and otherwise, which the trial court found to be exorbitant and refused to sustain.

During the protracted interviews and correspondence carried on between the defendant and the principals or their representatives prior to the institution of this action the defendant never suggested that the fact that he had not as yet received the amount coming from the Southern Pacific Company stood in the way of a settlement with his principals, but on the contrary made repeated offers of immediate settlement upon other terms as to commissions and compensation which were not acceptable to them. In his pleadings in this action he made no claim or plea that the action had been prematurely brought, but based his defenses wholly upon other grounds. The present claim that the defendant ought not to be required to pay over to the plaintiffs, his principals, the large sums he had received from the sale of their barley to European buyers for the reason that he had not seen fit to collect the comparatively small sum to which he was entitled

to get without obstacle from the Southern Pacific Company was an evident afterthought of which the plaintiffs had no notice or knowledge until after this action was instituted. Under these circumstances we think the trial court would have been entirely justified in directing the defendant to pay over to the plaintiffs the whole amount to which they were shown to be entitled, even though a certain small portion thereof had not been received by the defendant solely by reason of his own unexcused delay in collecting it. The trial court did not, however, go so far, but in its findings and judgment so adjusted the accounts between the parties as to charge the credits which the defendant was found entitled to receive for commissions, compensation, and traveling expenses, together with such amounts as he was required to pay the Southern Pacific Company for freight charges under the aforesaid agreement against the particular sum which the plaintiffs would otherwise have been entitled to receive from said corporation under said agreement, and by so doing did not require the defendant to actually pay over to the plaintiffs any money which he did not for any cause receive. All that the defendant has to do under the form of this judgment is to make those settlements with the Southern Pacific Company which he was required by his agreement to do and in the way of which there is no obstacle and which he should apparently have long since done, paying over to the plaintiffs the net sum derived by him from the sales of the plaintiffs' barley to the European buyers and which he has long and without sufficient reason withheld.

As to the other contentions of the defendant with reference to the reasonableness of his compensation, these matters were submitted to the discretion of the trial court in view of all the circumstances of the case, and we are unable to discover that this discretion has been in any manner abused. Its findings as to these matters will not, therefore, be disturbed upon appeal.

Judgment affirmed.

We concur: SHAW, C. J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAYLOR, J.

SHURTLEFF, J., deeming himself disqualified, does not participate in the foregoing.

(189 Cal. 1)

CONNOR v. ATCHISON, T. & S. F. RY. CO.
et al. (L. A. 6936.)

(Supreme Court of California. May 26, 1922.)

1. Courts \S 97(5)—Applicability of *res ipsa loquitur* doctrine to case under federal Employers' Liability Law to be determined by national Supreme Court decisions.

Whether the doctrine of *res ipsa loquitur* applies to a case under the federal Employers' Liability Law (U. S. Comp. St. $\S\S$ 8657-8665) is to be determined by the decisions of the national Supreme Court.

2. Master and servant \S 265(6)—Unexplained falling of railroad bridge establishes negligence, *prima facie*.

Under the doctrine of *res ipsa loquitur*, the unexplained falling of a railroad bridge, causing injury to a trainman, establishes a *prima facie* case of negligence.

3. Negligence \S 121(2)—Doctrine of *res ipsa loquitur* inapplicable, where complaint explains cause of accident.

The doctrine of *res ipsa loquitur* does not apply, where the complaint and plaintiff's evidence explains the cause of the falling of a railroad bridge while plaintiff's train was going over it, by alleging and showing that its support was washed away by a cloud-burst, shortly before, and predicates negligence on failure to inspect the tracks after the cloud-burst.

4. Negligence \S 138(2)—Instruction that *res ipsa loquitur* does not apply proper, though nothing indicates reliance on doctrine.

Though there is nothing in the case, either pleading or evidence, to indicate that plaintiff relies on the doctrine of *res ipsa loquitur*, it is proper to instruct that the doctrine does not apply, that being the fact.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by James Connor against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

E. W. Camp, M. W. Reed, and Robert Brennan, all of Los Angeles, for appellants.

Allison & Dickson, of San Bernardino (David W. Richards, of San Bernardino, of counsel), for respondent.

WILBUR, J. The plaintiff recovered a judgment for \$7,500, for injuries received by him while acting as a fireman upon a train operated from Searchlight to Goffs, upon the railroad of the Atchison, Topeka & Santa Fé Railway. The injuries were caused by the giving away of an abutment of a bridge, upon which the engine occupied by the plaintiff was crossing. The line was a branch line, 52 miles in length, and the train operated by the plaintiff and his coemployees left Goffs for Searchlight in the morning,

crossing the bridge in question about 3 miles after leaving Barnwell. The injuries occurred when they were returning over the same bridge in the evening. During the afternoon, a cloud-burst occurred in the mountains, causing a washout under the eastern abutment of the bridge, about 4 feet wide and sufficiently deep to undermine the abutment. The tracks remained in perfect alignment, and there was nothing to indicate to the approaching engineer and fireman that there had been any washout rendering the bridge unsafe, although there was some evidence that there had been rainfall in the vicinity. The train was proceeding about 10 miles an hour. The negligence relied upon by the plaintiff is the failure of the defendants to cause the track to be inspected after the cloud-burst and before the train passed over the bridge.

Plaintiff alleges in his complaint:

That "the approach and support of said bridge, on the opposite end from the direction in which said locomotive was proceeding, had previously been washed away by water, leaving said bridge in a defective and unsafe condition and unfit for the purpose for which it was constructed. That the condition of the said approach and support to said bridge and the condition of said bridge was not known to the plaintiff, but said condition was, or could have been, known to the defendants by the exercise of proper and necessary care on the part of the defendants, their agents, and servants. That the defendants, by and through their agents and servants, carelessly and negligently permitted and allowed said bridge to be and remain in the defective and unsafe condition as aforesaid, and did not exercise that degree of care and precaution and diligence to provide safe appliances and roadbed which the law requires."

The defendant John Barton Payne admits the injury to the bridge by the washout, but denies that he had knowledge of the injury to the bridge or that he could have ascertained such injury by the exercise of proper or necessary care, and denies that he negligently permitted the bridge to remain in an unsafe condition. The plaintiff offered evidence tending to show that certain employees of the defendant railroad director had been informed of the cloud-burst but, notwithstanding such information, had failed to inspect the tracks.

The defendants appeal from the judgment and claim that, in any event, the judgment is erroneous as to the railway company, because of the fact that, at the time of the accident, the railroad was being operated by the Director General, John Barton Payne, the defendant. It is conceded by the respondent that the judgment against the railroad company should be reversed for that reason. It is further claimed that the court erred in refusing to give certain instructions

proposed by the defendant and that the verdict is excessive.

The plaintiff offered no instructions, and the court gave none of its own motion and submitted the case upon some of the instructions requested by the defendants and refused others requested by the defendants. No instruction was given to the jury defining negligence or informing them that, for the plaintiff to recover, it must be shown that the injuries received by him were the proximate result of the negligence of the defendants nor was any instruction given upon the measure of damages. The defendant offered an instruction in three paragraphs, the first defining negligence, the second instructing the jury that, in order for the plaintiff to recover, the negligence must be the proximate cause of his injuries, and the third instruction upon the subject of *res ipsa loquitur*. Respondent concedes that the first and second paragraphs are correct statements of the law, and it must also be conceded that such instruction should have been given in the case, but it is contended that the instruction must be considered as a whole and that that portion of the instruction upon the subject of *res ipsa loquitur* was erroneous and therefore justified the refusal of the entire instruction. That portion of the instruction reads as follows:

"In this behalf, you are instructed that the mere occurrence of the accident in this case or of the damage complained of, if you find that the accident and damage did occur, is no evidence of negligence on the part of the defendants or of any of their servants, agents, or employees, and that the burden is on the plaintiff to show, by a preponderance of the evidence, that the defendants were guilty of negligence which proximately caused the damage. The plaintiff has the burden of proving, by a preponderance of the evidence, that the defendants were guilty of negligence."

[1] The question of whether or not the doctrine of *res ipsa loquitur* applies is to be determined by the decisions of the United States Supreme Court under the federal Employers' Liability Law (U. S. Comp. St. §§ 8657-8665), under which this action was brought. It is a matter of doubt whether this doctrine is applicable under the federal Employers' Liability Law. *Roberts' Injuries Interstate Employees*, § 22, p. 48; *Richey's Federal Employers' Liability* (2d Ed.) § 163, p. 330; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. 860; *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421; *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528, 71 C. C. A. 316; *Southern Ry. Co. v. Derr*, 240 Fed. 73, 153 C. C. A. 109.

[2] For the purpose of this decision, how-

ever, we will assume that the doctrine of *res ipsa loquitur* does apply to actions brought by the employees against interstate commerce carriers, under the federal Employers' Liability Law. Under this doctrine the unexplained falling of the bridge in question would establish negligence *prima facie*.

[3] In this case there was a complete explanation of the cause of the accident. The plaintiff himself in his pleading explains the cause of the accident, namely, the washing out of the support of the bridge. The evidence shows that this was the result of a sudden cloud-burst and that the injury to the bridge had occurred but a short time before the accident. The complaint is predicated upon the theory that the defendants were negligent in failing to inspect the tracks after the cloud-burst. The general rule is that, where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of *res ipsa loquitur* does not apply. *White v. Chicago G. W. R. Co.*, 246 Fed. 427, 158 C. C. A. 491; *Midland Valley R. Co. v. Conner*, 217 Fed. 956, 133 C. C. A. 628; *Lyon v. Chicago, etc., Ry. Co.*, 50 Mont. 532, 148 Pac. 386; *West v. Hollady* (Mo. App.) 196 S. W. 403; *Texas Co. v. Charles Clarke & Co.* (Tex. Civ. App.) 182 S. W. 351. The *res ipsa loquitur* doctrine is based in part upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it, and that the plaintiff has no such knowledge and, therefore, is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence. See cases last cited.

In this case, if the plaintiff had alleged negligence in general terms and had merely proved the happening of the accident, a *prima facie* case would have been established under the doctrine of *res ipsa loquitur*. But, where the plaintiff went further and showed that the accident was caused by a cloud-burst, the question of whether or not the defendant was negligent in failing to inspect the track was to be determined by the jury without reference to the *prima facie* case resulting from the mere happening of the accident. *Parsons v. Hecla Iron Works*, 186 Mass. 221, 223, 224, 71 N. E. 572; *Lyon v. Chicago, etc., Ry. Co.*, supra; *Hull v. Berkshire Street Railway*, 217 Mass. 361, 104 N. E. 747, 5 A. L. R. 1330; *Cleary v. Cavanaugh*, 219 Mass. 281, 106 N. E. 998; *Anderson v. Northern Pac. R. Co.*, 88 Wash. 139, 152 Pac. 1001, L. R. A. 1917F, 1020; *West v. Hollady*, supra; *Velotta v. Yampa*

Valley Coal Co., 63 Colo. 489, 167 Pac. 971, 975, L. R. A. 1918B, 917; Texas Co. v. Charles Clarke & Co., supra; Shea v. Thomas Elevator Co., 167 Ill. App. 365, 367; Dentz v. Pennsylvania Railroad Co., 75 N. J. Law, 893, 70 Atl. 164; Illinois Steel Co. v. Zolnowski, 118 Ill. App. 209, 216; Rocap v. Bell Telephone Co., 230 Pa. 597, 602, 603, 79 Atl. 769, 36 L. R. A. (N. S.) 279; Enloe v. Southern Ry. Co., 179 N. C. 83, 101 S. E. 557; Randolph v. Hunt, 41 Cal. App. 739, 748, 183 Pac. 358, 29 Cyc. 592; Ginochio v. City and County of San Francisco (Cal. App.) 206 Pac. 763, rehearing denied. However, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine. Zerbe v. United Railroads of San Francisco (Cal. App.) 205 Pac. 887, rehearing denied.

[4] Under the pleadings and the evidence in support thereof the res ipsa loquitur doctrine did not apply. While there is nothing in the case indicating that the plaintiff relied upon the doctrine, either in the pleading or proof, it was nevertheless proper to instruct the jury that the doctrine did not apply, and therefore the entire instruction under consideration defining negligence should have been given.

We think it clear, under these circumstances, that the instructions propounded by the defendants correctly stated the law, namely, that the mere happening of the accident under the circumstances of the case did not establish negligence upon the part of the defendants. The case of O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674, relied upon by the respondent as establishing the doctrine of res ipsa loquitur in cases of injury received by an employee, is not applicable for the reason that, in that case, the court was dealing with an unexplained accident, while in the case at bar the cause of the accident is fully explained and undisputed. It did not result from defective or unsafe appliances, but from an injury to the railroad from storm water, and the question involved was as to whether or not the defendants were negligent in failing to ascertain the fact of the injury in time to prevent the accident. Under the Employers' Liability Act, the basis of the plaintiff's recovery is negligence. 35 U. S. Stats. at Large, 65, c. 149; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. The question of negligence under the circumstances was one for the determination of the jury.

In view of the fact that our conclusion necessitates a reversal of the case, it is unnecessary to pass upon the other questions raised by the respondent as, in the event of a

new trial, the jury, no doubt, will be properly instructed.

Judgment reversed.

We concur: SHAW, C. J.; SHURTLEFF, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

(188 Cal. 744)

PEOPLE v. SANDERS. (Cr. 2411.)

(Supreme Court of California. May 20, 1922.)

1. Threats \S 5—Indictment charging extortion by threat to accuse named person of selling intoxicating liquors in violation of the United States statutes held sufficient.

Indictment alleging that defendants threatened to accuse named person of "engaging in the sale of intoxicating liquors, in violation of the United States statutes," held sufficient, in the absence of a demurrer, to charge extortion under Pen. Code, §§ 518, 519, subd. 2, defining extortion, where on the specified date it was unlawful to sell liquors for beverage purposes under the War Prohibition Act (U. S. Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f-3115¹¹/₁₂h), and to order, purchase, or cause intoxicating liquors to be transported in interstate commerce, to any state or territory in which the manufacture or sale of liquor was prohibited under the Reed Amendment to the Post Office Appropriation Act of March 3, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), though the indictment did not describe the crime of which defendants threatened to accuse named person as the sale of liquor for beverage purposes.

2. Threats \S 5—Indictment held to charge threat to do an unlawful injury to the person of prosecuting witness; "extortion."

Indictment charging that defendants threatened to "incarcerate" named person in county jail unless he paid defendants a certain sum of money held sufficient, in the absence of a demurrer, to charge a threat to "do an unlawful injury to the person" of such person under Pen. Code, §§ 518, 519, subd. 1, defining extortion as the crime of obtaining money by means of such threats, notwithstanding failure to allege that the threat to incarcerate such person in the county jail was a threat to "do him an unlawful injury," it appearing from the indictment as a whole, charging that defendants "did unlawfully, corruptly, knowingly, and feloniously extort and obtain" a certain sum of money from the named person, that the threat was to unlawfully injure such person, in view of section 950, subd. 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extort—Extortion.]

3. Threats \S 7—Evidence held to sustain conviction for extortion by threat to accuse prosecuting witness of violation of prohibition laws.

In prosecution for extortion by threatening to accuse prosecuting witness with the

crime of engaging in the sale of intoxicating liquors in violation of the United States statutes, under Pen. Code, §§ 518, 519, subd. 2, evidence held to sustain conviction.

4. Threats (1)(1)—Threat to incarcerate defendant in county jail after unlawful arrest held a threat to do an "unlawful injury to the person"; "extortion."

In prosecution for extortion under Pen. Code, §§ 518, 519, subd. 1, defining extortion as the crime of obtaining property by means of fear induced by threat to do an unlawful injury to the person of the prosecuting witness, where defendants, one of whom was a police officer, pursuant to a conspiracy, pretended to arrest the prosecuting witness without a warrant, and without any pretense of any legal right to make such arrest, in violation of sections 182 and 836 et seq., and threatened to incarcerate him in the county jail unless he paid them a certain sum of money, such threat constituted one to do prosecuting witness an "unlawful injury to his person" within section 519, subd. 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unlawful Injury.]

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

E. N. Sanders was convicted of extortion, and he appeals. Affirmed.

Louis G. Guernsey, W. I. Gilbert, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

RICHARDS, Justice pro tem. The appellant herein was tried and convicted upon the charge of extortion. In his appeal from the judgment entered upon such conviction he makes two main contentions as grounds for the reversal of such judgment. These are: First, insufficiency of the indictment; second, insufficiency of the evidence to sustain the verdict and judgment of conviction.

The defendant, with three other persons, whose names were Claude Morton, William W. Swan, and Lee Varain, were accused by the grand jury of the county of Los Angeles, by indictment, of the crime of extortion. The charging part of said indictment, which the appellant claims to be insufficient to charge said crime, reads as follows:

"The said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, on or about the 19th day of August, 1919, at and in the county of Los Angeles, state of California, did willfully, unlawfully, corruptly, knowingly, and feloniously extort and obtain from Thomas M. Quinlin, with the consent of said Thomas M. Quinlin, \$500 in lawful money of the United States, which said \$500 was then and there the personal property of the said Thomas M. Quinlin.

"The said \$500 was obtained from the said

Thomas M. Quinlin, and the consent of the said Thomas M. Quinlin was induced by a wrongful use of force and fear, in that the said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain did then and there unlawfully, and without any legal justification, arrest and detain the said Thomas M. Quinlin, and did then and there threaten to accuse him, the said Thomas M. Quinlin, of a crime, to wit, the crime of engaging in the sale of intoxicating liquors in violation of the United States statutes, and did then and there threaten to incarcerate the said Thomas M. Quinlin in the county jail of the county of Los Angeles unless he, the said Thomas M. Quinlin, did then and there pay to them, the said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, the said \$500.

"The said Thomas M. Quinlin did then and there believe that the said Claude Morton, E. N. Saunders, William W. Swan, and Lee Varain would enforce and carry out said threats, and then and there feared that the said defendants, Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, would and could do so, and solely by reason of said force, unlawful injury, threats, belief, and fear, did then and there consent as aforesaid, to the payment as aforesaid of said \$500, to the said defendants, Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, and did then and there, on account of the said force, unlawful injury, threats, belief, and fear, pay and deliver to the said defendants, Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain, said \$500, as aforesaid."

It is the appellant's contention that the foregoing language in said indictment fails to sufficiently charge him with the crime of extortion as defined in sections 518 and 519 of the Penal Code. These sections of the Code read as follows:

518. "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

519. "Fear, such as will constitute extortion, may be induced by a threat, either:

- "1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,
- "2. To accuse him, or any relative of his, or member of his family, of any crime; or,
- "3. To expose, or impute to him or them any deformity or disgrace; or,
- "4. To expose any secret affecting him or them."

[1] The appellant contends that the foregoing language of said indictment does not sufficiently set forth any threat on the part of the appellant or his associates, either to (1) accuse the prosecuting witness of any crime; or (2) to do an unlawful injury to his person; or (3) to expose or impute to him any deformity or disgrace; or (4) to expose any secret affecting him. The third and fourth of the specifications may be dismissed without comment as beyond the scope of said indictment. As to the second of said

specifications the appellant contends that there is not to be found within the language of said indictment a threat to accuse Quinlin of any crime. The particular clause in the indictment thus attacked alleges that the said defendants "did then and there threaten to accuse him, the said Thomas Quinlin, of a crime, to wit, the crime of engaging in the sale of intoxicating liquors in violation of the United States statutes." The date fixed in said indictment upon which said alleged threat was made was August 19, 1919, and the proofs correspond to said date. This was prior to the time the so-called Volstead Act (41 Stat. 305) went into effect. It is therefore obvious that the indictment did not include or contemplate the charge of a threat to accuse the prosecuting witness of the violation of a federal statute which had not yet come into being.

There were, however, in being at that time several other federal statutes which it would have been a crime for the defendant Quinlin to have violated. One of these was an act of Congress commonly known as the War Prohibition Act (Fed. Stats. 1919 Ann. Supp. 199 [U. S. Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f-3115¹¹/₁₂h]). By the terms of said act it was made unlawful to sell intoxicating liquors for beverage purposes, but the sale of such liquors for export or for sacramental, medicinal or other than beverage uses was not made unlawful by said act. There was also in existence at that time the federal act commonly known as the Reed Amendment to the Post Office Appropriation Act of March 3, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), making it a crime for any person to "order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes." There were also other federal statutes then in being, such as the statute forbidding the sale of liquor to Indians and the like, the violation of which would be a crime. As to these then existing federal statutes, the appellant argues that the alleged threat to accuse the prosecuting witness of selling liquors would not suffice to amount to an accusation of a crime because under these several statutes liquor could be sold or transported legally, as, for instance, for export or sacramental or medicinal purposes, under the War Prohibition Act; and, hence, that, in order to accuse a person of the crime of selling liquors, it was necessary to state in the accusation that the accused person was charged with selling liquors for beverage purposes.

In making this contention the appellant relies strongly upon the case of *People v.*

Hoffman, 126 Cal. 366, 58 Pac. 856, in which the threat set forth in the information, and upon which the charge of extortion was founded, was to accuse the prosecuting witness of the crime of selling diseased and unwholesome meat. This court, in reversing the judgment of conviction based upon such information, stated that the act of selling diseased and unwholesome meat was not of itself a crime, but only became so when knowingly sold with intent that it should be eaten, and that it should have appeared in the information that the defendant had threatened to accuse the other with having knowingly sold diseased and unwholesome meat with intent that it should be eaten in order to constitute an accusation of a crime. We do not think this case has the direct or compelling application to the instant case which the appellant claims for it. The questions presented in that case arose upon a demurrer to the information, while in the instant case no objection by demurrer or otherwise was presented. In the case at bar the threatened accusation was not merely one of selling liquors. The threat was that the prosecuting witness was to be accused of "the crime of engaging in the sale of intoxicating liquors in violation of the United States statutes." Assuming that that intended accusation was based upon the provisions of the War Prohibition Act, it would amount to an accusation of a sale of such liquors to such persons and for such purposes as would constitute a violation of the terms of said act, and hence the person so threatened could not have understood said accusation to refer to the sale of liquors for export or sacramental or medicinal or other innocent uses, since such a sale would not have been in violation of said act.

A case which seems to be precisely in point is that of *State v. Blackington*, 111 Me. 229, 88 Atl. 726, in which an indictment wherein the threatened accusation was "the crime of the sale of intoxicating liquor in violation of the law." This the court held sufficient to satisfy the terms of a statute defining the crime of extortion substantially in the form of section 519 of our Penal Code. It is to be noted at this point that a clear distinction is to be drawn between indictments or informations which directly charge a defendant with a crime, and which must be exact and specific both in the definition of the crime and in the elimination of all exceptions which would render the acts charged not criminal, and those indictments or informations which charge extortion through threats to accuse another of a crime. In the latter class of cases no such technical accusation is required as in the former for several obvious reasons, some of which are that the indictment or information cannot go beyond the terms of the threatened accusations, and the accusations need only be such as to put the

intended victim of the extortion in fear of being accused of some crime. The more vague and general the terms of the accusation, the better it would subserve the purpose of the accuser in magnifying the fears of his victim, and the better also it would serve to protect him in the event of the failure to accomplish his extortion, and of a prosecution for his attempted crime. *State v. Blackington*, supra; *Commonwealth v. Murphy*, 94 Mass. (12 Allen) 449; *Commonwealth v. Goodwin*, 122 Mass. 19; *Commonwealth v. Bacon*, 135 Mass. 521; *State v. Patterson*, 271 Mo. 99, 196 S. W. 3. We are therefore of the opinion that the indictment was sufficient in its statement of the accusation of a crime in fear of which the prosecuting witness consented to part with his money. *People v. Fuski* (Cal. App.) 192 Pac. 552.

[2] There is in this indictment a further allegation of an additional threat inducing the fear on the part of the prosecuting witness through which the alleged extortion was accomplished. It consists in the allegation that the defendants "did then and there threaten to incarcerate the said Thomas M. Quinlin in the county jail of the county of Los Angeles unless he, the said Thomas M. Quinlin, did then and there pay to them, the said Claude Morton, E. N. Sanders, William W. Swan, and Lee Varain," etc. The sufficiency of this averment is also called in question by the appellant, who contends that it is insufficient for the reason that the threat contained therein is not alleged to be a threat "to do an unlawful injury to the person" of the individual threatened, and hence is insufficient to satisfy the requirements of subdivision 1 of section 519 of the Penal Code, above quoted. It may not be denied that a threat to imprison another is a threat to do an injury to his person. It is such an injury that, if unlawful, would give grounds for both a civil action for damages and a criminal prosecution for false imprisonment. In order, however, to constitute such a threat as will lay the foundation for a charge of extortion under subdivision 1 of section 519 of the Penal Code, it must be a threat "to do an unlawful injury" to the person of another, and hence the indictment which charges such extortion must set forth that such threat on the part of the defendant was a threat to do an "unlawful" injury to the person of the alleged victim of the extortion. The appellant herein contends that the language of the indictment as to such threat above quoted is insufficient because of its failure to allege that the threat to incarcerate Quinlin in the county jail was a threat to do him "an unlawful injury." It is the absence of the word "unlawful" from said clause in the indictment which, according to the appellant, renders it fatally defective. The contention of the appellant is

sound in so far as it goes to the extent of requiring that the defendant must show that the alleged threat was a threat to do an unlawful injury to the person of the complaining witness. It does not, however, follow that the statement or showing that the threatened injury was unlawful should appear in immediate context with the phrasing of the threat. If, from the face of the indictment, read as a whole, it sufficiently appears that the injury threatened to be done to the complaining witness was an unlawful injury, the indictment will be upheld, particularly as against an assault made against its sufficiency for the first time upon appeal. Looking to this indictment as a whole, the following phrases therein may be emphasized as bearing upon the question as to whether the threat to incarcerate Quinlin in the county jail was sufficiently alleged to be a threat to do an unlawful injury to his person. The indictment begins by charging that the defendants "did unlawfully, corruptly, knowingly, and feloniously extort and obtain from Thomas M. Quinlin," etc. This court, in construing the words "willfully, unlawfully, and feloniously," as thus set forth in an information, in connection with the charge of a particular crime, said:

"The words 'willfully, unlawfully, and feloniously' must be given some effect in construing such language, and they certainly would exclude an act which by law was innocent. The utmost that can be said in criticism of this information, * * * is, that it may not be direct and certain as to the particular circumstances of the offense. Such an objection is waived by a failure to demur." *People v. Mead*, 145 Cal. 500, 78 Pac. 1047.

But the indictment herein goes further. It alleges that the arrest and detention of Thomas M. Quinlin by the defendants was "unlawful and without any justification," and that said Quinlin, "solely by reason of said force, unlawful injury, threats, belief, and fear, did then and there consent," etc., and "did then and there on account of said force, unlawful injury, threats, force, belief, and fear, pay," etc. We think the indictment sufficient, in the absence of a demurrer thereto, to constitute the charge of a threat to do an unlawful injury to the person of Quinlin on the part of these defendants. Section 950 of the Penal Code provides that—

"The indictment or information must contain:
* * *

"2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

This indictment charges that these defendants did "willfully, unlawfully, corruptly, knowingly, and feloniously extort and obtain from Thomas M. Quinlin" with his consent a sum of money which was obtained, and his consent thereto induced by "a wrongful use

of force and fear," in that these defendants "did unlawfully and without legal justification arrest and detain said Thomas M. Quinlin, and did then and there threaten to accuse him of a crime, * * * and did then and there threaten to incarcerate the said Thomas M. Quinlin in the county jail" unless he would pay to them a certain sum of money, and that said Thomas M. Quinlin, believing and fearing that said defendants would enforce and carry out said threats, "and solely by reason of said force, unlawful injury, threats, belief, and fear," did then and there consent to the payment of and did pay said sum of money. We think it must be admitted that persons of common understanding, construing the foregoing words and phrases of the indictment according to their usual acceptance in common language, would understand that they were being charged with the extortion of the said money from said Quinlin through fear induced by the threat of an unlawful incarceration. The utmost that can be said in criticism of this indictment in this particular is that it may not be direct and certain as to the particular circumstances of the offense. Such an objection would be waived by failure to demur. Pen. Code, § 1012; *People v. Mead*, supra. If it is claimed by the defendant that this indictment embraces two different threats, viz. a threat to accuse Quinlin of a crime indictable under subdivision 2 of section 519 of the Penal Code, and a threat to do an unlawful injury to his person indictable under subdivision 1 of said section, and that it cannot be ascertained to which of these the above-quoted language of the indictment had application, the answer still remains that this constituted at most a mere uncertainty, which could only be taken advantage of by demurrer or motion to have these two charges, if they be such, separately stated.

[3] The next contention of the appellant is that the evidence is insufficient to establish either of these two charges. As to the first of these, viz. that the defendant extorted said money from Quinlin by the threat to accuse him of a crime, we are of the opinion that the contention of the defendant cannot be sustained. The record herein discloses that the defendant, in arresting and detaining Quinlin, posed and pretended to be acting as a federal officer, and that as such he so arrested and detained Quinlin in the nighttime, and without warrant or other authority so to do. Quinlin testified that during the course of his said arrest and detention the defendant stated that "he had a charge against me of selling liquor; shipping liquor into Arizona, Washington, Idaho, and Nevada." He also testified that Sanders said that "he had enough on me to give me two or three years at McNeill's Island." He further testified that one or the other of the defendants threatened to accuse him of "shipping

liquor into dry territory and selling whisky illegally." It is true that these statements of the prosecuting witness are not couched in the precise language of the indictment, but, taken together, and, as we have seen, uttered by the defendant while he was posing as a federal arresting officer, we think they fairly import a threat to accuse Quinlin of participating in the sale and transportation of liquors into dry territory in violation of the federal statutes then in being, making such acts a crime. What has been heretofore said with reference to the vagueness of such an accusation has application to its proofs. All that was necessary by way of definiteness in such proof was: First, that they should be sufficient to come fairly within the scope and terms of the indictment; and, second, that they should be sufficiently definite to advise a person of ordinary intelligence that he was being threatened with an accusation of having committed a violation of the federal laws then in being relative to the sale and shipment of intoxicating liquors. We think the foregoing testimony sufficient to measure up to both of these requirements under the rules laid down in *People v. Mead*, supra, and hence that the defendant's contention that the evidence was insufficient to justify his conviction upon this particular charge cannot be sustained.

[4] The appellant's next contention is that the evidence is insufficient to sustain the charge in the indictment that the defendants threatened to do an unlawful injury to his person through an alleged threat "to incarcerate him in the county jail." An examination of the record in this regard also falls to support this contention. The evidence abundantly shows that, of the defendants charged jointly with extortion by this indictment *E. N. Sanders*, the appellant herein, was, at the time of said alleged extortion, a police officer of the city of Los Angeles, as was also one of the other codefendants, *W. W. Swan*; that of the other two defendants *Lee Varain* was an acquaintance of Quinlin, who, by reason of such acquaintanceship and pretended friendship, was made use of by his codefendants to aid in the accomplishment of said crime; that the other codefendant, *Claude Morton*, was the attorney of said Varain. These four defendants conspired together to extort money from Quinlin, whom they knew had money, which to the extent of \$1,000 he usually carried upon his person; and whom they also knew to be vulnerable as having been, or suspected of being, engaged in questionable enterprises in respect to the sale of liquor. In pursuance of this conspiracy Sanders on the evening of August 19, 1919, accosted Quinlin as he was coming out of the hotel, telling him that he was an officer; that he (Quinlin) was under arrest. He had no warrant, and Quinlin had committed no offense for which he could be legally ar-

rested without a warrant. The defendant did not tell Quinlin at the time what he was under arrest for, but took him to a tea room kept by Varain, where they were joined by Swan. The defendant indicated to Varain that he (Varain) was also to be arrested, and that both were about to be taken to the county jail. Varain said he would like to visit his lawyer, and the trio were then driven to the office of the defendant Morton, whom Varain first interviewed alone, while Quinlin and Sanders remained in the anteroom, and during which time Sanders told Quinlin that "he had plenty on him, and that he had better get \$1,000." Presently Morton emerged, and asked if he could see Varain and Quinlin alone, and was allowed to do so, and when they were together in Morton's inner office Varain began to play his part by pleading that he could not afford to be arrested again, as he had one charge against him already. He thus succeeded in getting Quinlin to agree that Morton should act as the lawyer for both of them, and go out and see if he could fix it with Sanders. He went outside, and soon returned and reported that the officer said he had "plenty on Quinlin, and had different charges, shipping liquor into different states, dry territories"; whereupon Varain began to suggest giving money to fix the officer up to \$500, to which Quinlin finally agreed; whereupon Morton again went outside, and came back saying "Well if you will give him \$1,000 apiece, you can both go to hell as far as he is concerned." Quinlin had only \$320 on his person, but was allowed to send a messenger to his wife for \$250 more. While these proceedings were going on Swan again appeared on the scene with a bottle of whisky, and they were all together in Morton's office when the final arrangements were made, by which Varain gave his check for \$500 and Quinlin paid over to Morton \$500 in money, agreeing to bring the other \$500 to his office on the following day. Thereupon the parties separated.

Was the threat to incarcerate Quinlin in the county jail, uttered under the foregoing circumstances, a threat to do an unlawful injury to his person within the meaning of subdivision 1 of section 519 of the Penal Code? We think this question must be answered in the affirmative. The conspiracy entered into between this defendant and his codefendants to extort money from Quinlin by means of his pretended arrest, and by the threat of his incarceration, was itself unlawful, and a crime under several of the subdivisions of section 182 of the Penal Code. The arrest and detention of Quinlin by the defendant was an unlawful arrest, in that it was made without a warrant, and, so far as the record discloses, was an arrest based upon no pretense of any legal right in the arresting officer to make such arrest without a warrant under the provisions of section 836

et seq. of the Penal Code, or under any other provision of law. The utmost which the defendant and his coconspirators assert upon the trial as a justification for Quinlin's arrest and detention was that he was suspected of certain acts in relation to the selling or shipment of liquor in violation of the United States statutes then in force; but these acts, even if there was any foundation for their existence, were not pretended to have been committed or attempted in the presence of the arresting officer, or of any other of said defendants, and, in addition to this, were merely misdemeanors, for the commission of which the arrest without a warrant could not lawfully be made. Having thus unlawfully arrested and detained their intended victim, the defendants proceeded to threaten to accuse him of a crime. It is quite immaterial whether they or any of them in making said threat knew or suspected or had any reason to know or suspect that said Quinlin had committed the particular offense of which they threatened to accuse him, since it was unlawful to make or employ such a threat for the purpose of extortion. *People v. Beggs*, 178 Cal. 79, 172 Pac. 152. Having thus unlawfully arrested said Quinlin, and thus far unlawfully detained him in custody and having thus further unlawfully threatened to accuse him of a crime, the defendants proposed to carry their unlawful conspiracy and conduct one step further by the threat to imprison Quinlin in the county jail. Thus it will be seen that this threat of incarceration had its inception in unlawfulness, and was but the last of a series of unlawful acts having for their object the creation of the wrongful fear in the mind of their victim sufficient to induce his consent to part with his money. The appellant, however, contends that this threat to incarcerate Quinlin in the county jail, although made under the foregoing circumstances, was not a threat to do "an unlawful injury" to the latter's person, for the reason that said defendants might lawfully have brought about Quinlin's incarceration in the county jail through the process of a complaint charging him with some offense, and through the issuance and execution of a warrant for his arrest and confinement in jail.

In making this contention the appellant strongly relies upon the case of *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717, and particularly upon the opinion of this court in denying the petition for a rehearing in that case. It is to be noted, however, that the questions discussed in that case arose upon the face of the indictment, and related solely to its sufficiency as charging a threat to do an unlawful injury to the property of the persons complaining. This court in that case decided that the term "unlawful injury," as used in section 519, subd. 1, of the Penal Code, had ref-

erence to injuries of such a character that, if committed as threatened, would have constituted an actionable wrong, and further held that the indictment in that case did not sufficiently show that the acts threatened, as stated therein, were not such as could and would have been lawfully done, and that, in order to render an act which a person might lawfully do an unlawful injury to the person or property of another, such act must be threatened to be done by means which the law denounces as unlawful. As illustrating and distinguishing this principle, the court referred to the two cases of *Boyson v. Thorne*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, and *People v. Hughes*, 137 N. Y. 37, 32 N. E. 1105. In commenting upon the latter of these two cases this court briefly recited the facts therein, showing that the defendant Hughes, the head of a labor organization, in order to extort a sum of money from certain wholesale merchants, threatened to induce certain retail merchants to continue in force a boycott of their institution and of the use of their goods by such retailers after the cause for creating the boycott had been removed. This he proposed to accomplish through an improper exercise of his influence with said retailers, and through false representations and deceit. This court adopted the views of the New York court in saying that, while it was true that the retailers had a lawful right to withhold their custom, and while it was also true that Hughes had a lawful right by proper means to induce them so to do, his threat was nevertheless a threat to do an unlawful injury to the property of those from whom he sought to extort the money, because the means to be employed by him were unlawful. In the text of the particular case thus referred to the New York Court of Appeals says:

"What Hughes threatened was found by the jury to be such an unlawful injury. They saw that he conveyed the idea strongly and clearly that, unless his demand for money was complied with, he could and would, by threatening the hostility of the order, compel the retail dealers to withdraw their custom, and could and would utilize the power he had, although the original occasion for its exercise was gone. Such a threat, within the doctrine of the *Barondess* Case, and within that also of the dissenting opinion in this court, amounts to a threat to do an unlawful injury to property. *People v. Barondess*, 133 N. Y. 649, 31 N. E. 240; ¹ *Id.*, 61 Hun. 581, 16 N. Y. Supp. 436. There was therefore a question for the jury, and the court could not properly have directed an acquittal."

This language is peculiarly appropriate to the case at bar. The threat which the defendant and his associates made to incarcerate Quinlin in the county jail must be taken and

understood by us as it would be naturally taken and understood by the person to whom it was uttered under the immediate circumstances of the case. He had been unlawfully arrested, he was being unlawfully detained, and, being thus already unlawfully imprisoned, he was being threatened with being immediately taken to jail. Had the threat been literally carried into effect as uttered under the immediate circumstances and conditions of the case, it would have constituted merely a continuance of the false and unlawful detention to which the person threatened was being subjected at the very moment when the threat was being made. When these facts are considered in connection with the further facts that Quinlin's unlawful arrest and detention as thus far consummated were the result of an unlawful conspiracy between this defendant and his codefendants to accomplish the crime of extortion by the aforesaid unlawful means, and that the threat of his incarceration was but a further step in the consummation of the said crime, and was not intended by these conspirators to be rendered legal by compliance with the usual forms of law, or indeed to be carried into effect at all, except so far as the threat of its execution was to be used as a means for accomplishing the crime of extortion, it would seem to be perfectly clear and in line with the foregoing cases that such a threat, when viewed in the light of its attending circumstances, constituted a threat to do an unlawful injury to the person of him against whom it was directed. The jury to which these facts were presented evidently so regarded it, and we are of the opinion that their verdict to that effect was fully sustained by the evidence in the case.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; WASTE, J.; SLOANE, J.; LAWLOR, J.; SHURTLEFF, J.

(188 Cal. 759)

PEOPLE v. SWAN. (Cr. 2412.)

(Supreme Court of California. May 20, 1922.)

1. Criminal law §593—Refusal of continuance so that other counsel could be present held not ground for reversal.

Where defendant was fully and fairly represented by counsel during all stages of the trial, court's refusal to postpone the trial until certain other counsel of defendant's choosing could be present held not ground for reversal.

2. Criminal law §823(12)—Instruction held not to withdraw from jury the right to consider the credibility of a witness in view of other instructions.

Court's statement in answer to inquiry of jury that a certain witness was not on trial, and that, if such witness was guilty of anything,

¹ Reported in full in the *Northeastern Reporter*; reported as a memorandum decision without opinion in the *New York Reports*.

it was the duty of the officer to file a charge against him, held not to mislead jurors into thinking that they could not consider the credibility of such witness, in view of other instructions as to the weight and credibility of the witnesses.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

William W. Swan was convicted of extortion, and he appeals. Affirmed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

PER CURIAM. [1] This case, as to the main questions presented for consideration, is identical with the case of *People v. Sanders*, 207 Pac. 380, this day decided, and the conclusions reached therein with respect to the sufficiency of the indictment, and also as to the sufficiency of the evidence to sustain it, are hereby given application to this appeal. In addition to the points therein considered, the appellant herein makes two further contentions. These are: First, that the trial court committed error in compelling the defendant herein to go to trial without the presence of one of his attorneys. Without attempting to recite in detail the facts relied upon by the appellant as supporting this contention and by respondent as opposing it, we are satisfied from an examination of the record that the defendant was at all the stages of his case represented by counsel, and particularly by counsel who, having also, and prior to his own trial, represented and been present at the trial of his codefendants, and were thus familiar with every phase of his case at all stages of the trial thereof, and hence that said defendant was fully and fairly represented by counsel during the trial of his case. This being so, we think the trial court did not abuse its discretion in not further postponing the trial of the cause until certain other counsel of the defendant's choosing could be present, and that the defendant has suffered no prejudicial error through the action of the trial court in that regard.

[2] The appellant makes the further contention that the trial court committed prejudicial error in prohibiting the jury from considering the question of the credibility of the prosecuting witness Quinlin. We find upon an examination of the record that it fails to sustain the appellant's contention in that regard. The episode in question occurred during the argument of the case before the jury. It appears that one of the jurors asked some question the substance or purport of which is not shown by the record herein. The court, not having caught the

purport of the question, asked that it be repeated, which being done the court said:

"Mr. Quinlin is not on trial. The one that is on trial is this defendant. If a man had committed a murder, had been guilty of it, and he had been taken by an officer to an office and turned loose for the consideration of \$500, and under threat he would put him in jail if he didn't pay it, the fact he was guilty of murder would not excuse the officer for taking the money from him. You want to get it out of your mind you are trying Mr. Quinlin. You are now trying to see whether these parties extorted the money from Mr. Quinlin, not if Mr. Quinlin was guilty of something. If Mr. Quinlin was guilty of anything, then it was the duty of the officer to file a charge against him, so you just get that out of your mind you are trying Mr. Quinlin, and try Mr. Swan."

In the absence of anything going to show what called for this expression on the part of the court, we are entirely at a loss to determine whether or not the language of the court was justified or whether or not the appellant was prejudicially affected thereby. The utterance of the court does not of itself amount to an instruction to the jury that they were not to consider the question of the credibility of the prosecuting witness, Quinlin. The court gave the usual instructions with relation to the functions of the jury as exclusive charges of the weight of the evidence and the credibility of the witnesses. One of said instructions having apparently reference and application to the particular matter above set forth was the following:

"You are the sole and exclusive judges of the weight and the credibility of witnesses, and it is your function to determine all questions of fact arising from the evidence in the case. With the facts the court has nothing to do. I have not expressed, nor intend to express, nor have I intimated or intend to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, such expression must be entirely disregarded by you."

We are satisfied that, if any misapprehension had been created in the minds of the jurors as to their right and duty to consider the credibility of the prosecuting witness Quinlin by reason of the foregoing remarks of the trial court during the argument, these were entirely removed by the foregoing instruction, and that the appellant therefore suffered no prejudicial injury therefrom.

No other errors appearing in the record, the judgment is affirmed.

SHAW, C. J., RICHARDS, Justice pro tem., and WILBUR, WASTE, SLOANE, LAWLOR, and SHURTLEFF, JJ., concur.

(57 Cal. App. 458)

CASE v. EGAN. (Civ. 3852.)

(District Court of Appeal, First District, Division 2, California. April 26, 1922. Hearing Denied by Supreme Court June 22, 1922.)

Mortgages **§282(1)**—Purchaser held not personally liable on assumption of mortgage debt for which vendor was not personally liable; "contract for benefit of third person."

Where defendant purchased property from a vendor who was not personally liable for a debt secured by a deed of trust on the property, and the deed to the purchaser stated the land was "subject to a deed of trust * * * which the party of the second part (purchaser) hereby assumes and agrees to pay," the mortgage indebtedness assumed by the purchaser was not a "contract for the benefit of a third person," within the meaning of Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him, so as to entitle the assignee of the note secured by the mortgage to hold the purchaser personally liable thereon, nor can the purchaser be held liable under section 2854, which requires as a basis of liability that the mortgagee must be a creditor of the grantor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Fred H. Case against N. Egan. From judgment for defendant, plaintiff appeals. Affirmed.

Geo. M. Naus and Chester H. Case, both of Oakland, for appellant.

Fred B. Mellman, of Oakland, for respondent.

LANGDON, P. J. This appeal is from a judgment against the plaintiff, following an order sustaining a general demurrer to the amended complaint without leave to amend after the plaintiff had declined to amend.

The complaint alleges, in substance: On August 4, 1913, Claude Scheelk made and delivered to George W. Austin his promissory note for \$1,450 secured by deed of trust to certain real property; that the said note was assigned by said Austin to Case, the plaintiff here; that there has been a default in the payment thereof when due; that the real property covered by said deed of trust was transferred by Scheelk to Covington, by Covington to Faulkner, and by Faulkner to Egan, the defendant here. With reference to the successive transfers of this property, the complaint alleges:

"Plaintiff is informed and believes, and therefore alleges, that neither said Covington nor said Faulkner personally assumed the payment of said promissory note, or the indebtedness secured by said deed of trust, but that each of said transfers was made subject to said deed of

trust without assumption of personal liability by the transferee."

But it is alleged that in the transfer from Faulkner to defendant Egan the grant contained the following:

"Subject to a deed of trust in the sum of fourteen hundred and fifty (1,450) dollars * * * which the party of the second part hereby assumes and agrees to pay."

It is alleged that on July 7, 1919, the trustees under the deed of trust sold the property; that after applying the proceeds of the sale to the debt, there was a deficiency of \$1,986.40, for which judgment is asked against the defendant upon the ground that she agreed in writing that she would personally assume and pay the obligation of said promissory note.

As admitted by both parties, the sole question presented upon this appeal is:

"Is defendant, Egan, relieved from direct liability to the plaintiff upon her assumption of and agreement to pay the amount secured by the note and deed of trust by the circumstance that her grantor, Faulkner, was not himself personally liable therefor?"

Appellant's position is that the liability of the transferee of real property to the mortgagee or beneficiary under a deed of trust springs, in this state, from two independent Code rules, i. e., sections 2854 and 1559, Civil Code. Counsel, however, admit that under section 2854 of the Civil Code it is essential that the grantor of the property be himself personally liable for the debt secured thereby before his grantee can be held liable by the mortgagee. This is because under that section the mortgagee must be "a creditor" of the grantor, and he cannot be a creditor of the grantor unless the grantor is personally liable to him for the debt. It is therefore admitted that if the rights of appellant depended solely upon that section of the Code, the demurrer was properly sustained.

However, the appellant, in a most comprehensive and scholarly brief, seeks to have this court declare that the plaintiff has stated a cause of action under the provisions of section 1559, Civil Code; that under said section personal liability of the grantor is a wholly immaterial circumstance in determining the liability of the grantee. Whatever may be our view as to the logic of appellant's arguments upon this question and his acuteness in differentiating the cases in this state which are opposed to his contention, we feel bound by the expressions of the rule in the following cases: *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411; *Sherwood v. Lowell*, 34 Cal. App. 365, 377, and 378, 167 Pac. 554; *Page v. Chase Co.*, 145 Cal.

578, 585, 79 Pac. 278; *Andrews v. Robertson*, 177 Cal. 434, 437, 170 Pac. 1129.

While some of these cases do not expressly decide the precise question presented here, we are of the opinion that it is the general doctrine of them all that where the grantor of real property is not personally liable for a mortgage debt, a stipulation in a deed from him to his grantee that said grantee shall pay, personally, the mortgage indebtedness, will not be regarded in law or equity as a contract intended for the benefit of a third person within the meaning of section 1559, Civil Code, so as to entitle such third person to enforce the same. The reasoning inducing this conclusion is set forth in the case of *Vrooman v. Turner*, 69 N. Y. 280, 283, and 284, 25 Am. Rep. 195, which was one of the cases relied upon by our Supreme Court in the case of *Biddel v. Brizzolara*, supra. The other cases herein cited, and which are binding upon us, either expressly announce this doctrine or they are in entire harmony therewith.

The demurrer to the complaint should have been sustained.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(57 Cal. App. 320)

SCOTT et ux. v. DELTA LAND & WATER CO. et al. (Civ. 3591.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

1. Vendor and purchaser §33—That some representations found to have been made are not actionable does not affect judgment rescinding contract on evidence showing actionable misrepresentation.

In purchasers' action to rescind contract, the fact that some of the misrepresentations alleged and found to have been made are not actionable does not affect the judgment rescinding the contract, where it can be sustained upon evidence supporting any one actionable material misrepresentation.

2. Vendor and purchaser §37(6)—Misrepresentations from which no damage could result held not actionable.

As respects validity of contract for purchase of land and shares of stock in irrigation company, misrepresentations as to the cost of the water system, the number of cattle and sheep being cared for in the valley where the land was situated, and as to the dam having a cement core, held not material.

3. Vendor and purchaser §36(2)—Misrepresentations as to productiveness of land and adequacy of water supply held ground for rescission.

As respects validity of contract for purchase of land and stock in irrigation company,

misrepresentations as to the productive quality of the soil and as to the adequacy of the water supply, if purchasers were thereby induced to contract, held ground for rescission.

4. Vendor and purchaser §37(4)—When purchaser could rely on vendor's representations as to productiveness of land and water supply.

A purchaser had the right to rely on vendor's representations as to productiveness of land and adequacy of water supply unless he possessed knowledge sufficient to induce a belief that the representations did not accord with the facts, or unless the conditions were such as to put him upon notice that the truth had not been stated.

5. Vendor and purchaser §44—Evidence held to sustain findings that vendor misrepresented productiveness of land and adequacy of water supply.

In purchasers' action to rescind contract, evidence held to sustain findings that vendor made misrepresentations as to the productive quality of the soil, and as to the adequacy of the water supply.

6. Appeal and error §1011(1)—Finding on conflicting evidence conclusive.

Trial court's conclusion of fact on conflicting evidence is conclusive on appeal.

7. Vendor and purchaser §42—Fraud inducing execution of contract not waived by modification of contract before discovery of fraud.

Fraud by which purchasers were induced to enter into contract was not waived by changing of contract at a time when purchasers were not aware of the fraud.

8. Vendor and purchaser §119—Purchasers held not barred by laches from right to rescind contract for misrepresentations.

Where purchasers obtained information respecting inadequacy of water supply, and attempted to cancel the contract in August, 1915, and carried on negotiations for cancellation for several months thereafter, gave notice of rescission March, 1916, and commenced action therefor during May, 1916, they were not barred by laches from the right to rescind on the ground of misrepresentations.

9. Vendor and purchaser §37(5)—Good faith in making material misrepresentations no defense.

In action for rescission of contract because of misrepresentations, the good faith of the party who made the representations is no defense under Civ. Code, § 1572.

10. Contracts §94(3)—Rule of criminal law requiring proof of specific intent to defraud not applicable to civil actions.

The rule of the criminal law requiring proof of a specific intent to defraud in false pretense cases does not apply to civil actions.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Charles C. Scott and wife against the Delta Land & Water Company,

a corporation, and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Wm. Story, Jr., of Ouray, Colo., and Joseph L. Lewinsohn, of Los Angeles, for appellants.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondents.

JAMES, J. Plaintiffs, alleging misrepresentations fraudulently made to induce them to enter into a contract for the purchase of certain land and water rights in the state of Utah, brought this action to enforce rescission. The prayer of their complaint was that the contract of sale be canceled; that a certain mortgage creating a lien against real property in the state of California, which was executed by them to secure payment of a portion of the purchase price of the Utah land and water stock, be ordered surrendered, and promissory notes made incidental therewith be canceled, and for damages and costs. The decree as entered secured to the plaintiffs all of the relief demanded, except that no judgment was allowed for damages. The defendants have appealed from the judgment, and assign as a principal ground therefor that the evidence was insufficient to sustain the findings of the trial court. Certain alleged errors of law occurring in the course of the trial make up the remaining points upon which it is claimed that a reversal should be ordered.

The defendant Delta Land & Water Company was the owner of the real property contracted to be purchased by the plaintiffs; the Western Securities Company was an allied corporation organized for the purpose of acting as sales agent of the property. The legal connection between the two corporations was so close as to leave no question but that the corporation first named assumed full responsibility for every act done and representation made by any of the officers or agents of the latter while promoting sales of the Delta properties; hence, in references made hereinafter to such officers or agents, they will for convenience be generally referred to as those of the defendants, and the principal corporation will be designated as the Delta Company. Plaintiffs in their complaint alleged that on March 5, 1915, they entered into a contract to purchase from the Delta Company 160 acres of land in Beaver county, Utah, and 160 shares of capital stock of the Beaver County Irrigation Company (all of the stock of the latter corporation being owned by the Delta Company); that they executed notes to cover the purchase price of the land, which was agreed to be \$3,800, and the price of the water stock, which was agreed to be \$11,200, and in addition thereto gave a mortgage on five acres of land which they owned near the town of Whittier, in California, to secure payment of the \$3,800. The payment of the price of the water stock

was secured by assignment of the shares to the Delta Company, and by mortgages made covering the land purchased. They alleged that on May 20, 1915, a new agreement was made whereby plaintiffs relinquished one-half of the land and water stock agreed to be purchased, and contracted then to pay for 80 acres retained by them at the price of \$30 per acre, and 80 shares of water stock at \$70 per share. The terms of the notes given on account of the modified contract were changed from those which accompanied the original contract, but the mortgage liens remained, and 80 of the shares of water stock continued to be held by the Delta Company as collateral security. Plaintiffs alleged that their contract to purchase the land and water stock was procured through false and fraudulent representations made to them by defendants; that the defendants represented: (1) that the land "was of the best quality, fertile in every respect, free from alkali and noxious weeds, and suitable for growing thereon all kinds of crops of hay, grain and vegetables"; (2) that the Delta Company owned all of the water flowing in Beaver river, and that, according to the record kept by the United States Government for 14 years, that river furnished sufficient average flow to irrigate 44,000 acres of land; that all of the said water had been made appurtenant to the 15,000-acre tract of land owned by the Delta Company, and that it was sufficient and would furnish all necessary water for irrigating said tract, and amount to an average each year of not less than 3 "acre-feet"; that said land was worth \$30 per acre, and the water stock was worth \$70 per share. There were other allegations as to fraudulent representations, such as that defendants stated that the Delta Company had spent \$1,000,000 in providing an irrigation system; that many thousand cattle and sheep (the particular number being stated in the complaint) were being cared for and fed in the valley where the land was situated; that the dam provided to hold the water in storage had a cement core extending to bedrock. It was alleged that the land was not fertile; that it was impregnated with black alkali; that it was not of the best quality, or in any respect suitable to grow hay, grain, and vegetables, and that the water supply was not as represented, or sufficient with which to irrigate the 15,000-acre tract, but sufficient only to irrigate not to exceed 6,000 acres; that the United States government had not kept a record of the flow of water for 14 years, but had only kept a record for 6 years, and that, according to such record, it was not shown that there was sufficient water in Beaver river to furnish an average of 3 "acre feet" annually to the 15,000-acre tract; that in the year 1915, on or about July 1st, the water was exhausted, and that no further water was available during that season for the irrigation of crops, and that the other

representations referred to were not founded in fact. The trial judge found that misrepresentations had been made in the particulars alleged, and found that the land was not worth more than \$10 per acre, and the water stock not more than \$15 per share.

[1-4] The judgment may be sustained upon evidence supporting any one material misrepresentation. *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Thomas v. Hacker*, 179 Cal. 731, 178 Pac. 855. It matters not that there may have been included in the allegations and findings representations which are not actionable; for instance, the representations as to the cost of the water system; and as to the number of cattle and sheep which were represented as being cared for in the valley where the land was situated, and whether the dam had a cement core, may be left out of consideration. The representations as to the productive quality of the soil and as to the adequacy of the water supply were material factors which, if they furnished an inducement to the vendees to enter into the contract made by them, would afford ground upon which to base a rescission when their falsity was established. *Bickel v. Munger*, 20 Cal. App. 633, 129 Pac. 958; *Tracy v. Smith*, 175 Cal. 161, 164, 165 Pac. 535. On the other hand, if the land was as represented, and the water supply adequate, no damage could result because of any of the other alleged misrepresentations. Misinformation as to the material matters referred to would constitute representations as to existing facts and conditions, and would not fall within the category of mere opinion or speculation. *Barron Est. Co. v. Woodruff Co.*, 163 Cal. 573, 126 Pac. 351, 42 L. R. A. (N. S.) 125. And the vendee had the right to rest upon them unless he possessed knowledge sufficient to induce a belief that the representations did not accord with the facts, or unless the conditions were such as to put him upon notice that the truth had not been stated. *Willey v. Clements*, 146 Cal. 91, 79 Pac. 850; *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

The evidence showed that the Delta Company issued a circular which was printed and used generally by the sales agents, which contained these statements:

"15,000 acres of virgin soil under a one million dollar irrigation system; an inexhaustible supply of water that makes the Milford farmer absolutely independent of rainfall."

Plaintiff C. C. Scott (the husband) testified that he was a farmer residing near Whittier, California; that he had been solicited by an agent of the defendants to purchase land in the Utah tract, and that he was given one of the circulars to which reference has been made; that he went to Utah in February of 1915 with an agent of defendant, and was shown an experimental farm upon which was a good stand of alfalfa (this experimental farm had been highly fertilized but the

agents did not give that information to Scott); that he was shown the dam in which was collected the water supply, and that the agent told him that every share of water entitled the holder to 3 acre-feet; that the agent explained what the term "3 acre-feet" meant; that at Minersville adjoining the 15,000-acre tract the agent showed trees and berries, and said that there could be grown just such products on the tract referred to; also that the agent showed alfalfa which he said had been planted 35 years, and said that the same kind of crop could be produced on the land which said plaintiff was solicited to buy; that the agent took a shovel and showed different soils; said that it was all good soil; that he had never seen better; and made the representations regarding the government having measured the water for 14 years, and of the conclusions drawn therefrom as to the water supply, as the same were alleged by plaintiffs in their complaint. The land had never been cultivated or changed from its raw state.

It appears by Scott's testimony that he did not enter into a contract immediately after making this first trip to the Utah land, and other agents of the defendants soon called upon him, one of whom (the president of the Delta Company) stated that "they had sufficient water for 44,000 acres, but to make this thing safe for the people we are going to put it on only 15,000." Following this, plaintiffs made the contract of March 5, 1915. Shortly thereafter Scott took his son and went upon the land contracted to be purchased, and spent some time in leveling and clearing the ground. He raised no crops, but expressed himself in his testimony as having become dissatisfied with conditions, although he did not, during his stay there, obtain information as to whether the water supply would be adequate, or what the productivity of the soil was. Upon his return to his home in Los Angeles county he requested and secured the new agreement which has been mentioned, under which he contracted to purchase but one-half of the land covered by the agreement of March 5th. Some time in July of 1915 he received notice that the water supply for irrigation purposes had for the time being become exhausted, and, after negotiations with the Delta Company looking to an abrogation of his contract, all of which failed of result, he served on behalf of himself and wife a notice of rescission, which notice was given on March 20, 1916.

As to the representations concerning the character of the soil, it must be conceded that such representations, testified by Scott as having been made, warranted the latter in believing and assuming that the soil was of a character as would produce crops of general kinds suitable to that locality and in average quantities. It was shown, even by the testimony of witnesses for the defendant, that the land was lacking in humus

constituent, and would not produce general crops until that element had been supplied, either by fertilizing with material brought upon it, or by growing alfalfa thereon for several years; furthermore that for the first year or two even an average crop of alfalfa could not be produced. The representation was that the then condition of the land was such as would produce crops of the kind referred to, and in average quantities, and such representation would not be satisfied by showing that, after a process of fertilization extending over several years, the land might be made productive. It was shown that the only way that the quality of the soil could be determined would be by chemical analysis, or by actual experimentation; hence there could be no imputation of negligence because Scott, a farmer, having been afforded an opportunity to see and examine the soil, did not at once discover its true character.

[5, 6] The evidence was sufficient to sustain the finding on that issue. It was sufficient also to support the conclusion of the trial judge that 1.7 acre-feet, which he found to be the maximum available supply of water, was insufficient to properly irrigate the 15,000-acre tract. There was some conflict in the evidence as to that issue, but there was testimony of witnesses who stated that the requirement (or the water duty, as it was termed) was 3 acre-feet annually in order to meet needs in the production of average crops. This testimony furnished evidence of a substantial kind and, as this court has no duty to resolve the conflict, the conclusion of the trial judge upon that matter of fact must be taken as final. Upon the two main issues specified there was sufficient evidence.

[7] The fraud was not waived by the changing of the contract on May 20, 1915. At the latter date plaintiffs had not been made aware of the deficiencies in soil and water supply. The consent of the Delta Company to the release of the obligations of the plaintiffs as to one-half the quantity of land and water shares purchased was not in any way, so far as is shown, based upon a condition that the Delta Company should no longer be liable for any fraudulent representations made as an inducement to the plaintiffs to enter into the original contract. The contract of May 20th amounted to a modification of the original agreement; it carried with it the original mortgage security as then existing against the California property of the plaintiffs.

[8] Plaintiffs were not guilty of laches barring them from the equitable relief sought. In August of 1915 they obtained information respecting the inadequacy of the water supply. They then proceeded in an attempt to secure a cancellation of their contract, and negotiations proceeded, it may be gathered from the record, for several months there-

after. About March 20, 1916, they gave notice of rescission, and on May 3d of the same year commenced this action. They acted with reasonable diligence in pursuing the remedy which the law afforded them. No conditions are shown as where the opposite party has so changed its situation, relying upon the contract, as to make it inequitable that it should now be compelled to release plaintiffs from the obligations assumed by them. The offer of the plaintiffs to release to the Delta Company all claim to the land or water stock was sufficiently expressed in the notice of rescission.

[9, 10] The court in its findings recited that the representations made by defendants and their agents were "false, untrue, misleading, and fraudulent, and were positively asserted by said defendants and their said agents, and each of them, to be true, in a manner not warranted by the information which they or either of them possessed at the time of the making thereof." Appellants argue that the burden rested with the respondents to show at the trial that the representations when made by defendants were not "actually believed by the defendants on reasonable grounds to be true." This point carries with it the suggestion that the finding of the court which has just been referred to was not sufficient to support the judgment. Aside from the provisions of section 1572 of the Civil Code, it is not established by the weight of authority in the United States that a party to a contract may innocently, and with belief in the truth of his statements, misrepresent to the opposite party conditions material to the consideration to be rendered by the former and escape liability. In a civil action the good faith of the party who procures the assent of another to the making of a contract by material misrepresentations is of no moment.

"Many courts lay down the rule that the misrepresentation of a material fact may be ground for rescinding or avoiding a contract though there is no actual fraud, and though it is innocently made. Such a representation is considered to be constructively fraudulent because of its effect of imposing upon and deceiving the person to whom it is made." 12 R. C. L. p. 343, par. 98.

The rule of the criminal law requiring proof of a specific intent to defraud in false pretense cases does not apply to civil actions.

Errors alleged to have been committed by the trial judge in his rulings on the admission of evidence have been examined, and as to none of them is it made to appear that the appellants have been so prejudiced as to entitle them to a new trial. There was competent evidence to the main issues which have been hereinbefore discussed. Such evidence supports the findings and judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

**DELTA LAND & WATER CO. v. PERRY
et al. (Civ. 3590.)**

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

1. Pleading \S 411—Parties who without objection assumed issue to be presented by cross-complaint cannot complain that it was not properly presented.

A cross-complaint must in itself state facts sufficient to entitle the pleader to affirmative relief, and is not aided by averments in other pleadings; but, where the parties without objection to the pleading assumed the issue to be properly presented, and made no objection to evidence, they cannot complain on appeal.

2. Vendor and purchaser \S 42—Fraud inducing execution of contract was not waived by modification of contract before discovery of fraud.

Fraud inducing the execution of a contract was not waived by modification of the contract prior to discovery of fraud.

3. Waters and water courses \S 234—Rights of purchasers of water stock under notice of rescission held not affected by payment of assessments to prevent sale for nonpayment.

Payments of assessments on water stock to prevent a sale thereof for nonpayment by purchasers subsequent to service of notice of rescission of the contract for purchase thereof did not affect the rights of the purchasers under their notice of rescission.

4. Appeal and error \S 1170(7)—Erroneous admission of evidence held harmless in view of other evidence overwhelmingly supporting the finding.

In purchasers' action to rescind contract because of misrepresentations as to the productiveness of the land and adequacy of the water supply, admission of document signed by other purchasers as to inadequacy of water supply, if error, held harmless under Const. art. 6, \S 4 $\frac{1}{2}$, in view of overwhelming evidence in support of the conclusion that the water supply was inadequate.

5. Vendor and purchaser \S 113—Purchasers held not barred by laches from obtaining rescission of contract for fraud.

Purchasers who gave notice of rescission promptly upon discovery of fraud, and who tendered back and offered to relinquish and return to vendor everything of value which they had received, were not barred by laches from obtaining relief in vendor's action brought less than 9 months after service of notice of rescission, since purchasers were not required to immediately sue to enforce rescission, but could await affirmative action on part of vendor, and set up facts upon which they based their right to relief in vendor's action.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by the Delta Land & Water Company against Harry F. Perry and others, in

which the defendant filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Affirmed.

William Story, Jr., of Ouray, Colo., and Lissner & Lewinsohn and Lewinsohn & Barnhill, all of Los Angeles, for appellant.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiff sought the foreclosure of a mortgage given by defendants to secure the payment of their promissory note in the sum of \$2,400. By answer defendants admitted the execution and delivery of the note and mortgage, but, as a defense to the cause of action, alleged the same was procured by false and fraudulent representations made by plaintiff and its agents, whereby defendants in reliance thereon were induced to buy from plaintiff certain arid land and right to water for irrigating the same, which right was evidenced by shares of stock in the Beaver County Irrigation Company, a subsidiary of plaintiff, and for the purchase price of which the note and mortgage were given to plaintiff. By a cross-complaint filed they alleged in substance the facts set forth in the answer as a defense to the action, and prayed that the note and mortgage constituting plaintiff's cause of action be annulled and canceled. The court upon trial of the issues found in accordance with the allegations of defendants' answer and cross-complaint, and entered judgment thereon in favor of defendants as prayed for, from which plaintiff has appealed.

The 40 acres of land sold to defendants, and for the purchase of which the note and mortgage securing the same were executed, was a part of a tract of 15,000 acres of arid land situated in Beaver county, Utah, for the irrigation and development of which plaintiff, in the name of the Beaver County Irrigation Company, caused to be constructed a reservoir for impounding the waters of Beaver river, together with a system of conduits for distributing the water upon the same.

A complete history of the scheme adopted by plaintiff for the development of this large tract of land, and the means and representations employed by it in procuring purchasers of subdivisions thereof, together with one share of stock in the irrigation company for each acre of land as a means of obtaining water for sufficiently irrigating the land, without which crops could not be successfully produced, is stated in an opinion by this court, filed on April 11, 1922, in the case of Scott et al. v. Delta Land & Water Co. (Civ. No. 3591), 207 Pac. 389. As shown by the evidence in the instant case, the representations made and means em-

ployed by plaintiff to induce defendants to purchase the land and water stock and execute the note and mortgage are, as conceded by appellant, substantially the same as made and employed in the Scott Case. No purpose could be served by a repetition of what is there said in discussing that feature of the case. Suffice it to say that, notwithstanding testimony on behalf of plaintiff in conflict therewith, there is here, as in the Scott Case, ample evidence to support the finding that defendants, in buying the land and water stock, and executing the note and mortgage in part payment therefor, relied upon the representations so made by plaintiff and its recognized agents; that such representations were false and untrue, and "were known to the cross-defendant at the time of making them and each of them to be wholly false, untrue and fraudulent." The finding relates to the representations as to the fertility of the soil, its content of humus, freedom from alkali, and the adequacy of a supply of water for irrigation, the amount of which, as represented to defendants, was $2\frac{1}{2}$ acre feet for each acre of the entire tract. As in the case referred to, wherein the evidence touching such issues is substantially the same as in this, we conclude there is no merit in appellant's contention that the findings are without sufficient support in the evidence.

[1] The fraudulent representations whereby defendants were induced to execute the note and mortgage were set up by the answer as a defense to the foreclosure of the mortgage. By a cross-complaint filed therewith defendants alleged the same facts pleaded by way of defense, and upon which they based a claim for affirmative relief, namely, the cancellation of the note and mortgage. In the cross-complaint, however, they failed to allege a rescission or offer to rescind, by reason of which omission appellant insists that the cross-complaint did not state facts upon which defendants were entitled to affirmative relief, and hence the judgment canceling the note and mortgage should be reversed. *Fairchild v. Western Securities Corporation*, 176 Cal. 742, 169 Pac. 363. While it is true that a cross-complaint must in itself state facts sufficient to entitle the pleader to affirmative relief, and is not aided by averments in other pleadings, nevertheless, where the parties without objection to the pleading assume the issue to be properly presented, and make no objection to evidence touching the same, they are in no position on appeal to complain of such defect. It is alleged that defendants first discovered the fraud about July 1, 1915. While no reference is made thereto in the cross-complaint, there was attached to it, marked "Exhibit A," a notice of rescission upon the ground of false and fraudulent representations made by said company, its officers and agents, and wherein defendants tendered to the company deeds to said property so con-

veyed to them by plaintiff, and offered to execute such other or further instruments as might be requested in order to release any interest they might have in the property, and demanded a cancellation and return of the note and mortgage mentioned. At the trial, and without objection, the notice of rescission, copy of which was attached to the cross-complaint, was offered and received in evidence, and plaintiff admitted the same was served on its agent on July 15, 1915. It thus appears that the issue, though not presented by the pleading, was nevertheless fully tried, and hence appellant could not have been prejudiced by reason of the error, and is now for the first time in no position to complain on account of its omission from the pleading.

[2] It is also claimed in this case, as in the Scott Case, that the right to rescind on account of fraud was waived by the making of a new contract. This contention is based upon the fact that on January 20, 1915, Perry purchased 80 acres of land, together with 80 shares of water stock, as to which, but prior to July 1, 1915, when he learned of the fraud, he agreed with plaintiff for a modification of his contract by which he surrendered 40 acres of the land, together with the stock attached thereto, retaining the balance with 40 shares of water stock, upon which the note and mortgage were to be applied. Under these circumstances, and since the modification was had prior to the discovery of the fraud, defendant's act in making the new contract did not relieve the transaction of the vice of the original act founded in fraud. Since defendants had no knowledge of the fraud prior to the subsequent transaction, their acts did not constitute a waiver thereof. *Pomeroy's Eq. Juris.* (4th Ed.) p. 2090; *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351.

[3] It also appears that subsequent to serving the notice of rescission defendants paid two assessments upon the water stock, and it is insisted by appellant that this constituted a waiver of the fraud. The purpose of paying the assessments was to prevent a sale of the stock for nonpayment, and thus preserve the property to its rightful owner. In the case at bar it operated to preserve the property to appellant, which, as the wrongdoer, had refused to accept a return of the property tendered. The making of the payments did not affect the rights of defendants under their notice of rescission. *Clark v. Wells*, 127 Minn. 353, 149 N. W. 547, L. R. A. 1916F, 476; *Shermaster v. California Building, etc., Co.*, 40 Cal. App. 661, 181 Pac. 409.

[4] It is next claimed that plaintiff was prejudiced by the ruling of the court in admitting, over its objection that the same was irrelevant and immaterial, a document signed by a number of farmers who had purchased lands in the project, wherein atten-

tion of the plaintiff was called to the fact that the two preceding years had demonstrated that there was not more than half enough water available to irrigate the lands in the project, and suggested a means of increasing the supply. Conceding, as we do, the ruling to have been erroneous, nevertheless, in view of the overwhelming evidence in support of the conclusion that the supply of water was inadequate to irrigate the lands, it cannot be deemed to have operated prejudicially to plaintiff or influenced the court in arriving at its decision. Section 4½, art. 6, of the Constitution.

[5] Lastly, it is claimed that defendants are barred from relief by laches. There is no merit in this contention. They gave notice of rescission promptly upon discovering the fraud, tendered back and offered to relinquish and return to plaintiff everything of value which they had received from it. Plaintiff had possession of the water stock, holding it as collateral security for the purchase price thereof, and hence it was not necessary to tender to plaintiff that which it already had. Defendants were not called upon to institute an immediate suit to enforce the rescission, but might, as they did, await some affirmative action on the part of plaintiff in this case had and taken by filing its complaint less than nine months after the service of notice of rescission (*Suhr v. Lauterbach*, 164 Cal. 591, 130 Pac. 2), and then in that action set up the facts upon which they based their right to relief.

That the land was arid, and practically valueless for the growing of crops, without a supply of water for irrigation, admits of no question. It likewise appears, that for the purpose of inducing defendants to purchase the land and execute the note and mortgage, plaintiff's agents made representations which led the purchasers to believe that plaintiff had then made ample provision for an adequate supply of water for use upon the entire tract of 15,000 acres, to which the water developed and impounded by the Beaver County Irrigation Company was made appurtenant, and that the 40 shares of stock thereof so purchased by defendants represented a right equal to $\frac{40}{15,000}$ of the water of said irrigation company, by virtue of which defendants were and would be entitled to at least $2\frac{1}{2}$ acre feet of water to each acre so purchased, and which amount was necessary to the proper irrigation of the same. These representations, at the time of making them, were by plaintiff's agents known to be untrue. Hence, conceding, as claimed by appellant, that other representations should be disregarded as mere expressions of opinion, nevertheless the false representations as to the supply of water, standing alone, justify the decision of the trial court. The record as a whole discloses no error which could have

prejudiced the substantial rights of cross-defendant.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 790)

BRADLEY et ux. v. DELTA LAND & WATER CO. et al. (Civ. 3593.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Leroy Bradley and wife against the Delta Land & Water Company and another. Judgment for plaintiffs, and defendant named appeals. Affirmed.

William Story, Jr., of Ouray, Colo., and Lissner & Lewinsohn, and Lewinsohn & Barnhill, all of Los Angeles, for appellant.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondents.

SHAW, J. This is one of a brood of like cases based upon alleged false and fraudulent representations made by defendants and their selling agents, by means whereof certain parties, including plaintiffs, in reliance thereon, were induced to purchase arid lands in Beaver county, Utah, and shares of stock in an irrigation company which evidenced the right to water for use thereon. This action, instituted upon notice of rescission served upon defendants, is to recover a sum of money paid by plaintiffs in the purchase of 80 acres of such land, located in what was known as the Milford project in said state, and to cancel a promissory note and mortgage securing payment of the same, executed by plaintiffs in the purchase of the water stock. Upon trial the court found the issues in favor of plaintiffs, and entered judgment in accordance therewith, from which defendant Delta Land & Water Company has appealed.

Appellant's chief contention is that the findings are not justified by the evidence.

The facts upon which the action is based are in substance identical with those involved in the case of *Scott v. Delta Land & Water Co.* (Civ. No. 3591) 207 Pac. 389, the judgment in which was, in an opinion filed by this court on April 11, 1922, affirmed. The opinion referred to contains a full discussion of the alleged errors urged in the instant case as ground for a reversal of the judgment herein. What is there said is equally applicable to appellant's contention upon the insufficiency of evidence to support the findings herein, as well as upon the ground of laches on the part of plaintiffs in bringing their action to enforce the rescission. No purpose could be served by a restatement of the facts or reasons which prompted the court in affirming the judgment therein. Suffice it to say that, upon the authority of what is said in the *Scott Case* and the case of *Delta Land & Water Co. v. Perry et al.* (Civ. No. 3590) 207 Pac. 893, filed herewith, the judgment herein is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 789)

LOHR v. DELTA LAND & WATER CO. et al.
(Civ. 3592.)

(District Court of Appeal, Second District, Division 1, California. April 11, 1922. Hearing Denied by Supreme Court June 8, 1922.)

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by John W. Lohr against the Delta Land & Water Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

William Story, Jr., of Ouray, Colo., and Lissner & Lewinsohn, and Lewinsohn & Barnhill, all of Los Angeles, for appellants.

L. M. Fall, Dudley W. Robinson, and Hickcox & Crenshaw, all of Los Angeles, for respondent.

PER CURIAM. Action to enforce rescission of a contract for the purchase of real property and of certain shares of corporation stock, and for other relief. The case is similar to three others in which decisions of this court are being filed at this time. They are No. 3590, Delta Land & Water Co. v. Perry et al., 207 Pac. 393; No. 3591, Scott et al. v. Delta Land & Water Co. et al., 207 Pac. 389, and No. 3593, Bradley et al. v. Delta Land & Water Co. et al., 207 Pac. 395. This case differs from the others only in that it relates to a different contract and different property. The alleged false and fraudulent representations made by the defendants and their agents and the various circumstances of the transactions are so much alike that a separate statement of the particular facts of this case is not necessary.

On the authority of the decisions above mentioned, the judgment is affirmed.

(57 Cal. App. 136)

PEOPLE v. SEILER. (Cr. 1012.)

(District Court of Appeal, First District, Division 2, California. March 28, 1922. Hearing Denied by Supreme Court May 25, 1922.)

1. Criminal law §553—Jury has right to accept testimony for prosecution, notwithstanding contradiction by defendant's witnesses.

Though defendant and his witnesses testified defendant was driving at a reasonable speed on the right side of the road before colliding with the automobile of deceased, the jury had the right to accept the testimony of witnesses for the prosecution that defendant was driving in the center or on the left of the road at a speed between 40 and 55 miles an hour.

2. Homicide §250—Evidence held to sustain conviction for manslaughter by unlawfully driving automobile.

Evidence on behalf of the state that defendant was driving his automobile in the nighttime, either in the center of the road or on the left-hand side at a speed of 45 or 50 miles an hour, when he collided with two other automobiles at

a sharp curve and killed the driver of one of the other machines, held sufficient to sustain a conviction for manslaughter.

3. Homicide §62—Death caused by act expressly forbidden by statute is "manslaughter."

Death caused by driving an automobile on the left side of the road at a speed exceeding 40 miles an hour or at an unreasonable rate of speed on a winding road where there was much traffic, each of which acts made a misdemeanor under Motor Vehicle Act, as amended by St. 1919, p. 191, is manslaughter under Pen. Code § 192, defining "manslaughter" as the unlawful killing of a human being without malice, in commission of an unlawful act not amounting to a felony.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

4. Homicide §340(3)—Instruction held favorable to accused.

In a prosecution for manslaughter by the unlawful operation of an automobile, a paragraph of the instruction that the driving of an automobile on the highway under the circumstances disclosed by the evidence was a lawful act was more favorable than defendant was entitled to.

5. Criminal law §800(1)—Homicide §285—Instruction as to criminal negligence held unnecessary, and where given need not define term where acts charged were unlawful.

Where the acts charged in a prosecution for manslaughter were unlawful, so that the negligent performance of a lawful act was not involved in the case, an instruction on criminal negligence was unnecessary, and the fact that the court gave such instruction did not require it to go further and define criminal negligence.

6. Criminal law §789(4), 823(15)—Instruction as to reasonable doubt held improper in form, but not prejudicial in view of further instruction.

An instruction that, if the jury are convinced beyond a reasonable doubt defendant was not negligent in operating his automobile, they should return a verdict of not guilty, was in improper form; it should have directed a verdict of not guilty if the jury were not convinced beyond a reasonable doubt he was negligent, but the error does not require reversal, where the next sentence in the court's charge stated that, if the jury entertained a reasonable doubt as to whether he was negligent, they should give him the benefit of that doubt.

On Hearing in Supreme Court.

7. Homicide §74—Commission of lawful act need not be wanton or reckless to be "manslaughter."

Under Pen. Code, § 192, subd. 2, defining involuntary manslaughter as the unlawful killing of a human being involuntarily, but in the commission of a lawful act which might produce death, without due caution and circumspection, the act performed must be one which might produce death, but lack of caution and circumspection need not go to the extent of being wanton or reckless.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

A. V. Seiler was convicted of manslaughter, and he appeals from the judgment of conviction and from the order denying new trial. Affirmed.

Theodore A. Bell, and Ralph Starke, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted on a charge of manslaughter; he moved for a new trial, the motion was denied; he made a motion in arrest of judgment, and that motion was denied; and he has appealed from the judgment and the order denying him a new trial.

[1, 2] That the appellant contends that the evidence is insufficient to support the verdict. The evidence shows that on the evening of the 22d day of April, 1921, the defendant was driving an automobile from Burlingame north toward San Francisco. At the point known as Death Curve, which is located below the cemeteries and between Burlingame and San Francisco, the car driven by the defendant collided with an automobile driven by Harry D. Utter, and thereafter proceeded and immediately struck an automobile driven by the deceased, Harry R. Doty. The latter collision was of such violence that Doty was killed. The place of the accident is particularly dangerous, as may be inferred from the name it bears. Each of the drivers of each of the machines lived in the general neighborhood and knew the dangerous nature of the spot. The accident occurred about 8 o'clock in the evening. The prosecution called as its witnesses persons who were riding in the other machines, and the defendant called as his witnesses persons who were riding in his machine. It will serve no purpose to quote the testimony of each witness, but it may be said that the defendant's witnesses testified that the defendant was driving on the right-hand side of the highway, at a rate of speed variously estimated at 18, 20, or 25 miles per hour; that the other two automobiles were very close together, and both were going down the road at a rate of speed variously estimated at 35 or 40 miles per hour. Of course, if the jury had accepted the foregoing testimony they would have been entitled to bring in a verdict of not guilty. Their verdict, however, indicates that they did not accept the foregoing as being the true statement of the facts.

The witnesses called by the prosecution testified that at the time of the first impact and also at the time of the second impact, the defendant was either in the center of the road or on his left-hand side; some of those witnesses placed the speed of the defendant's car at 45 miles an hour, and some placed

his speed as high as 50 miles an hour; those same witnesses claimed that Utter's car and Doty's car, at the time of the accident, were traveling at a rate of speed not exceeding 20, 23, 24, or 25 miles an hour. The jury had the right to believe, and if it did believe, that at the time of the accident, the defendant attempted, in the nighttime, to make Death Curve by driving on the left-hand side of the road at a speed of 45 or 50 miles an hour, then, and in that event, the defendant was guilty of manslaughter.

On the publication of the foregoing, the appellant applied for a rehearing. In his petition he set forth that certain errors were committed by the trial court in instructing the jury. The petition was granted for the purpose of allowing the appellant to present his points. As we understand the appellant's contention, it is that the trial court gave instructions which were conflicting, and that the instructions of the trial court stated to the jury that the defendant should be convicted if the decedent was killed by reason of the "criminal negligence" of the defendant, but that the trial court did not define the expression "criminal negligence." Complaint is also made that one instruction as to the proof was unfair as to the defendant. The instructions given we have numbered for convenience as follows:

I. "I want to say to you that the driving of an automobile upon the public street or highway under the circumstances disclosed by the evidence in this case was a lawful act. In other words, it was an act which this defendant or any other person had under the law a right to do.

II. "If you are convinced to a moral certainty and beyond a reasonable doubt that the defendant on the occasion in question was guilty of negligence, and you further find to a moral certainty and beyond a reasonable doubt that the negligence of which he was then and there guilty, if any, was of criminal character, or, in other words, was criminal negligence, you will in that case return a verdict of guilty on that count as charged in the information.

III. "If you are convinced to a moral certainty and beyond a reasonable doubt that he was not at the time in question guilty of negligence of any sort or kind, whatsoever, and was exercising reasonable care and circumspection and caution in the operation of the automobile, and that he was not under the influence of intoxicating liquor, you will, of course, return a verdict of not guilty."

It was the theory of the prosecution, and it introduced evidence tending to prove: (A) That at the time of the accident the defendant was under the influence of intoxicating liquor, while driving his automobile; (B) that at said time he was driving on the left-hand side of the road; (C) that immediately prior to the accident he was driving at a speed of 40, or 45 miles or 50 miles per hour; (D) that the accident occurred about 8 o'clock at night on a hilly, serpentine road, which is,

during the day and night, traveled by vast numbers of pedestrians and vehicles, and, at said time and place, the defendant did not operate his car in a careful and prudent manner and at a reasonable rate of speed having regard to the traffic and use of said highway. Under the Motor Vehicle Act of California as amended (Stats. 1919, p. 191), specification A, is a felony (Id. § 17); specification B is a misdemeanor (Id. § 20, subd. "a"; section 32, subd. "a"); specification C is a misdemeanor (Id. § 22, subd. "a"; section 32, subd. "a") and specification D, is a misdemeanor (Id. § 22, subd. "a"; section 32, subd. "a").

In the information on which the defendant went to trial there were two counts. The second count charged the defendant as under specification A. On that count the jury refused to bring in a verdict. For the purpose of this decision we will assume that the jury acquitted the defendant thereon, and we will not consider intoxication in determining the merits of this appeal.

Section 192 of the Penal Code, in effect, provides as follows: Manslaughter is the unlawful killing of a human being without malice. It is involuntary—in the *commission of an unlawful act* not amounting to a felony; or, manslaughter is the unlawful killing of a human being without malice. It is involuntary—in the *commission of a lawful act* which might produce death without due caution and circumspection.

[3] Under our statutes if the death was caused under specification B, C, or D, the jury was entitled to bring in a verdict of guilty under the first definition of manslaughter. In other words, if one performs an act in a *manner expressly forbidden* by statute and thereby causes the death of another, he may be convicted under the definition of manslaughter as firstly defined. *State v. Campbell*, 82 Conn. 671, 677, 74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236; *People v. Camberis*, 297 Ill. 455, 130 N. E. 712; *State v. Clark*, 99 Or. 629, 196 Pac. 360; *State v. Rountree*, 181 N. C. 535, 106 S. E. 669, and 2 R. C. L. 1212. If one performs an act in a *manner not forbidden by statute*, but in a wanton, reckless, or culpable manner, and thereby kills another, he may be convicted under the definition of manslaughter as secondly defined. *Schultz v. State*, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495; *State v. Goetz*, 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (N. S.) 458, 462; 21 Cyc. 760. In other words every alleged act of the defendant done in the management of his car at the time of the accident is provided against in the statute and is made unlawful. This being so, the case involved the doing of *unlawful acts* and not *lawful acts*.

[4] It will be noted that the instructions given by the trial court were not addressed to homicides committed in the performance

of unlawful acts. It will be noted, at once, that instruction I, which is addressed to homicides committed in the performance of lawful acts, is far more favorable to the defendant than he was entitled to. Under that instruction as it is worded, the jury should have brought in a verdict of not guilty. But, by its verdict, it appears that the jury disregarded the instruction.

[5] Instruction II deals with "criminal negligence." That expression is used in those jurisdictions where it has been created by statute. 29 Cyc. 424. Nebraska is such a state.

"The term 'criminal negligence,' as it is used in" section 3, article 1 of chapter 72 of the Compiled Laws of Nebraska, "is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety and amount to a willful indifference to the injury liable to follow." *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 146, 49 N. W. 1114, 1115.

In other words, criminal negligence consists of the commission of a lawful act, but in a culpable, reckless manner. However, as stated above, the performance of a lawful act is not involved in the issues in this case. It was neither necessary nor appropriate that the trial court should have given instruction No. II concerning criminal negligence. Having done so, however, it was not error for the trial court to omit to go further and define criminal negligence.

[6] Instruction No. III is not exactly correct. The instruction would have been in better form if it had been worded as follows:

"If you are not convinced to a moral certainty and beyond a reasonable doubt that he was at the time in question guilty of negligence of any sort or kind, whatsoever, and was exercising reasonable care and circumspection and caution in the operation of the automobile, and that he was not under the influence of intoxicating liquor, you will, of course, return a verdict of not guilty."

Such, undoubtedly, was the meaning of the trial court, and such undoubtedly was the meaning which the jury obtained, because the very next sentence in the court's charge was:

"On the other hand if you entertain reasonable doubt as to whether he was guilty of negligence of any kind or character, whatsoever, or as to whether he was under the influence of intoxicating liquor, you will in that case give him the benefit of such reasonable doubt and return a verdict of not guilty."

We find no reversible error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7] The opinion of the district court contains this passage:

"If one performs an act in a manner not forbidden by statute, but in a wanton, reckless, or culpable manner, and thereby kills another, he may be convicted under the definition of manslaughter as secondly defined."

The statute (Pen. Code, § 192, subd. 2) defines involuntary manslaughter of this specific character as the unlawful killing of a human being, involuntarily, but "in the commission of a lawful act which might produce death * * * without due caution and circumspection." In order to constitute this kind of manslaughter the act may be lawful, but it must be one which might produce death, and which does produce death, and it must be committed without due caution and circumspection. The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. But the word "culpable" is not an apt description of the idea intended to be conveyed by the words "due caution and circumspection." On this subject see note II to the case of Johnson v. State (1902) 61 L. R. A. 277. This remark was not necessary to the decision of the district court, and therefore its inaccuracy does not require us to grant a rehearing.

The petition for a rehearing is denied.

SHAW, C. J., and SHURTLEFF, WILBUR, and LAWLOR, JJ., concur.

(57 Cal. App. 347)

JOHNSTON et al. v. MENDENHALL et al.
(Civ. 4158.)

(District Court of Appeal, First District, Division 1. California. April 14, 1922. Hearing Denied by Supreme Court June 12, 1922.)

I. Ejectment §69—Demurrers to defenses based on entry under contract of sale properly sustained in view of defense of ownership and right to possession as plaintiffs' partners.

In an action in ejectment, which went to trial on defendant's first defense denying plaintiffs' ownership as exclusive tenants in common, and alleging ownership and right of possession in plaintiffs and defendants as partners, demurrers to defenses and causes of action based on defendant's entry under and fulfillment, so far as not prevented by plaintiffs' nonperformance, of a contract of sale, under which they were to have exclusive possession, management, etc., for ten years, apply the entire gross income, except salary, to the payment of interest on a note and mortgage, which they agreed to discharge in payment of the purchase price, and reduce the amount thereof at the end of such period to a given sum, at which time provision was made for a division of the profits between them and plaintiffs, but that, if they failed to pay as stipulated, plaintiff should be

released from the contract, and defendants' rights thereunder, including that of possession, forfeited, and that the agreement was purely one of purchase and sale, under which the parties were not partners, were properly sustained; the first defense being sufficient to afford defendants full opportunity to present their defenses of ownership and right to possession under the contract.

2. Ejectment §23—Vendors' agreement to resell and indemnify purchasers for losses from proceeds held not to create interest in land sufficient as a defense in ejectment.

Vendors' agreement to pay purchasers in possession under a contract of sale the amount expended on the land by them, in consideration of their remaining in possession and caring for it, despite losses alleged to have been caused by vendors' nonperformance, until a sale could be consummated, and to use their best efforts to sell the land and pay such sum with interest from the proceeds did not create an interest in the land which defendants could set up as a defense to an action in ejectment but merely an interest in the proceeds of the sale thereof.

3. Appeal and error §694(1)—Judgment on issue held conclusive in absence of evidence.

In an action in ejectment where trial was had on an issue as to defendants' ownership and right of possession under a contract of sale a judgment for plaintiffs, in the absence of the evidence, held conclusive.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John Johnston, Jr., and another, against Carl Mendenhall and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

U. E. White, of Pomona, and Glen M. Ely, of Los Angeles, for appellants.

R. C. Springer, of San Diego, for respondents.

TYLER, P. J. This action is one in ejectment brought to recover possession of certain land situated in San Diego county and known as the Riverview ranch. Plaintiffs, who are husband and wife, claim to be the owners in common of the property and entitled to its possession. Defendants' pleadings consist of a second amended answer containing seven different pleas, which include a denial of ownership as alleged, and certain allegations which, it is claimed, establish equitable defenses and counterclaims, and an amended cross-complaint containing eleven allegations which substantially set up all the alleged equitable defenses recited in the various defenses in the amended answer. Demurrers were sustained to the amended cross-complaint and to all of the defenses set up in the amended answer except the first defense thereof. This first defense denied ownership in plaintiffs as exclusive tenants in common and alleged ownership and right to

possession in both plaintiffs and defendants as partners. It further denied the allegations of the complaint as to the wrongful withholding of possession by defendants, and alleged rightful possession in them at the time of the commencement of the action, and it also denied, as charged in the complaint, that the value of the use and occupation of the premises was of the sum of \$300 a month or any other sum. The case went to trial upon the complaint and the first defense contained in the amended answer. Judgment went for plaintiffs. Defendants appeal on the judgment roll alone, and they contend that the trial court erred in sustaining demurrers to various allegations of their amended answer and to their amended cross-complaint, which pleadings, they assert, contain and fully set forth complete legal and equitable defenses to the action and upon which they have been denied a trial. These defenses, it is claimed, appear in the seventh defense of the answer and are again reiterated in the second cause of action alleged in the cross-complaint.

The seventh defense of the amended answer alleges the making of a contract upon February 26, 1919, with a recital of its terms and the entry of the defendants thereunder, and their fulfillment, so far as not prevented by plaintiffs, of the contract. It then alleges the failure of plaintiffs to perform, and the giving of notice to them by defendants of certain losses which would necessarily follow from a continuation of nonperformance. It also alleges a modification of the contract in relation to plaintiffs' duty, the continued failure of plaintiffs to perform the agreement as modified, and the consequent inability of defendants to make payments under the contract, with notice of such fact to plaintiffs. A new agreement of settlement is then claimed to have been made whereby defendants were to have and receive the sum of \$15,000, which sum, it is recited, they had expended on the land, and it is further alleged that under this new agreement defendants were to remain in possession of the property for the purpose of farming and caring for the same for the mutual benefit of plaintiffs and defendants until a sale thereof could be consummated, plaintiffs agreeing in the meantime to use their best efforts to sell the land and out of the proceeds to pay defendants the said sum with interest thereon from the date of the settlement agreement, they being unable to purchase defendants' interests. Defendants then allege that pursuant to this settlement agreement they remained on the land and carried out their contract until prevented from so doing by an attachment levied by plaintiffs in another action upon the farming tools, the nature of which action the record does not disclose. Defendants then plead their willingness and ability to carry out the agreement except as prevented by plaintiffs, and claim that the plaintiffs have waived

their right to declare any of the agreements forfeited. The pleading then concludes with a prayer that plaintiffs take nothing and that it be adjudged that the said agreements have not been forfeited by defendants, but that they are still in full force and effect, and general relief is asked for. The second cause of action of the amended cross-complaint reiterates the matters alleged in the seventh defense of the amended answer, and this pleading concludes with a prayer that the agreement be revised to show the true contract existing between the plaintiffs and defendants and that the contract as revised be specifically enforced, and damages in the sum of \$30,000 and general relief are prayed for. Attached to and as an exhibit to defendants' amended cross-complaint is a contract which in substance shows, in addition to the recitals contained in defendants' pleadings, that the parties hereto entered into an agreement of sale by the terms of which the plaintiffs agreed to sell and the defendants agreed to purchase a certain interest in the lands here involved, together with water rights, for the sum of \$50,000. It is recited therein that the land is incumbered with a mortgage for this amount, and that defendants agree to pay their purchase price by fully paying and discharging the same in accordance with the terms of the agreement. Further provisions show that defendants were to have exclusive possession, management and direction of the property for a term of ten years, during which period they were to apply the entire gross income of the property to the payment of interest upon the note and mortgage and certain other expenses, including insurance and taxes, except the sum of \$150 per month which defendant Carl Mendenhall was to retain as a salary. By the terms thereof, however, defendants agreed in any event to reduce the amount of the mortgage at the end of the ten-year period down to the sum of \$10,000, at which time provision was made for a certain division of the profits between plaintiffs and defendants. By the agreement plaintiffs undertook to install a pumping plant upon the lands for the purpose of irrigating the same. The agreement further provided that in the event of defendants' failure to pay the interest or principal, and the taxes and other operating expenses stipulated for, that plaintiffs should be released therefrom and that defendants should forfeit any and all rights acquired thereunder, including their right to possession, and that the agreement should terminate; and it also contained a clause to the effect that the agreement was purely one of purchase and sale and that the parties were in no sense partners. It also appears by the very terms of this contract that defendants were bound to make certain payments irrespective of any profit derived from the land, and that their rights under the contract were declared to depend upon the prompt and faithful per-

formance of the agreement, failing in which they were to forfeit all rights acquired thereunder, including their right to possession.

[1, 2] It is manifest, therefore, that the demurrers were properly sustained to the causes of action alleged, and the defenses relied upon in the amended answer and the cross-complaint, as the first defense of the answer upon which the case went to trial was sufficient to afford defendants full opportunity to present their defenses of alleged ownership and right of possession under the contract. The seventh defense alleged a termination of the contract and the making of a new agreement whereby plaintiffs were only obligated to use their best efforts to sell the land and pay certain amounts to the defendants out of the proceeds of such sale, and that defendants were in the meantime to remain in possession of the premises. Assuming the agreement to have been made as alleged, it did not purport to pass an interest in the land to defendants, but merely an interest in the proceeds arising from the sale thereof. The alleged agreement, therefore, did not create an interest in land. *Miller v. Lerdo Land Co.* (Cal. Sup.) 198 Pac. 778.

[3] Prior to proceeding to trial of the case, defendants, upon application to the court, were permitted to amend their second amended answer and second amended cross-complaint. By these amendments defendants allege that during the season of 1920 they informed plaintiffs that they had suffered losses and would be unable to comply with the provisions of their contract, and that thereupon plaintiffs and defendants entered into an arrangement of settlement by the terms of which defendants acquired certain interests in the land to the extent of \$15,000, and that plaintiffs were to use their best efforts to effect a sale of the same and from the proceeds thereof were to pay to defendants the sum mentioned. They further alleged that the defendants in the meantime were to remain in possession and care for the land, and that pursuant to this agreement defendants did so remain in possession until prevented by plaintiffs, who caused an attachment to be levied on the farming implements. This amendment, given its most favorable interpretation, merely shows, as does the agreement in the second amended answer, that the original contract was terminated, and if we assume the allegations to be true, they simply attempt to set up a legal interest in the land, and the allegations therefore have no more force and effect than those contained in the first defense of the amended answer, which alleged ownership and right of possession. Trial having been had upon this issue, the judgment, in the absence of evidence, is conclusive upon this question.

The additional defenses of the amended answer and cross-complaint deal with the

validity and the relationship of the parties under the contract, and do not require consideration.

From what we have said it follows that the orders and judgment should be, and they are, hereby affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(57 Cal. App. 413)

IRRIGATED VALLEYS LAND CO. OF CALIFORNIA v. ALTMAN et al. (Civ. 2419.)

(District Court of Appeal, Third District, California. April 24, 1922.)

1. Waters and water courses \Leftrightarrow 158½(2)—Evidence held to support findings entitling defendant to use of water.

In an action to restrain defendants from appropriating the water from a certain ditch, evidence held to support findings entitling defendants to the use of the water.

2. Corporations \Leftrightarrow 410—Secretary's powers as to disposition of lands and concomitant rights held coextensive with those of corporation.

Where the secretary of a corporation organized to buy and sell land was vested with power to sell and develop its lands and water rights, and by special act of the directors was also made sales agent and manager with power to sell its lands, so far as authority to dispose of its lands and concomitant rights was concerned, his powers were coextensive with those of the corporation.

3. Corporations \Leftrightarrow 410—Bound by secretary's act tending to promote authorized business.

Where a corporation's business was buying, selling, and improving farm lands, it was within the authority of its secretary, with plenary power to give an adjacent landowner the privilege of using the company's water to improve his crops, and, as this was an appropriate means of promoting the authorized business of the company, it was bound by its officer's act.

4. Waters and water courses \Leftrightarrow 157—A parol license acted on to use water held irrevocable.

Where licensee began to use water from an irrigation company's ditch under a parol license, and at the suggestion of the company had spent money in purchasing this land from a third party and preparing it to use the company's water, the license was irrevocable.

5. Waters and water courses \Leftrightarrow 154(1)—Irrevocable license to use water held a right appurtenant to the land.

Where the present owner's predecessor in interest had obtained an irrevocable license to water the land from an irrigation company's ditch, a contention that the present owner had made no expenditures on the company's representation, and hence was not entitled to use the water, was unsound, for when the present owner's predecessor in interest acquired an ir-

revocable license it became a right appurtenant to the land.

3. Waters and water courses ⇨157—Irrigation company, by failure to protest against use of water, recognized validity of original license.

Where an irrigation company remained silent for years, although it had knowledge that the present owner's predecessor in interest had used the company's water on his land and the present owner had and was continuing to use the company's water, the company by its conduct recognized the validity of the original license, as quiescence is tantamount to acquiescence.

7. Estoppel ⇨52—Nature of estoppel stated.

Where a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that the state of facts does not in truth exist.

8. Waters and water courses ⇨138—Protest to tenant does not prevent landlord from acquiring against irrigation company easement to use water by estoppel.

A protest by an irrigation company against the appropriation of water for certain lands made to a tenant does not break the operation of an estoppel against the company to deny the right of the landlord to use this water.

9. Waters and water courses ⇨138—Continuous use for five years gave easement by prescription.

Where after defendant's predecessor in interest had notified plaintiff irrigation company that he proposed to use water from plaintiff's ditch, and that plaintiff could not stop him, and there was a continuous use of the water under a claim of right for a period of more than five years, a finding that defendant acquired title to an easement to use the water by prescription was authorized.

10. Waters and water courses ⇨137 — Use continuous within prescription rule, where water used as often as necessary.

Where one claiming an easement uses it as often as it is necessary for him to do so, the use is generally held to be continuous, and this is particularly true with reference to easements connected with irrigation.

11. Waters and water courses ⇨138—Right to use water both under irrevocable license and under easement by prescription not inconsistent.

In an action by an irrigation company to restrain defendant from using its water, there is no inconsistency between defendants' claims of a right to appropriate the water under an irrevocable license and a right to appropriate the water under an easement by prescription.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Irrigated Valleys Land Company of California against D. J. Altman

and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Dudley D. Sales, of San Francisco, for appellant.

A. O. Huston and Harry L. Huston, both of Woodland, for respondents.

HART, J. The plaintiff instituted this action for the purpose of securing a decree perpetually enjoining and restraining the defendants from using a certain ditch, known as the "Hungry Hollow Ditch" and the right of way over which said ditch traverses and which is the property of the plaintiff. The alleged wrongful use of said ditch by the defendants consists of the "diversion of water from said ditch by and through an irrigating canal which connected with the same and extended to a certain piece of real property owned by defendant, Schaupp, and leased by the defendant, Altman." Said real property embraces 160 acres, and for the sake of convenience will hereinafter be referred to as "the 160-acre tract."

The amended complaint sets out in detail the acts of the defendants constituting the alleged wrongful diversion of the water from said ditch. The answer to said complaint denies specifically the averments thereof and also sets up a number of special defenses which may be stated in substance as follows: (1) That plaintiff is estopped from denying that defendants have the right to the use of said ditch and right of way because of the representation by plaintiff to the predecessor in interest of defendants, one William Chaney, prior to the purchase of said tract by said Chaney, that the right to the use of said ditch and right of way would become, upon said purchase by said Chaney, appurtenant to said tract, and that he could enjoy said use without cost; that said Chaney thereupon purchased the said 160-acre tract on the faith of said representations and expended money in constructing ditches and preparing said tract for cultivation; and in connection with this latter averment it is further alleged that the defendants and their predecessors in interest have used said ditch and right of way under a license and with the consent of plaintiff, and "relying upon said license and consent have spent money in the construction of irrigating ditches and in preparing said land for cultivation"; (2) that the owners of said 160-acre tract were given the right to use said ditch and right of way for the purpose of obtaining water with which to irrigate said tract in an instrument whereby the right of way for said ditch was granted to the plaintiff company by the Bank of Woodland; that "at the time defendants' predecessor in interest purchased the 160-acre tract, plaintiff represented that said tract was contiguous to the said ditch,

and now the plaintiff is estopped to deny the truth of said statement." The right of the defendants to an easement in said ditch and right of way by prescription is also set up.

The cause was tried by the court sitting without a jury upon the amended complaint and the answer thereto, and the court thereupon filed its findings of fact and conclusions of law, upholding the special defenses of the defendants, and rendered and caused to be entered judgment accordingly. The appeal is by the plaintiff from said judgment under the alternative method.

The general contention of the appellant is that certain findings are not supported by the evidence, and also that the conclusions of law are inconsistent with the findings of fact. As to the latter proposition, the contention is, in effect, that certain findings vital to the judgment, conceding that they are bottomed by sufficient evidentiary support, do not warrant the conclusions of law deduced therefrom by the court below. In other words, it is claimed that, admitting that the facts embraced within these findings are true the trial court made an erroneous application of the law thereto.

The defendant Schapp is the owner of the 160-acre tract and the defendant Altman the lessee thereof. The said 160-acre tract does not border upon the ditch, but adjoins on the west what is known as the "Foster Land," which does abut upon the ditch.

[1] The plaintiff was organized as a corporation in the month of October, 1909, from which time uninterruptedly down to the date of the trial one William Metzner was president thereof. Charles J. Cox, Jr., became the secretary of the corporation at or about the time of its organization, and held and discharged the duties of that office down to and including the year 1912. In this connection it should be stated that there were two persons officially associated with the corporation by the name of Charles J. Cox; they being father and son. The former was a director of the plaintiff. It should further be stated that, during the time he was secretary of plaintiff, Charles J. Cox, Jr., was engaged in the general, real estate business in the city of San Francisco under the name of Cox & Co. Upon its organization the plaintiff adopted by-laws for the government thereof and its business. Section 8 of article 10 of said by-laws provided:

"It will be the duty of the secretary to negotiate all contracts for the purchase of lands, water power and water rights; to supervise the development and improvement of all lands belonging to the corporation, and to form and draw plans for the subdivision, general supervision and sale of lands, and to generally supervise the sale, purchase, development, and marketing of the lands of the corporation."

The plaintiff, in the year 1910, purchased from the bank of Woodland a 3,000-acre tract

of land, situated in Yolo county, having in view the subdividing of said tract into smaller farms and putting the same as so subdivided on the market for sale. In the month of September of said year 1910 (probably at the time that the tract referred to was acquired by the plaintiff), the said Bank of Woodland granted to plaintiff a right of way for a ditch; the purpose of the construction of which was to divert water from Cache creek, in said county, to the tract of land mentioned, the right to the use of so much water as might be necessary for said purpose or as might be conveniently permitted to be used therefor having been granted to the plaintiff by the Yolo Water & Power Company. Among the covenants contained in the instrument granting said right of way to plaintiff was the following:

"It being further agreed and understood that the owners of land now contiguous to said right of way, and each of them, shall have the right to the use of said ditch for the purpose of conveying water therein for the irrigation of their land, such use to be free to them and to each of them."

The plaintiff commenced the construction of a ditch over said right of way in the year 1910, shortly after the grant to it of said right by the Bank of Woodland. The said ditch taps Cache creek at a point opposite the town of Capay, in Yolo county, and, having been completed, runs in a northeasterly direction for a distance of about six miles, where it reaches the tract of land already referred to as having been acquired by the plaintiff from the said Bank of Woodland. Said ditch is designated and known as the "Hungry Hollow Ditch" and is, in point of fact, a part of the irrigating system of the Yolo Water & Power Company.

On November 15, 1909, Charles J. Cox, Jr., secretary of the plaintiff, addressed a letter to one William Chaney, then residing in Hollister, Cal., proposing to secure for him the 160-acre tract in question. His letter reads:

"Dear Will: Inclosed you will find a small diagram of the land belonging to the Irrigated Valleys Land Company, showing the ditches in proximity to Cache creek. The company is building these ditches now, subdividing this big 3,000-acre tract into small farms and selling it for \$125 per acre. The two pieces marked red on this map, consisting of 131 and 160 acres, respectively, adjoin our land and come under our ditch. I secured a contract on these two pieces Saturday, at \$65 an acre, as the owner, who is not a resident of this neighborhood, does not know of the improvements going on there. It is fine rich soil, and worth \$150 an acre under ditch; anybody buying this now will get the benefit of the ditches for nothing. The land company have all they can handle, and I would like to have some friend of mine buy this property. Would like to have you go up and see it this week, and hope to hear from you at your earliest convenience."

Chaney, testifying as a witness for the defendant, said that upon receiving the above letter, he wrote to Mr. Cox and asked him to give him further information with regard to the 160-acre tract; that Cox later visited him at his house, and asked him to go with him (Cox) to see the land, and the witness consented to and did do so.

"After inspecting the land," proceeded Chaney, "Cox told me if I bought it I could use the company's ditches, and that he wanted me to put out alfalfa, and he said it would be an advertisement for them and help sell their property."

Cox further informed witness that he (Cox) was the secretary and manager of the plaintiff. Acting upon the statements and representations made by Cox, Chaney bought the property on the day that he had the conversation with the former. He testified that he would not have bought the property if he had known or thought that he could not have irrigated it. He further stated that he had often seen Cox in and about the property that he bought in the company of prospective purchasers of the subdivisions of the plaintiff's tract. The witness said that after he purchased the property he had a conversation with Cox about mapping the 160-acre tract as part of the lands of the Woodland tract, and that Cox subsequently "showed me a map like this (a map being in the possession of the witness at the time he was testifying), and he said he had mapped that out and had marked it 'sold' in order to help the sales of the rest of the property." The witness testified that after purchasing and taking possession of the land—in the fall of 1910—he proceeded to prepare 40 acres of it for the raising of alfalfa, and that he seeded the land, built some laterals, and used the ditch in question for the purpose of irrigating the portion of the land so utilized. In the fall of 1911 he planted to alfalfa an additional 30 acres, and expended the sum of \$65.25 in putting a bulkhead into the main ditch and also \$50 to make a bulkhead in the lateral ditch, which he dug to carry the water from the main ditch to his tract. Altogether he expended approximately \$200 in making preparation for the use of the water upon his land. In addition to this it cost him about \$10 per acre to prepare the soil for the growing of alfalfa and the seeding of the same. He testified that he commenced irrigating from the ditch in the year 1911, and also used water from the ditch for the same purpose in the year 1912, and that there was no objection voiced against his use of the water from the ditch by any one connected with the plaintiff until the year 1912, when he received a letter dated August 31st of that year from plaintiff, in which it notified him that the company protested against his use of the water from

the ditch of the company, and informed him, that—

"The Irrigated Valley Lands Company recognizes no right in you, or any right as appurtenant to your land, to obtain water through the company's ditch, or any ditch which connects with said ditch. There is not sufficient water to irrigate the lands adjoining said ditch, without considering lands adjacent thereto."

Upon receiving said letter, Chaney called on W. C. Wallace, who had control for the company of the distribution of the water flowing into and through the Hungry Hollow ditch, and said to Mr. Wallace that he had received the letter referred to, and that that letter stated that there was not sufficient water to accommodate the company's lands and his land also, but that Wallace, nevertheless, turned the water into the defendant's ditch. The witness testified that he had a conversation with C. J. Cox, Sr., and a Mr. Wagner after he had purchased the land through the former's son. On that occasion Cox, Sr., who represented himself to Chaney as being a director of the plaintiff, and Mr. Wagner, while not directly telling him that he could use the water, said to him that they were anxious that he should put his land into alfalfa as soon as possible. From the general trend of the conversation with Cox, Sr., the witness understood that said Cox intended that he should use the water upon his land.

Chaney entered into an agreement for the sale of the land on the 21st day of November, 1912, to Frank Galentine. Galentine on the 16th day of August, 1913, assigned his contract with Chaney for the purchase of the land to W. E. Joerger. On the 4th day of December, 1917, Chaney and Joerger joined in a deed conveying the land to the defendant Schaupp.

W. C. Wallace, heretofore mentioned as the man in charge of the distribution of the water of the Hungry Hollow ditch, testified that he distributed water to Chaney during the years 1911 and 1912 and to Joerger, while the latter was in possession of the land, during the years 1913, 1914, and 1915. He also furnished water to Galentine when he was in possession of the land. The defendant D. J. Altman testified that he bought property near the land in question in the year 1913, and was in a position at all times thereafter where he could observe operations on the 160-acre tract after it had been purchased from one Schultz by William Chaney. He stated that the land had been irrigated from the ditch during the years 1911 and 1912, and that in 1913 he took possession of the 160-acre tract under a lease; that he knew that the land had been irrigated from the water flowing through the Hungry Hollow ditch from the year 1911 to the year 1918, inclusive. He was particularly asked

if the land was irrigated in the year 1916, and he replied that it was, and that he saw the water on the land. He stated that a pumping plant was installed on the 160-acre tract, but that enough water to irrigate the land could not be obtained from that source, and that the land was always irrigated by water obtained from the Yolo Water & Power Company and flowing through the main ditch in question. The pumping plant was finally abandoned and the engine sold. During the time that he was in possession of the land he stated that no one interposed any objection to the use of the water from the ditch until just prior to the commencement of this action, when he received a letter from the company, protesting against further use of the ditch by him. He also specified the number of different occasions in each year on which the portion of the 160-acre tract which was under cultivation was irrigated from the water of the ditch.

Metzner, president of the plaintiff, testified that—

The company never "entered into any agreement with the owner, or purported owner, of this 160-acre tract in reference to the use of water thereon taken from the Hungry Hollow ditch."

He stated that he had no knowledge of the diversion of the water from the ditch to the 160-acre tract until a short time prior to August 31, 1912, when the company addressed to Chaney the letter heretofore referred to, declaring that the company recognized "no right in Chaney or any right as appurtenant to his land" to obtain water through the company's ditch or any ditch connected with said ditch; that he had no knowledge thereafter of the use of said water by Chaney or any of his successors in interest until some time in 1918, when it was learned by the company that the defendant Altman was diverting water to said 160-acre tract from the ditch, and had diverted water from the ditch to the said 160-acre tract in the year 1917; that, upon learning this, the company addressed a letter to Altman, protesting against the taking of any water from the main canal of said company, and diverting the same to the 160-acre tract in question, and stating to him that, unless he ceased so taking and using said water, legal steps would be taken by the company to prevent him from further so diverting and using the same. Metzner testified that the company received no written reply to the letter addressed to Chaney, under date of August 31, 1912, but said that about a week or ten days after sending said letter to Chaney, he (Metzner) went to what is known as the "Home Ranch" of the company's lands in Yolo county, and that he there met Chaney; that Chaney, addressing him, said: "I got your letter, and I propose to use the water, and you can't

stop me." The witness said: "As far as I know, Mr. Chaney never continued to make an attempt to use it." A letter written by G. D. Parish, a tenant in possession of the 160-acre tract, under date of May 20, 1916, was received by the company, and therein Parish asked the permission of the company for the use of water to "wet a piece of grain and alfalfa" on said land. This letter was introduced in evidence and Metzner said that, while no written reply was made thereto, he later visited the properties of the company and there met Mr. Parish, and said to him that the company could not furnish him water at that time. Metzner further testified that C. J. Cox, Jr., under the firm name of Cox & Co., was made the selling agent of the lands of the plaintiff. This agency existed while said Cox was still secretary of the company.

G. D. Parish testified for the plaintiff in rebuttal that he had the 160-acre tract leased during the years 1916 and 1917; that he did not use the water on the premises in 1916, but did irrigate from the ditch in the year 1917. He stated that he did not have any alfalfa in 1916 because he had no water.

It should also be stated that it was shown that the distribution of the water was controlled by an employee of the plaintiff, and that said employee generally used his own judgment as to the turning in of the water upon the various pieces of land which used the water from the Hungry Hollow ditch.

The above statement represents substantially all the important testimony received at the trial.

The findings are not of specific facts, but are general in form, declaring that the allegations of the answer are true and those of the complaint untrue. As we have seen, the answer, besides specific denials, sets up the several different and distinct special defenses above referred to, and sets out with particularity the facts upon which each is founded. It follows that all of the material facts so alleged, as well as those facts which were brought out by the evidence in support thereof, are comprehended within the findings or were found to be true by the court, viz.: (1) That the grant of the right of way for the ditch to the plaintiff by the Bank of Woodland also specifically granted to the owner of "land now contiguous to said right of way" the right to the use of said ditch for the purpose of conveying water therein for the irrigation of their lands, "such use to be free to them and to each of them." (2) That Cox, Jr., was, at the time of the purchase of the 160-acre tract by Chaney, secretary of the plaintiff and its agent for the sale of the lands embraced within the tract for the special irrigation of which the right of way for a ditch was granted to it and the main ditch was built; that Cox, Jr., as secretary of the plaintiff, was vested with full

power to negotiate all contracts for the purchase of lands, water power, and water rights, and "to supervise the development of all lands belonging to the corporation"; that Cox, Jr., was also the selling agent of the plaintiff under the firm name of Cox & Co.; that said Cox induced Chaney to purchase the 160-acre tract upon the representation and promise to the latter that if he (Chaney) would purchase said tract, he could have the use of the ditch for the purpose of conveying water to his land for irrigating the same; that said Cox further stated to Chaney, during the negotiations for the sale of the 160-acre tract to the latter that it would be an advertisement and to the interest of the plaintiff's lands, and thus facilitate the sale of the subdivisions thereof, if he (Chaney) would purchase and sow the 160-acre tract to alfalfa and raise good crops thereon; that, solely upon the faith of the promise of Cox, Jr., that he could have the use of the said ditch, Chaney purchased the land; that Chaney would not have made said purchase but for said representation and promise; that Cox mapped the lands of the plaintiff and included therein as a part and parcel of the same the 160-acre tract, marking on said map the latter tract as having been sold. (3) That Chaney immediately entered into the possession of said 160-acre tract, expended large sums of money in preparing to convey the water from the main ditch to his land and in cultivating the said tract and in growing alfalfa and grain thereon; that he so used the main ditch in the years 1911 and 1912. (4) That in the month of August, 1912, the plaintiff demanded of Chaney in writing that he cease using the water of the ditch, and at the same time likewise notified him that the company did not recognize in him any right to obtain water through its ditch or any ditch which connects with said ditch, or that the right to use the ditch was appurtenant to the 160-acre tract; that within 10 or 12 days after the receipt of the said written notice or demand to stop the further use of the ditch for the purpose of conveying water to his land, Chaney said to Metzner (president of plaintiff), referring to the plaintiff's protest against his further use of the ditch, "I propose to use the water and you can't stop me"; that from that time on down to the commencement of this action on May 29, 1918, Chaney and his successors in interest, including the defendants, have continuously, uninterruptedly, notoriously, and under a claim of right used said ditch for conveying water for irrigating the 160-acre tract.

That the evidence, of which we have above presented an epitomized statement, is amply sufficient to support said findings is a proposition which it seems to us stands beyond the realms of doubt or disputation. The remaining question is therefore whether the court

deduced from said findings the correct conclusions of law.

It is not necessary, nor is such the intention, to express a definite opinion upon the question whether the 160-acre tract is "contiguous" to the main ditch within the meaning and intent of the grant of the right of way for a ditch by the Bank of Woodland to the plaintiff. We may, however, venture these suggestions in connection with this proposition: That it is probable that the bank by the insertion of that covenant in the grant intended to confer upon all owners of land in the immediate community or neighborhood in which the tract of the plaintiff is situated the right to the use of the ditch for irrigating purposes; and the word "contiguous" would not be wholly inapt in the expression of such meaning and intent under the circumstances of this case. In Ann. Cas. 1918E, 798, it is said that, while the primary meaning of the word "contiguous" is "in actual contact, touching, meeting or adjoining at the surface or border" (*Johnston v. Davenport Brick, etc., Co.* [D. C.] 237 Fed. 668), and that it must therefore always be so understood, unless the context shows it was otherwise intended (*Holston Salt, etc., Co. v. Campbell*, 89 Va. 396, 16 S. E. 274), still the meaning of the word depends largely on the subject-matter to which it is applied (*Griffin v. Denison Land Co.*, 18 N. D. 246, 119 N. W. 1041). It is reasonable to suppose that if the right of way was granted by the bank for the exclusive use and benefit of the lands embraced within the plaintiff's 3,000-acre tract, the instrument granting the easement would probably have expressly so provided, or, in other words, restricted the employment of the ditch to such use, and therefore the fact of the omission from the grant of such a provision affords some support to the suggestion that the word "contiguous" was used in the grant as indicating an intention in the grantor to give to owners of land in the immediate vicinity of plaintiff's tract, and not included within the latter, the right to use the ditch for the irrigation of their lands. But, whatever may be the correct interpretation of the grant in that respect, it is clear that the judgment may and should be sustained upon other considerations.

[2] As secretary of the plaintiff, Cox, Jr., it will be observed, was vested with full power not only to sell the lands and water rights of the plaintiff, but was also given general power to develop the said lands for marketing purposes. He was also, moreover, by special action of the board of directors of the plaintiff, given authority to act as its sales agent and manager, with power to sell its lands. As secretary, in so far as the authority to dispose of the lands and concomitant rights of plaintiff was concerned, his powers were as broad as or coextensive with those of the corporation itself. And, as is said by Chief Justice Shaw in the very recent

case of *Woods Lumber Co. v. W. H. Moore, Trustee, etc.*, 183 Cal. 497, 501, 191 Pac. 905, 907 (11 A. L. R. 549):

"A corporation engaged in carrying on a business which it is authorized to do by its articles and the law under which it is organized has implied power to make all contracts which are 'essential to the successful prosecution of the business' (Civ. Code, § 354, subd. 8; *Bates v. Coronado B. Co.*, 109 Cal. 163; *Merc. Trust Co. v. Kiser*, 91 Ga. 636), or the making of which is an appropriate means by which it may be 'reasonably expected that the business in which the corporation is engaged will be advanced' (*Depot R. Synd. v. Enterprise Brewing Co.*, 87 Or. 560), or which are 'necessary and helpful to the conduct of its authorized business' (*Timm v. Grand Rapids Br. Co.*, 160 Mich. 371), or which tends directly to promote the business authorized by its articles and which it is doing. *Kraft v. Brewery Co.*, 219 Ill. 206; *Central L. Co. v. Kelter*, 201 Ill. 508; *Blue Island Br. Co. v. Fraatz*, 123 Ill. App. 26; *Horst v. Lewis*, 71 Neb. 365."

[3] That the plaintiff is authorized, either expressly or impliedly, to do all of these things for the successful prosecution of the business for the carrying on of which it was organized, there can be no manner of doubt; and, as above suggested, it is equally clear from the evidence that Cox, Jr., as secretary and sales agent of the plaintiff, was clothed with like authority. And, obviously, if the agreement that said Cox made with Chaney would, as Cox so conceived, and as we may assume from the evidence that it did, directly tend to promote the authorized business of the plaintiff, or be "an appropriate means" whereby it might reasonably be expected that the business of plaintiff would be advanced, then the act of making the agreement was within the scope of his authority as the agent of the plaintiff, and the latter is consequently bound thereby.

[4] It being true, then, that Cox possessed plenary power, as secretary and sales manager of the corporation, to make for and in behalf of the corporation the said agreement with Chaney, it follows that Chaney entered into the use of the ditch under a parol license from the plaintiff, and that, upon the incurring by him of expenditures of money in buying the land and also for the purpose of facilitating the use of the easement and in cultivating the tract according to the suggestion of Cox, Jr., the license became irrevocable. *Churchill v. Russell*, 148 Cal. 1, 82 Pac. 440; *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; *Roseberry v. Clark*, 23 Cal. App. 549, 138 Pac. 923; *Smith v. Green*, 109 Cal. 228, 234, 41 Pac. 1022; *Blankenship v. Whaley*, 124 Cal. 300, 304, 57 Pac. 79; *Flickinger v. Shaw*, 87 Cal. 126, 131, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; *Rerick v. Kern*, 14 Serg. & R. (Pa.) 271, 16 Am. Dec. 497; *Stepp v. Williams* (Cal. App.) 198 Pac. 661, 668, 669; *Raritan Waterpower Co. v. Veghte*, 21 N. J.

Eq. 475. See, also, comment of Prof. Freeman on the last-named case in 16 Am. Dec. 501 et seq.

In *Stoner v. Zucker*, supra, at page 520 of 148 Cal., at page 810 of 83 Pac. (113 Am. St. Rep. 301, 7 Ann. Cas. 704), the doctrine is thus explained:

"The recognized principle, therefore, is that where a licensee has entered [upon the premises of another] under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for."

In *Raritan Waterpower Co. v. Veghte*, supra, the rule is stated as follows:

"To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly provided, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee."

[5-7] Appellant, however, takes the position that the license whereby Chaney acquired the right to the easement cannot inure to the benefit of his successors in interest, inasmuch as the latter themselves made no expenditures in improving the property upon the faith of any representations made by Cox to Chaney, and that no representations were made to them. In other words, the contention is that an estoppel cannot be set up here for the reason that there were no representations or promises made by Cox, Jr., to any of the successors in interest of Chaney. The reply to this proposition is, though, that the license under which Chaney entered into the use of the ditch having become irrevocable, the right acquired thereby and thereunder became appurtenant to the 160-acre tract. Furthermore, the successors in interest of Chaney took the land with the ditch as constructed by the latter, and which connected with the main ditch, and the said ditch remained in the same condition from the time of its construction down to the date of the institution of this action, during which period of time the appellant made no attempt to interrupt the use of the ditch in any manner until August 31, 1912, and, later, April

30, 1918 (approximately a month prior to the commencement of this action), on which former date the letter heretofore referred to was addressed to Chaney, and on which latter date it addressed a letter to the defendant Altman, a tenant and not the owner of the 160-acre tract, objecting to the further use of the ditch for the purpose of irrigating said tract. It is not necessary to the working of an estoppel that in such a situation there should be direct or affirmative verbal representations. Such representations may arise by implication. In this case, the plaintiff, although, as we will later show in considering another branch of the case, having knowledge that the successors in interest of Chaney had used and were using the ditch, remained silent, addressing no protest against such use to the successors of Chaney, and thus by conduct recognized the validity of the license by which Chaney acquired the right to the easement and so acquiesced therein. As the law-writers say, "Quiescence is tantamount to acquiescence." In other words, "if a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist." 21 C. J. p. 1060. The ground upon which the estoppel rests is that the conduct constitutes an implied representation of the truth of the state of facts in question. Bigelow, Estop. (5th Ed.) p. 570. There can be no doubt—indeed, it must be assumed from the fact that the irrigation of the land was necessary to the successful growing of alfalfa and other grain—that the successors in interest of Chaney would not have bought the same but for their knowledge of the fact that said easement was appurtenant to said tract.

[8] Counsel for the appellant, however, declares that the letters from the plaintiff to Chaney and Altman, protesting against their use of the ditch, constitute convincing, if not conclusive, evidence that the respondents were not given the license pleaded in the answer. But the answer to this is that permission had been granted to Chaney to use the ditch, and the same had developed into an irrevocable license before said letters were received by either of the parties named. Moreover, Altman, as we have seen, was only a tenant or lessee of the 160-acre tract, and in such case such a protest, addressed to a mere tenant of the property against the use of the easement, cannot break the operation of the estoppel.

[9, 10] But the judgment may securely rest upon the finding that the defendant Schaupt acquired title to the easement or the right to the use of the ditch by prescription. As seen, the plaintiff, in a letter to Chaney, under date of August 31, 1912, notified him to cease using the ditch, but a few days thereafter Metzner, president of the plaintiff, according

to his own testimony met Chaney, and they discussed the matter of the receipt of said letter, and Chaney then declared to Metzner that he proposed to use the ditch or the water, "and you can't stop me." The evidence clearly shows that from that time until and immediately preceding the date of the commencement of the present action Chaney and his successors in interest continuously used the ditch under a claim of right, or, in other words, for a period of more than five years from the date of said conversation between Metzner and Chaney. It is true that one witness testified that in the year 1916 no water from the ditch was used on the land, the explanation being that the spring of 1916 was a late, wet season, and that there was really no necessity for using the ditch. This testimony came from the 1916 lessee of the 160-acre tract. This though, if true, would not be such an omission in the use of the ditch as to have the effect of breaking the continuity of the user. The failure, if any, to use the ditch in the year 1916 was not due to any act of the owner, but to the fact only that the circumstances were such that water from the ditch was not needed. The omission amounted neither to a nonuser nor evidence of an intention to abandon the easement. In other words, as counsel for the defendants well say, "continuous use" does not necessarily mean "constant use." Where one who claims an easement uses it as often as it may be necessary for him to do so, the use is generally held to be continuous, and this is particularly true with reference to easements connected with irrigation. *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209; *Bodfish v. Bodfish*, 105 Mass. 319.

There was, however, other testimony to the effect that water was conveyed to the 160-acre tract from the ditch in the year 1916. And from the entire evidence the court remained well within its discretion in finding that the defendants claimed and exercised the right to use the ditch openly and continuously and uninterruptedly and in hostility to the claim of the plaintiff for a period of over five years immediately preceding the date of the commencement of this action. Metzner, it is true, testified that he had no knowledge of the use of the ditch by Chaney and his successors in interest, and had no means of ascertaining whether the ditch was being so used; but he also testified that he had instructed the foreman of the plaintiff having charge of the distribution of the water flowing in the ditch to watch and report if any attempt was made to irrigate the 160-acre tract from the company's ditches. But, notwithstanding this instruction, as the evidence shows, the employees of the appellant who had charge of the ditches and the distribution of the water thereof continued, during the prescriptive period, to supply water for the 160-acre tract through the ditch

in question. Furthermore, it was shown that Cox, Sr., who was a director of the company at the time, had a conversation with Chaney after the latter had purchased the 160-acre tract, and that said Cox stated to Chaney that the company was anxious that he should put the land into alfalfa as soon as possible. It was also shown, as we have seen, that Cox, Jr., was often near the 160-acre tract after the sale thereof to Chaney, accompanied generally by persons to whom he desired to sell subdivisions of the plaintiff's tract. From all this and the fact that water was actually supplied to the 160-acre tract by means of the main ditch during every year from 1912 to 1918, inclusive, the court could well have concluded that if it was true that the appellant had no knowledge of the use of the easement by Chaney and his successors in interest, it certainly had ready means for ascertaining the fact. But, under all the circumstances of the case as they were developed at the trial, it is hardly reasonable to believe that the appellant did not know at all times that its ditches were being used by the several owners of the 160-acre tract. Indeed, the knowledge of Cox, Jr., the secretary, and also that of its several foremen, whose special business or duty it was to distribute the water flowing through the main ditch to those entitled thereto, that the ditch was being used by Chaney and his successors, was the knowledge of that fact of the appellant itself, since not only said Cox as secretary, but also said foremen, were the agents of appellant with full power to act for it in all the matters committed to them by the plaintiff.

But it is further argued that, from the fact that the owner in the year 1915 installed a pumping plant on the 160-acre tract, capable, as is the claim of irrigating the entire acreage, and from the further fact that a tenant in 1916 asked permission of the company to irrigate the tract from its ditches, the irresistible conclusion is, and the court should have so found, that the appellant could not have known, nor did it have any reason to believe, that the 160-acre tract was being supplied with water conveyed through the company's ditches. But there is no showing here that the appellant had any knowledge of the existence of the establishment of the pumping plant; and the fact that a tenant of the owner of the land in 1916 asked permission of the company to irrigate said land from its ditches would not necessarily show that said ditches had not been used or were not being used for the purpose of conveying water to the lands of the defendants, or that the appellant did not know that they were being so used. At any rate, the trial court, it seems, did not attach any significance to the circumstances here referred to, concluding, as we may presume, and as it had a right to do, that the other facts and circum-

stances in the case, tending to show the continuous and uninterrupted use of the easement, were sufficient to overcome the probative effect of any facts or circumstances leading to an opposite conclusion upon the question of adverse user.

[11] Lastly, we may briefly consider the point, made at the threshold of appellant's argument, that the defense based on the license and that of title to the easement by adverse user are inconsistent, in that possession by license is not adverse and cannot ripen into a title. If the license were revocable there would no doubt be force in that contention; but, as we have shown, the license became irrevocable, and it was within the right of defendants to set up either or both of the said defenses as the basis of their title to the easement. The situation is no different from a case where a party, suing to quiet title to land, would set up and prove a conventional title thereto and at the same time title by adverse possession. *Porters Bar Dredging Co. v. Beaudry*, 15 Cal. App. 751, 763, 115 Pac. 951. It follows, also, that there is no inconsistency between the findings and the conclusions of law for the reason suggested.

We have discovered no substantial reason for disturbing the judgment herein, and it is accordingly affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(57 Cal. App. 260)

DYMENT v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA
et al. (Civ. 3677.)

(District Court of Appeal, Second District, Division 2, California. April 5, 1922. Rehearing Denied May 3, 1922. Hearing Denied by Supreme Court June 1, 1922.)

1. Physicians and surgeons ⇨11(3)—Charge physician had obtained license to practice by fraud not sufficiently specific.

A charge that petitioner had procured his certificate to practice medicine through fraud and misrepresentation without a statement of the facts constituting the fraud is not sufficiently specific to sustain an order of the board of medical examiners revoking petitioner's certificate under St. 1913, p. 732, § 14, as amended by St. 1917, p. 109, § 9.

2. Physicians and surgeons ⇨11(3)—Procedure in trial before medical board need not be technical.

The procedure in trials before medical boards for revocation of a license to practice medicine need not, either as to pleadings or evidence, be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law.

On Hearing in Supreme Court.

3. Pleading ¶8(15)—General allegation of fraud in obtaining physician's certificate insufficient.

A general charge, alleging fraud and misrepresentation without stating the facts on which it is based, is insufficient.

4. Physicians and surgeons ¶11(3)—Board need not determine sufficiency of charges before hearing.

The board of medical examiners need not, before the hearing, determine the sufficiency of charges against a physician whose license is sought to be revoked.

5. Physicians and surgeons ¶11(3)—Objection to sufficiency of charges unnecessary to review on certiorari.

Though a physician may question the sufficiency of charges before the hearing for the revocation of his license, his failure to do so does not give the board power or jurisdiction to revoke the certificate if the charges are in fact insufficient, and if the board enters an order revoking his certificate the physician may maintain certiorari to have it annulled for want of jurisdiction.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Application by Philip Dymont against the Board of Medical Examiners of the State of California and the members of the board for a writ to review an order of the board revoking petitioner's license to practice medicine. From a judgment affirming the order of the board, petitioner appeals. Reversed, with directions to annul the order of the board.

L. E. Dadmun, of San Diego, for appellant.
Harry A. Encell, of San Francisco, and Frank M. Smith and Charles D. Ballard, both of Los Angeles, for respondents.

WORKS, J. On December 21, 1917, respondent board of medical examiners of the state of California issued to petitioner a certificate authorizing him to practice medicine and surgery. The document was of the kind known as a reciprocity certificate; that term being applied to a certificate issued without examination, under section 13 of the Medical Practice Act (Stats. 1913, p. 722, as amended Stats. 1917, p. 107) upon the production by an applicant for leave to practice medicine and surgery in California of a license certificate issued by the medical board of a sister state. Section 14 of the same act as amended (Stats. 1917, p. 109) authorizes the board of medical examiners to revoke any certificate issued by it when procured by the fraud and misrepresentation of the applicant. On August 30, 1920, there was filed with the board a complaint that petitioner had procured his reciprocity certificate through fraud and misrepresentation,

and, after steps taken to acquire jurisdiction over petitioner and on October 19, 1920, the board made its order revoking the certificate. Thereafter petitioner applied to the superior court for a writ of review in the premises, and it was issued. Upon a hearing pursuant to the writ judgment was rendered, affirming the order of the board, and petitioner appeals from the judgment.

In response to the complaint filed with the medical board appellant presented to that body a letter signed by himself in which, among other things, it is said:

"The said Philip Dymont hereby demurs to the charges in the complaint. * * * Said demurrer is to the effect that the complaint is deficient in that it is not sufficiently definite and specific. * * * Inasmuch as section 14, chapter 354, of the Statutes of 1913 set out twelve distinct and separate definitions of 'unprofessional conduct,' the defendant Philip Dymont demands to know and has a right to know which particular statute he is accused of violating and how. If on receipt of such amended charges and specifications I find that the charges are then sufficiently definite, specific, and sufficient to warrant a proper defense, I will make my answer according to the provisions of said section 14."

This letter was plainly effective as a demurrer to the complaint, but the medical board, going forward upon the theory that only an answer on the facts under oath was permissible under the statute, proceeded in the absence of appellant to try the charges against him as upon a default and after the time fixed by the statute for answering had elapsed, with the result that the certificate of appellant was revoked as already stated. The board never at any time passed upon the demurrer.

Appellant contends that he had the right to demur to the complaint, and that the medical board had no jurisdiction to proceed under the charge against him without a ruling upon the demurrer which he presented. Respondents, on the contrary, insist that the right to demur does not exist in the case of such proceedings as that instituted before respondent medical board against appellant. It is true that the enactment regulating such proceedings does not provide for demurrers. As the statute stood at the time the charge against appellant was pending (Stats. 1917, p. 109), one against whom complaint was made before the board was required to "file his written answer, under oath, within 20 days next after the service on him" of the citation provided for in the act. This is far from meaning, however, that such a person might not demur, or might not by some other method object to the sufficiency of the written charge lodged against him. The right to present such a question in every form of action or proceeding, whether civil, criminal, or

quasi criminal is practically universal under the genius of Anglo-Saxon institutions, if not under all systems for the administration of justice. It may almost be said to be a natural right, for the idea that a man may be brought to trial upon an insufficient charge is opposed to the sense of justice inherent in the human breast. This fact has found tacit recognition in many cases in which proceedings such as that pressed against appellant before the medical board have been brought in question in the courts. The regularly constituted judicial tribunals have uniformly considered the question of the legal sufficiency of complaints making such charges whenever the point has been presented to them under writs of review or in kindred proceedings (*Munk v. Frink*, 75 Neb. 172, 106 N. W. 425; *Board of Medical Examiners v. Eisen*, 61 Or. 492, 123 Pac. 52; *Richardson v. Simpson*, 88 Kan. 684, 129 Pac. 1128, 43 L. R. A. (N. S.) 911; *Freeman v. State Board*, 54 Okl. 531, 154 Pac. 56, L. R. A. 1918D, 436; *State Board v. Jordan*, 92 Wash. 234, 158 Pac. 982); the courts of our own state being among those which have held this attitude (*Lanternman v. Anderson*, 36 Cal. App. 472, 172 Pac. 625; *Suckow v. Alderson*, 182 Cal. 247, 187 Pac. 965). If such a question is to arise concerning these complaints—and we have already said that upon principles inherent to the administration of justice it must arise—the place for its initial presentation is before the tribunal with which the complaint is originally lodged. If a charge against a physician is made to a board of medical examiners, it is due the board that the question of the sufficiency of the complaint be ascertained at once, rather than after the proceeding has been terminated before the board and has gone to the courts, with the possible result that the board's order of revocation is annulled because of defects in the charge. A solution of the question before the board is equally due the practitioner complained against. The settlement of the point while the proceeding is yet before the initial tribunal will not only conduce to a more speedy administration of justice in the interest of all concerned—and the interest of the general public in such a question is far from negligible—but it will conduce to a great saving of expense to those directly interested. We conclude that appellant had the right to test the sufficiency of the complaint against him while the proceeding was yet before the board, either by demurrer or after some other method, and that the board was in error in proceeding to a hearing on the facts without passing upon the demurrer which was interposed by appellant. Because of the conclusion reached by us on the point next to be considered, we need not express an opinion upon the question whether, in cases in which a complaint

is finally determined to be sufficient, a respondent in such a proceeding must have filed his answer under oath at the same time with his demurrer, or, at least, within the 20 days fixed by statute for answer, or suffer default upon the overruling of the demurrer.

[1] Appellant contends not only that he had the right to demur to the complaint against him filed with the medical board, but that the demurrer should have been sustained. This is the only remaining point made by appellant which we shall consider. The complaint fails to state the facts constituting the fraud and misrepresentation by means of which it is alleged that appellant procured his reciprocity certificate. The averment is that the person making the complaint "charges Philip Dymont with having been guilty of unprofessional conduct by violating section 14 of chapter 354 of the Statutes of 1913 and acts amendatory thereof of the state of California, in that he (Philip Dymont) procured by fraud and misrepresentation a certificate to practice medicine and surgery in the state of California." We are of the opinion that the complaint is insufficient.

[2] It is of course, needless to cite authorities upon the proposition that neither as to pleadings nor as to evidence must the procedure in trials before medical boards be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law. The cases upon this point are both uniform and numerous. Still, giving to the rule its full scope, a complaint in such a proceeding must give an alleged erring practitioner such notice of the nature of the charge against him as will enable him to formulate a defense. *Munk v. Frink*, supra; *Richardson v. Simpson*, supra; *Freeman v. State Board*, supra. This the complaint now before us does not do. It is probably not possible to conceive of the many different practices by means of which an applicant fraudulently might procure the issuance to him of a certificate licensing him to practice medicine and surgery, and a complaint against him for having brought such an attempt to fruition ought to notify him of the specific acts committed by him in the attempt.

The work done by the medical boards of the various states in purging the ranks of the medical profession of quacks and charlatans is a most commendable one. The public interest demands the prosecution of that work with vigor, dispatch, and thoroughness and without undue interference by the courts. It is equally important, however, that no man be brought to trial, even before a medical board, upon a charge which does not notify him of the nature of the offense attempted to be pleaded against him.

It is due the California medical board in the present instance to observe that the body acted under legal advice at all stages of the proceeding before it, and it is not surprising that the views of its counsel should have been followed. We, however, cannot be satisfied that the advice given was sound.

Judgment reversed, with directions to the trial court to enter judgment annulling the order made by the board of medical examiners of the state of California by which the reciprocity certificate of appellant was revoked, and directing the board to take such further proceedings as it may be advised to take in the proceeding against appellant pending before it, all in accordance with the views expressed in this opinion.

We concur: FINLAYSON, P. J.; ORAIG, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [3] We are satisfied with the conclusion of the District Court of Appeal that the complaint made to the board of medical examiners is not in law a sufficient charge of unprofessional conduct to give the board jurisdiction to revoke the certificate or license authorizing the appellant to practice medicine. It contains no specific allegations of fact, but merely states that he "procured by fraud and misrepresentation a certificate to practice medicine." Such method of charging fraud has always been held insufficient; the specific facts must be stated. 9 Ency. of Pl. & Prac. 686; 31 Cyc. 55.

[4] But we do not agree with the theory that it was necessary for the board to determine the sufficiency of that complaint prior to the time of the hearing thereof. The act does not contemplate a formal method of procedure. The person charged may at the hearing object either formally or informally to the sufficiency of the complaint.

[5] But, whether he does or not, the complaint must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke his certificate, and if a revocation is ordered on such a complaint the holder thereof may maintain a proceeding in certiorari to have it annulled for the want of jurisdiction of the board to make the order, as well where he did not make the objection to the board as where he did object.

The petition for a rehearing in the Supreme Court is denied.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SLOANE, SHURTLEFF, and WASTE, JJ., concur.

(57 Cal. App. 366)

OVERLAND PUB. CO. v. UNION LITHO-GRAPH CO. et al. (Civ. 4127.)

(District Court of Appeal, First District, Division 2, California. April 18, 1922. Hearing Denied by Supreme Court June 15, 1922.)

1. Monopolies ¶12(2) — Agreement to sell labor only to certain class held legal.

Under St. 1907, p. 984, as amended by St. 1909, p. 594, providing that labor, skilled or unskilled, is not a commodity, an agreement of printing associations to sell their labor only to persons coming within a certain class was legal, and involves no restraint of trade.

2. Constitutional law ¶88—Right of laborer to work or refuse to work for any man or class of men inviolate.

It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without in any way being held accountable therefor.

3. Monopolies ¶24(1), 28—Agreement to sell labor only to certain class not ground for injunctive relief or recovery of damages.

Where printing associations entered into an agreement providing that they would sell their labor only to persons coming within a designated class is not ground for injunctive relief or for damages.

4. Monopolies ¶28—Special damages resulting from practices in restraint of trade must be pleaded.

An action cannot be maintained against an association because of the attempt to restrain competition among its own members without pleading and proving special damages to the business or property of the plaintiff.

5. Monopolies ¶24(1)—No right to injunction for injury by monopoly, but plaintiff may recover double damages.

St. 1907, p. 984, as amended by St. 1909, p. 594, gives no right to injunctive relief to a private person in the violation of the provisions of the act, but such person is merely given the right to recover double damages.

Appeal from Superior Court, City and County of San Francisco; H. M. Owens, Judge.

Suit by the Overland Publishing Company, a corporation, against the Union Lithograph Company, a corporation, and others. From a judgment of the superior court denying an injunction and damages, plaintiff appeals. Affirmed.

Hoefler, Cook & Snyder, of San Francisco, for appellant.

Harry G. McKannay, of San Francisco, for respondents Union Lithograph Co. and others.

Heidelberg & Murasky, of San Francisco, for respondent unions.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it entered after general demurrers to the complaint had been sustained. The complaint asks for injunctive relief and for damages; its allegations are lengthy and complex. In substance, they are as follows:

Plaintiff is a corporation doing business under the laws of California. Certain named defendants and some 200 others, whose names are unknown to plaintiff, composed an organization known as the "Printers' Board of Trade." Said association is formed for the purpose, among others (as set forth in its by-laws) "to investigate and check injurious trade practices, and encourage the opposite" in the business of printing and publishing, which is the business carried on by the several members of the association. Certain of the named defendants, together with about 1,300 others whose names are unknown to plaintiff, composed an association known as "S. F. Typographical Union No. 21." Certain named defendants and 500 other persons whose names are unknown to plaintiff compose an association of persons engaged in the business of printing pressmen and assistants known as the "S. F. Printing Pressmen & Assistants Union No. 24." Certain named defendants, with numerous other persons whose names are unknown to plaintiff, compose an association of persons engaged in the printing trades in the city and county of San Francisco under the name of "Franklin Printing Trades Association." The executive officers of each of these associations are also joined as defendants.

The complaint continues with allegations, in effect, as follows: That on or about March 1, 1920, plaintiff was engaged in the city and county of San Francisco in carrying on and doing business as a printer and publisher in said city and county, and had invested in its business capital in excess of \$25,000, and had built up an established trade and employed on the average more than 25 persons in said business; that in the month of March, 1920, the said association known as "Printers' Board of Trade of San Francisco" caused an agent or representative of said association to approach the managing officers of plaintiff and to demand that plaintiff become a member of said board of trade; that plaintiff, for its own good reasons, declined to join said board of trade. On January 17, 1921, plaintiff received from said board of trade a written communication, signed by the secretary thereof, inviting plaintiff to become a member of said board of trade, and reciting that the monthly dues of members would amount to \$2, plus \$1 for each employee in plaintiff's composing room and press room. Plaintiff again advised the said board of trade that it did not desire to become a member thereof.

It is alleged that on November 23, 1920, a

written agreement was entered into by and between the defendant association, "Franklin Printing Trades Association," and the association known as the "Printers' Board of Trade" (in said agreement referred to as the "Employers' Association") and the association known as the "S. F. Typographical Union No. 21." Said agreement is referred to as the "Typographical Agreement" and it is alleged that it provides, in paragraph fifth thereof, as follows:

"In order that the union may secure the adoption and carrying out by all commercial printing concerns within its jurisdiction of the scale of wages and working conditions herein specified, and have the responsibility of the employers for their observance and performance, the union requests and the employers hereby agree that the employers will admit to membership in their association all reputable printing concerns; and in consideration hereof, and of the assumption of the responsibility by the employers for any and all violations of said scale of wages and working conditions by every member of the employers, the union agrees that its members will work only for such printing concerns as are members of the employers, provided that the employers shall not arbitrarily, or for any but good cause, refuse admission to or deny retention of membership in the Employers' Association."

The complaint sets forth that during the years 1919 and 1920, the representatives of the printers' board of trade sought to induce plaintiff to join said board of trade and threatened to enforce the provisions of said Typographical Agreement above set forth and compel the members of said unions who were working for plaintiff to leave such employment. Plaintiff was also visited by representatives of the unions involved, who stated that if plaintiff did not join the association known as Printers' Board of Trade of San Francisco, the said two union associations would be compelled and would, in pursuance of paragraph 5 of said Typographical Agreement, order the withdrawal from the employ of plaintiff of all members of said two union associations. Plaintiff refused to join the printers' board of trade and the union employees left plaintiff's employ.

It is alleged that if plaintiff persists in its refusal to become a member of the printers' board of trade, the persons alleged to have quitted its employ whil "refuse to resume work and refuse to longer continue in the employ of plaintiff"; "that without the co-operation of the aforesaid quitting members of said S. F. Typographical Union No. 21, it will be impossible, within a period of three or four days, for plaintiff to continue its printing and publishing operations." It is then alleged that plaintiff has on hand important large contracts for printing and is under written contract to publish certain magazines and periodicals and that time is of the essence of such contracts, and that

by reason of the acts and things charged against the defendants, plaintiff will be prevented from carrying out said contracts, and will become liable in damages thereon.

There are also allegations to the effect that the unions involved here are members of the American Federation of Labor Unions, which controls a magazine with a wide circulation among its members and affords "a ready, convenient, powerful and effective vehicle for the dissemination of information as to persons, products and manufacturers boycotted or to be boycotted"; that "if the defendants * * * continue in the course which they have consummated and threatened of boycotting this plaintiff and advising others to boycott, plaintiff, it will result in the very great injury of plaintiff."

[1] We shall pause here in our enumeration of the allegations of the complaint so as to consider the effect of those already set forth. The Typographical Agreement, in so far as it is set forth in the complaint, is one which is perfectly legal and involves no restraint of trade. Provisions substantially the same as those pleaded herein were considered in the case of *People v. Epstein*, 102 Misc. Rep. 476, 170 N. Y. Supp. 68, 70. The agreement in that case was between the Photo-Engravers' Board of Trade of New York and members of a Photo-Engravers' Union. The reasoning of the court in that case is applicable in considering the portion of the Typographical Agreement before this court in the present case. The so-called Cartwright Act (Stats. 1907, p. 984, as amended by Stats. 1909, p. 594), upon which plaintiff relies in bringing this action, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of this act. The portion of the Typographical Agreement pleaded by plaintiff is a contract concerning labor. It is an agreement by the unions to sell their labor only to persons coming within a designated class.

[2] It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. *Parkinson v. Bldg. Trades*, 154 Cal. 581, 599, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Pierce v. Stablemen's Union*, 156 Cal. 70, 75, 103 Pac. 324. These rights may be exercised in association with others so long as they have no unlawful object in view. *Parkinson v. Building Trades*, supra, 154 Cal. at page 599, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165. Thus, where building contractors and a group of workmen made an agreement which restricted the opportunities of a contractor not a party thereto, it was said that—

Though the business of the third party was interfered with, the courts could give no re-

lief, since "the law could only make it possible for the complainant to do business in the way it chooses by compelling the defendants to do business in the way they did not choose. * * * When equal rights clash, the law cannot interfere." *National Fireproofing Co. v. Masons Bldg. Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

In the case of *Pierce v. Stablemen's Union*, 156 Cal. 75, 103 Pac. 327, it was said:

"We think that to-day no court would question the right of an organized union of employees, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a 'strike.' We think, moreover, that no court questions the right of those men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence, constitutes the primary boycott."

"The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. * * * A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is damnum absque injuria." *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 265, 94 C. C. A. 535, 541 (26 L. R. A. [N. S.] 148).

"An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action." *Bossert v. Dhuy*, 221 N. Y. 342, 359, 117 N. E. 582, 585 (Ann. Cas. 1918D, 661).

In this state, the doctrine has been announced even more broadly. In the case of *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. at p. 599, 98 Pac. 1034, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, it is said:

"In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strik-

ers—their acts being entirely lawful, their motives would be held immaterial.”

[3] In the light of the foregoing cases, we think it clear that in so far as the allegations of the complaint so far enumerated are concerned, they state no ground for either injunctive relief or for the recovery of damages.

But the complaint continues, in another section thereof, with allegations concerning the practices of the printers' board of trade. There are no allegations establishing a causal connection between the plaintiff's grievance, i. e., the withdrawal of the union printers and these averments regarding the methods of the printers' board of trade. The latter are made upon information and belief, and are substantially as follows: That said board now is and for more than three years last past has been engaged in “a combined scheme and effort to violate the laws of the state of California and of the United States of America in such case made and provided, by causing the prices of articles and services made and furnished by various members of the said Printers' Board of Trade of San Francisco, to be fixed grossly in excess of an amount that would yield to the persons making the charge and collecting said prices, a fair and reasonable profit”; that in pursuance of said scheme and effort various members composing the said printers' board of trade meet daily in the office of the said printers' board of trade in the city and county of San Francisco, and said board of trade requires that all of the new contracts and proposals for business involving an amount in excess of \$15, then under submission to members of said Printers' Board of Trade of San Francisco, be reported and submitted at such meetings, and that, thereupon, by lot or agreement tentative prices are fixed upon said new contracts and it is likewise determined which member of the printers' board of trade shall perform the services or furnish the materials contemplated by such proposals or contracts; that thereupon all of the members other than the member so decided upon refrain from bidding for the doing of said work or the furnishing of said material except in an amount above the amount so fixed. It is alleged that by reason of these facts a person seeking to have work done or materials furnished is compelled to pay the price fixed as aforesaid by said members of said printers' board of trade; that said price so fixed is arrived at through corrupt, unjust, and illegal methods as aforesaid, practiced by said Printers' Board of Trade of San Francisco, and the person desiring the work or materials believes that the price so fixed is obtained as a result of competitive bidding; that as the result of said unjust and illegal practices aforesaid, competition *between the members* of said Printers' Board of Trade of San Francisco (which Board em-

braces practically 95 per cent. of the concerns engaged in the printing trade in the city and county of San Francisco) is destroyed and rendered impossible and that said acts constitute an unjust, discriminating and unlawful restraint upon trade and commerce, both intrastate and interstate.

Appellant contends that these allegations, if proven, constitute the Printers' Board of Trade a trust within the meaning of the so-called Cartwright Act. Act 4186, General Laws of California (1915) Deering; Stats. 1907, p. 984, as amended by Stats. 1909, p. 594. Conceding, for the purposes of this opinion that this be true, the said association would, in consequence, be subject to forfeiture of its charter rights, franchises, and privileges, and to dissolution upon proceedings taken by the Attorney General or the district attorney. Section 2, Stats. 1907, p. 984. But this is not such a proceeding. This is an action by a private corporation, and, as such, is governed by the provisions of section 11 of said act. In that section it is provided that an action may be brought by “any person who shall be *injured in his business or property* by any other person or corporation * * * by reason of anything forbidden” in said act.

In the present case the plaintiff makes no allegations of any such injury or damage. The general allegation of its complaint:

“That by means of each and all of said acts done and threatened by the defendants aforesaid, respectively, as hereinbefore set forth, the trade and commerce of the plaintiff with its patrons and customers * * * has been and will continue to be forcibly suspended, and unless the relief hereinafter prayed shall be granted * * * plaintiff will lose valuable copyrights because of its inability to continue its usual operations; and that plaintiff by reason of the premises has suffered, and will suffer in an increasing degree, damages * * * in excess of \$75,000”

—is insufficient. There is no allegation of the particulars in which the plaintiff has been or will be damaged by the restraint of competition among the members of the printers' board of trade. The only damage to plaintiff which is alleged, i. e., the loss of contracts, copyrights, etc., arises from the alleged inability of plaintiff to continue its operations, due to the fact that it cannot secure union labor. This matter we have disposed of in the first part of this opinion. We consider it *damnum absque injuria*. There is no allegation of loss to plaintiff arising because of the alleged practices of the printers' board of trade in restricting competition *among its own members*. On the contrary, it is perfectly apparent that plaintiff's business could not be injured by such practice, but must be benefited thereby. If, as plaintiff alleges, 95 per cent. of the persons engaged in the printing business voluntarily form an association and restrain themselves

from competing with one another, plaintiff, being free from such restraint, has the fewer competitors with whom to contend. Indeed, plaintiff does not complain of loss or damage because of the want of competition among the members of the printers' board of trade, of which plaintiff is not a member. If plaintiff could secure union labor and continue to operate its business, the activities of the printers' board of trade in restricting competition among its own members would not injure plaintiff in the least. It is alleged that these practices have continued for three years. Apparently they have not injured plaintiff, but have probably meant to it a business opportunity. It is the withdrawal of the union labor and the consequent inability of plaintiff to operate its business in competition with the members of the printers' board of trade which is its real complaint.

[4] Plaintiff cannot maintain an action against the Printers' Board of Trade because of these alleged practices without pleading and proving special damages to his business or property by reason thereof. There are no facts alleged in the complaint showing damage to plaintiff because of said defendant's methods of doing business.

In the case of *Munter v. Eastman Kodak Co.*, 28 Cal. App. 664, 153 Pac. 739, it is said:

"While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, in a civil action for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in *Krigbaum v. Sbarbaro*, 23 Cal. App. 427, 433 [188 Pac. 364]: 'To be "injured in business or property" within the contemplation of said law, as we understand it, is where the injury has directly resulted from the fact of the existence of the trust—that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or com-

merce carried out by such trust or combination.'"

[5] Furthermore, the statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages. Section 11, Stats. 1907, p. 984, as amended Stats. 1909, p. 594. See, also, *Natl. Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

The demurrers were properly sustained; the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(57 Cal. App. 352)

LOS ANGELES SHIPBUILDING & DRY-DOCK CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 3835.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1922. Hearing Denied by Supreme Court June 12, 1922.)

1. Admiralty §10—Nature of work done test as to whether contract maritime.

In determining whether a contract be maritime, the test is, not locality, as in the case of torts, but the subject-matter of the contract, the nature of the work to be done.

2. Admiralty §11—Contract to construct vessel nonmaritime.

A contract for the construction of a vessel is nonmaritime and not within admiralty jurisdiction.

3. Admiralty §13—Marine machinist's services on uncompleted vessel lying in navigable waters not of maritime nature.

Where the general employment or activities of a marine machinist on an uncompleted vessel lying in navigable waters at the time of his injury had no direct relation to navigation or commerce, the services were not of a maritime nature.

4. Admiralty §20—State cannot abolish rules of recovery for injury in maritime contract.

Where work is performed under a maritime contract, no state has power to abolish maritime rules concerning the measure of recovery, and substitute therefor indemnity under a workmen's compensation act.

5. Admiralty §20—In nonmaritime contracts obligation to compensate employee for injury attaches.

Where a contract of employment is nonmaritime and the work is not of a maritime character, Workmen's Compensation Act fastens upon the relation of employer and employee the obligation to compensate for injuries received in the course of employment.

6. Master and servant — 346—Compensation Act imposes quasi ex contractu liability.

Liability imposed by the Workmen's Compensation Act may be described as quasi ex contractu; the law attaching, as an incident, to the relation of master and servant an obligation to compensate for injuries received in the course of employment.

Application of the Los Angeles Shipbuilding & Drydock Company against the Industrial Accident Commission of the State of California and another for certiorari to review an order awarding compensation for injuries. Award affirmed.

Louis M. Lissner, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

FINLAYSON, P. J. This is a proceeding in certiorari to review an award of the Industrial Accident Commission in favor of one M. Toutain, a marine machinist who was injured while installing machinery in a vessel that was being constructed by Toutain's employer, the petitioner here. The vessel had never been in commission. It was an incomplete structure at the time of the injuries. It had, however, been launched and had been drawn up beside a dock for completion, where it was afloat and riding the navigable waters of Los Angeles Harbor at the time of the accident. Claiming that the commission's award was based upon a maritime tort, petitioner contends that the respective rights and duties of the parties must be determined and controlled by the maritime law, and that therefore the application of the California Workmen's Compensation Act would be an unauthorized invasion of the admiralty jurisdiction of the federal courts.

By article 3, section 2, of the Constitution of the United States the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction."

The Judicial Code of the United States (40 Stats. at L. 395), by sections 24 and 256 (U. S. Comp. St. §§ 991 [3], 1233), vests exclusive jurisdiction in the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state." The concluding part of this saving clause, that which purports to save to claimants the rights and remedies afforded by a state workmen's compensation act, was added to the federal Judicial Code on October 6, 1917, by an amendment commonly known as the Johnson Amendment. In *Southern Pacific*

Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and in *Clyde Steamship Co. v. Walker*, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116, it was decided that a state compulsory workmen's compensation act is opposed to the federal Constitution in so far as its terms apply to maritime injuries received in the performance of work of a maritime nature, performed in the course of employment under a maritime contract, and in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, it was decided that, in passing the Johnson Amendment, Congress transcended its constitutional power to legislate concerning rights and liabilities which are within the maritime jurisdiction, and that therefore the clause saving to claimants the rights and remedies under the Workmen's Compensation Law of any state is ineffective and void in so far as its operation might interfere with the characteristic harmony and uniformity of the law maritime in its interstate and international relations.

[1-3] It is earnestly urged by petitioner that the case at bar is within the doctrine of these decisions of the United States Supreme Court. In each of those cases the injury was received in the course of an employment under a maritime contract or while the injured servant was performing work of an essentially maritime character. In the instant case the injured employee was not engaged in the performance of a maritime contract, nor were his services of a maritime nature. In determining whether a contract be maritime the test is, not locality, as in the case of torts, but the subject-matter of the contract, the nature of the work to be done. *Doey v. Clarence P. Howland Co.*, 224 N. Y. 30, 120 N. E. 53. A contract for the construction of a vessel is nonmaritime and not within the admiralty jurisdiction. *Thames Towboat Co. v. Francis McDonald*, 254 U. S. 242, 41 Sup. Ct. 65, 65 L. Ed. 245; *Grant Smith-Porter Ship Co. v. Rhode*, 257 U. S. —, 42 Sup. Ct. 157, 66 L. Ed. —. Although the uncompleted vessel upon which he was hurt was lying in navigable waters, Toutain's services were not of a maritime nature. Neither his general employment nor his activities at the time had any direct relation to navigation or commerce. *Grant Smith-Porter Ship Co. v. Rhode*, supra.

Notwithstanding Toutain's employment was nonmaritime, petitioner, assuming that the injury was the result of a maritime tort, argues that, because courts of admiralty have jurisdiction of claims for damages growing out of torts committed on navigable waters, it would destroy that uniformity which the federal Constitution was designed to accomplish in matters maritime if our state

Workmen's Compensation Law (St. 1913, p. 279, as amended by St. 1917, p. 831) were applied to such an injury. We are unable to agree with this contention. In our opinion this case is controlled by the recent decision of the United States Supreme Court in *Grant, etc., Ship Co. v. Rhode*, supra, a case wherein it was alleged that the employee received his injuries as the result of a maritime tort, it being alleged that he was hurt by reason of his employer's negligence in constructing and maintaining a faulty scaffolding on a vessel afloat on navigable waters. In that case *Rhode*, as libellant, brought a suit on the admiralty side of the United States District Court to recover damages for injuries sustained by him while at work as a carpenter or joiner on a partially completed vessel lying at a dock in the Willamette river in the state of Oregon. The uncompleted vessel was lying in navigable waters at the time of the injuries. Negligence of the employer in the construction and maintenance of the scaffolding was alleged as ground for the recovery of damages. It was held that, though the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel lying on navigable waters within a state, nevertheless the exclusive features of the Oregon Workmen's Compensation Act are applicable to such a case, and that therefore the state statute abrogated the right to recover damages in an admiralty court which otherwise would have existed. In other words, it was held, in effect that where the work is nonmaritime and is done pursuant to a nonmaritime contract, the rights and liabilities of the parties have no direct relation to navigation, and need not be measured by those rules of the sea the uniform operation of which is essential to any general system of maritime law; and that therefore in such cases, and notwithstanding that the work is done on navigable waters, the remedy afforded by a state workmen's compensation act is the exclusive remedy, even though the injury may have been the result of the employer's maritime tort.

Because the Oregon Workmen's Compensation Act (Laws 1913, p. 188) is an elective statute, giving to both employers and workmen the option to except or reject its provisions, whereas our statute is compulsory, petitioner claims that the principle of the *Rhode* Case is not applicable here. With this contention we find ourselves unable to agree. In the first place, we fail to see any ground for the assumption that the award under review here was based upon a tort, maritime or nonmaritime. Nowhere in the record is there the slightest hint that the injury was the result of any negligence or fault. To entitle *Toutain* to the compensation provided for by our Workmen's Compensation Act it was not necessary that there

should be any wrongful act or omission. That act allows compensation for all injuries arising out of employment irrespective of negligence or fault. The payments provided for by the act are founded simply upon the injury, and are entirely disconnected with any theory of fault on the part of the employer or right on the part of the employee established by law prior to the passage of the act, save in instances of "serious and willful misconduct." The basic principle of the act is that the cost of injuries incidental to modern industry should be treated as a part of the cost of production. That purpose is effected without the creation of a delictual liability. *Doey v. Clarence, etc., Co.*, supra; *Berton v. Dry Dock Co. (D. C.)* 219 Fed. 765. See, also, *Quong Ham Wah Co. v. Ind. Acc. Comm.*, 184 Cal. 35, 192 Pac. 1021, 12 A. L. R. 1190.

[4, 5] But as we understand the doctrine of the *Rhode* Case, it matters not whether the injury be the result of a tort—a delictual omission or commission—or whether it happened without any fault on the part of the employer. Nor is it a matter of moment that the state Compensation Act be either elective or compulsory. Where, as in the *Jensen, Walker, and Stewart* Cases, the servant is injured while performing work of a maritime nature, or while employed under a maritime contract, the parties must be deemed to have contracted with each other in contemplation of the general system of maritime law and with the knowledge that their respective rights and liabilities would be measured and defined by that law. And since it was the design of the federal Constitution to preserve a proper harmony and uniformity in the maritime law, it follows that where work is performed under a maritime contract no state has power to abolish the well-recognized maritime rules concerning the measure of recovery and substitute therefor the indemnity that is afforded by a workmen's compensation act. But where, as in the case before us, the contract of employment is nonmaritime, and the work is not of a maritime character, the Workmen's Compensation Law fastens upon the relation of employer and employee the obligation to compensate for injuries received in the course of employment. *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642; *Quong Ham Wah Co. v. Ind. Acc. Comm.*, supra. The contract being nonmaritime, the parties must be deemed to have entered into it with the knowledge that the law has attached to their relation of master and servant an obligation to pay the statutory compensation for any injury which may be received in the course of the employment. In *Doey v. Clarence, etc., Co.*, supra, the New York Court of Appeals, speaking of the Workmen's Compensation Law of that state, says that an award

under that law is made "upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract."

[8] It is true that in no strict sense does the obligation of the employer to compensate the employee for injuries spring from the contract of employment as a contractual obligation. Ours is a compulsory statute, and the proposition that a compulsory statute is a contract has been definitely repudiated in this state. *North Alaska Salmon Co. v. Pillsbury*, supra. The liability imposed by the statute is in a class by itself. For want of a better term it may be described as quasi ex contractu. *Quong Ham Wah Co. v. Ind. Acc. Comm.*, supra. But though the parties do not contract to create the rights and liabilities which are prescribed by the statute, nevertheless, if their contract be nonmaritime, as in the instant case, there is no reason why it may not be deemed to have been entered into with reference to the state statute—with a knowledge that, to the relation of master and servant which is created by the contract, the law attaches, as an incident to that status, an obligation to compensate for injuries received in the course of the employment. This being so, the following excerpt from the *Rhode Case* is applicable here:

"In each of them [the *Jensen*, *Stewart*, and other decisions of the federal Supreme Court] the employment or contract was maritime in nature, and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

The award is affirmed.

We concur: WORKS, J.; CRAIG, J.

(57 Cal. App. 792)

LOS ANGELES SHIPBUILDING & DRY-DOCK CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 3824.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1922. Hearing Denied by Supreme Court June 12, 1922.)

Application of the Los Angeles Shipbuilding & Drydock Company against the Industrial Accident Commission of the state of California and another for certiorari to review an order awarding compensation for injuries. Award affirmed.

Louis M. Lissner, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

FINLAYSON, P. J. This is a proceeding in certiorari to review the award of the Industrial Accident Commission in favor of one J. M. Bush. The facts are similar to those stated in the opinion filed this day in *Los Angeles Shipbuilding & Drydock Company v. Industrial Accident Commission et al.* (Cal. App. No. 3835) 207 Pac. 417. The opinion in that case disposes of the fundamental questions involved here and the award of the commission is therefore affirmed.

We concur: WORKS, J.; CRAIG, J.

(57 Cal. App. 379)

ROACH BROS. & CO. v. LACTEIN FOOD CO. (Civ. 2426.)

(District Court of Appeal, Third District, California. April 18, 1922. Hearing Denied by Supreme Court June 15, 1922.)

1. Pleading \S 248(4)—Amendments to complaint by buyer of goods more fully explaining contract held not to change cause of action.

In an action by a buyer of goods against a seller on a contract, where it would have been proper and competent to have proved all the terms of the contract under the general issue as framed by the pleadings originally filed, amendments to the complaint based upon the contract, and containing averments which more elaborately explained the terms of the contract, and specifically referring to matters involved therein, which were not so referred to in the original complaint, did not change the cause of action or introduce new issues.

2. Pleading \S 250—Damages asked in amended complaint may be larger than those asked in original complaint.

A party suing for damages for any tort may ask for a larger amount of damages in his amended complaint than in the original complaint.

3. Sales \S 81(5)—Refusal to supply goods contracted for held a breach of contract.

Where a contract for the sale of goods called for the sale of all the seller's surplus goods in such amounts as the buyer might require for the space of a year, the refusal of the seller to supply the buyer with goods in the required quantity on demand, when the seller had such a quantity of goods, was a breach of the contract.

4. Sales \S 151—Letter held to be a repudiation in toto of contract of sale.

Where a contract called for the sale of all a seller's surplus goods of a certain kind that a buyer should order for one year, a letter from the seller to the buyer, written after the buyer had sent a second order for goods, stating that the seller would not allow the buyer to sell the goods in certain territory according

to their first contract, was a repudiation in toto of the contract, and not merely a refusal to supply the goods called for in the second order.

5. Sales \Leftrightarrow 418(7)—Loss of profits on an article sold, but not delivered, not recoverable where no allegation they could not be bought in open market.

Under Civ. Code, §§ 3300, 3308, as to damages for breach of contract, and section 3354, providing that the value of property to a buyer or owner, deprived of its possession, is the price at which he might have bought an equivalent thing in the market, in buyer's action for seller's refusal to deliver, in which plaintiff did not allege that the goods bought could not be purchased in the open market, he could not recover the amount of profits lost by him through such default.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Roach Bros. & Co., a corporation, against the Lactein Food Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Dennett & Zion, of Modesto, and H. A. Stout, of Oakland, for appellant.

E. B. Mering, of San Francisco, and T. B. Scott, of Modesto, for respondent.

HART, J. This is an action for damages for the breach of a certain contract, alleged to have been entered into between the plaintiff and the defendant.

The defendant was, for a long time prior to and at the time of the making of the contract declared upon in the complaint, engaged in the business of manufacturing condensed buttermilk, known as "Lactein," or "Hen and Hog Buttermilk," in the city of Modesto, Stanislaus county. It was alleged in the complaint as originally filed that, on the 30th day of April, 1919, said plaintiff and said defendant entered into an agreement which was to continue one year from said date, and whereby the defendant granted to said plaintiff the exclusive option to purchase all the surplus "Hen and Hog Buttermilk" in certain designated amounts and sizes, and for certain prices. It was alleged in said complaint that said agreement was in writing, and was duly executed and delivered by said parties; that thereafter, pursuant to said agreement, the defendant delivered to the plaintiff one carload of said Lactein, and that plaintiff accepted and paid for the same; that thereafter plaintiff demanded that said defendant deliver said Lactein according to the terms of said agreement, but that defendant refused to deliver said Lactein, and "further refused to be bound by said agreement, and all without just cause or reason." There was no direct allegation in the complaint, in its original draft, stating the number of carloads of said Lactein with which the defendant agreed to supply the

plaintiff, notwithstanding which omission said complaint further alleged that, "Had said defendant delivered said 19 carloads of said Lactein or Hen and Hog Buttermilk, the value of said Lactein or Hen and Hog Buttermilk to the plaintiff herein would have been \$27,360; that, by reason of said refusal of said defendant to carry out said contract, said plaintiff has been damaged in the sum of \$4,408, the excess of said value over said purchase price," for which sum judgment is prayed.

The defendant, answering the complaint, and after certain formal denials, admitted that the contract referred to in the complaint was entered into between the parties on the day therein named, and that under said contract the defendant was to furnish said plaintiff for a period of one year from the date of said agreement Hen and Hog Buttermilk, at the prices set forth in the complaint, on the condition, however, that said defendant had the product on hand to sell to the said plaintiff; admitted delivering one carload of Hen and Hog Buttermilk to the plaintiff, and that the plaintiff accepted and paid for the same; admitted that the plaintiff demanded another carload of Hen and Hog Buttermilk, but denied that plaintiff demanded any Lactein, and admitted that defendant refused to deliver said material, giving as the reason therefor that the plaintiff violated the terms of the contract, and so surrendered its rights under the same, as follows: That among the terms of said agreement the retail price thereof was to be \$15.10 for 52-gallon barrels, but that plaintiff sold said material at prices lower than the prices so agreed upon, and that it did "actually sell one carload of said Hen and Hog Buttermilk at a price so far below the prices set forth in said contract that the defendant could not deliver the same without great loss"; that said agreement provided that said plaintiff was not to sell or deliver said material to any person or firm purchasing Lactein from the said defendant, but "after the delivery of said carload said defendant sold a carload of said Hen and Hog Buttermilk to the agent (of defendant) for the sale of Lactein in the county of Sacramento, state of California," in violation of the terms of said agreement.

Plaintiff later filed an amendment to the complaint, alleging, among other things, that the defendant was organized as a corporation on the 1st day of March, 1918, by M. P. Long, E. H. Zion, and J. R. Gilbert; that the capital stock of said corporation was 2,500 shares, of the par value of \$10 each; that 2,410 shares of said stock were issued, of which 1,007 were issued to J. R. Gilbert; that said Gilbert on the day of the organization of said corporation sold and transferred to certain persons in Modesto 407 shares of said stock at the price of \$10 per share;

that at all times herein mentioned the market value of said stock was \$10 per share; that said Lactein Company, on the 30th day of April, 1919, had on hand a surplus of about 600 barrels of Lactein or Hen and Hog Buttermilk, "and were then accumulating said Lactein at the rate of 250 barrels per month, all of which they were unable to dispose of"; that on said date W. B. Gilbert was the president of the plaintiff, and that "said defendant was anxious to secure the assistance of said plaintiff to dispose of said surplus Lactein, and said plaintiff was desirous of securing a contract with said defendant for the sale of said Lactein."

It was then alleged that the parties on the 30th day of April, 1919, entered into a verbal contract whereby the defendant granted to plaintiff an exclusive option to purchase all the surplus Hen and Hog Buttermilk for the prices and on the terms stated in the complaint as originally drawn. It further alleged in said amendment that plaintiff "has drawn up and annexed hereto, marked 'Exhibit A', the verbal contract as made by the parties, and as intended by the parties. The same is made a part hereof." It was alleged that the prices designated were to be for carload lots of 30,000 pounds minimum capacity, and the purchase price was to be paid in cash within 10 days of date of shipment, less 2 per cent. discount for cash; that defendant further "agreed to secure the entire present output of buttermilk and other milk products of the Newman Creamery, and convert the same into Hen and Hog Buttermilk, and hold the same subject to the above option"; that it was expressly understood and agreed and a part of the consideration of the agreement that "said defendant should purchase and pay for at least 20 carloads of said product during the first year, and that all the covenants and provisions therein contained were mutual, and the promises and agreements of the one party are in consideration of the promises and agreements of the other party herein."

It was further alleged that, at the time of the making of said contract, "L. L. Dennett was the regular counsel of the defendants and was in their employ; that at said time said L. L. Dennett was not the counsel for the plaintiff herein, and was not in its employ; that in the making of said contract W. B. Gilbert acted as representative of the plaintiff; that said L. L. Dennett was not in the employ of W. B. Gilbert, nor was he his counsel; that it was mutually agreed between the parties that said L. L. Dennett should reduce said contract to writing; that thereafter said L. L. Dennett drew up an agreement which was executed by the plaintiff and the defendant; that a copy of said agreement is hereto annexed, marked 'Exhibit B,' and is made a part of the amendment to the complaint." It was further alleged that plaintiff agreed to procure for

said defendant the 600 shares of stock of the Lactein Food Company then held by said J. R. Gilbert, and cause the same to be sold and transferred to said defendant for the sum of \$3,500. It was also alleged that the Hen and Hog Buttermilk to be furnished by the plaintiff to the defendant should be equal in every respect to the product then and thereafter made by said defendant, and sold under the trade name of "Lactein," and also that said product should be sold by said plaintiff under the name of "Hen and Hog Buttermilk," and that the business was to be carried on by plaintiff with buyers under the name of "Dairy Products Company." It was alleged that said contract executed by the parties failed to express the actual agreement of the parties in the following particulars: First, it fails to set forth the surplus milk that plaintiff was to receive; second, it fails to grant unto plaintiff the option to purchase any milk; third, it fails to mention the covenant of the defendant to secure the milk from the Newman Creamery and subject the same to the option of the plaintiff; fourth, it fails to set forth the covenant of the plaintiff to secure for the defendant the stock in the Lactein Food Company.

The allegations in the complaint as originally drafted, to the effect that the defendant, in pursuance of said contract, delivered to plaintiff and plaintiff accepted and paid for one carload of Lactein, and that on or about the 12th day of May, 1919, plaintiff demanded one carload of said Lactein, and that defendant refused to deliver the same, and "then and there gave notice that it would not perform said contract nor be bound by the same," were repeated in the amendment to the complaint. It is alleged that plaintiff "has at all times been ready, willing, and able to accept and pay for said Lactein according to the terms of said contract." It is further alleged (paragraph 10) that, "pursuant to the terms of said verbal contract, this plaintiff did, on or about the 30th day of April, 1919, cause to be transferred to defendant said 600 shares of stock in said defendant company, and said company paid therefor said \$3,500, according to the terms of said verbal contract."

The prayer of the complaint as amended prays for "judgment of the court that said contract be reformed so as to conform to the form attached to this amendment to the complaint, and for such and other further relief as, considering the premises, is meet and proper, and for costs."

A second amendment to the complaint was filed, in which it was alleged, among other things, after formally realleging paragraphs 1, 2, 3, 4, 5, 9, and 10 of the amendment to the complaint:

"Paragraph 3. That the average carload according to said contract and as demanded by the market was made up as follows: 80 52-gal-

lon barrels or not less than 40 52-gallon barrels, 20 25-gallon barrels, 30 10-gallon barrels, and 50 5-gallon barrels; that under the terms of said contract said defendant could have produced for this plaintiff 100 carloads of the above average of Lactein during said first year of said contract and plaintiff could have disposed of the whole thereof; that, according to the terms of said contract, the amount that would have been due and payable to defendant for said 100 carloads of Lactein would have been \$120,800; that the value of said 100 carloads of Lactein to this plaintiff would have been \$144,000.

"Paragraph 4. That by reason of said refusal of said defendant to carry out said contract said plaintiff has been damaged in the sum of \$23,200, the excess of said value over said purchase price."

Judgment is asked for the last stated amount. The defendant demurred to the amendment and second amendment to the complaint and moved to strike out certain averments contained therein, the demurrers being overruled, and the motions denied. Thereupon it answered the allegations of said amendments, embodying in the answers denials and admissions contained in the answers to the complaint as originally filed, and meeting such other new matter as the second amendment to the complaint contained either by way of denial, admission, or special defense.

We have presented above an extended statement of the averments of the several pleadings filed by the plaintiff for two particular reasons, to wit: First, because therein the terms of the contract, for the breach of which the plaintiff brought this action, are quite fully stated, thereby making it unnecessary to reproduce the contract itself herein; and, second, because it is claimed, as we shall later see, that the effect of the amendments to the complaint was to state a new and different cause of action, based upon an entirely different contract from that pleaded in the complaint as originally filed.

The court, among other things, found that paragraph 5 of the amendment to the complaint does not express the terms of the agreement, but that the terms of the agreement as actually made by the parties are set forth in the contract designated as "Exhibit B," and made a part of the amendment to the complaint; that, if the defendant had delivered 19 carloads, as provided by the terms of said contract, there would have been due and unpaid the defendant the sum of \$18,401.50; that the value of said 19 carloads of Lactein to the plaintiff would have been \$22,201.50; that by the refusal of defendant to deliver said 19 carloads of Lactein plaintiff has been damaged in the sum of \$3,800; that the allegations of paragraph 7 of the amendment to the complaint, to the effect that the contract executed by the parties fails to express their actual agreement in the particulars

above indicated, are untrue; that paragraph 8, alleging certain prices which the plaintiff agreed to pay per barrel for said Lactein, the cost of Lactein to the defendant, the net profit to the defendant by the sale of the Lactein to the plaintiff under the contract, and that "the surplus of the Modesto plant was 250 barrels per month, and the production in addition to this surplus after the contract with the Newman Creamery Company was made, would give an additional surplus of 600 barrels per month," is untrue; that paragraph 10 of the answer to the complaint, as originally filed alleging that the refusal of defendant to deliver said material to said plaintiff was due to certain breaches of the contract by the plaintiff, is untrue. As to the second amendment to the complaint, the court finds that the allegation of paragraph 2, to the effect that, "by the judgment of this court in the amendment to the complaint in this action, said court has reformed said contract, and declared the contract set forth herein to be the reformed contract of the said parties," is untrue; that paragraphs 3 and 4 are true. As conclusions of law the court declared that the written contract annexed to the complaint, and marked "Exhibit B," "is the true contract executed by the parties; that by said contract the plaintiff was bound to receive 20 carloads of Hen and Hog Buttermilk, and also the defendant was bound to furnish the same; that defendant furnished one car and refused to furnish more, and that, by reason of said refusal, plaintiff has been damaged in the sum of \$3,800."

Judgment was entered accordingly, and from said judgment the defendant prosecutes this appeal, supporting the same by a record prepared according to the alternative method.

The defendant urges six specific and different points, any one of which, it is claimed, will, if found tenable, require a reversal of the judgment.

Our conclusion is that the judgment must be reversed, for the reason that the court, as a basis for the relief awarded the plaintiff for the alleged breach of the contract, adopted an erroneous measure of damages. We are, though, of the opinion that the other points, in so far as they may be regarded as affecting or impairing the validity of the judgment, are devoid of substantial merit; yet, in view of a new trial, we think that two of these should be briefly noticed herein, viz.: First, that a new and different cause of action from that stated in the complaint as originally filed is set up in the amendments to the complaint; second, that there was no breach of the agreement for the reason that, as is the claim, there was no time specified at which the material should be furnished to plaintiff, and that, therefore, it was within the discretion of the defendant to furnish the material at any time during the year that the contract was to exist.

[1] 1. The cause of action stated in the original complaint was based upon a breach of a contract whereby the defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant a certain amount of Hen and Hog Buttermilk during the year commencing with the 30th day of April, 1919, at certain specified prices. The amendments to the complaint were based upon said contract, although the averments thereof more elaborately explain the terms of the convention. This, however, did not have the effect of changing the cause of action or of introducing issues into the case which were not there by virtue of the complaint as originally filed. It is true that the amendments to the complaint specifically referred to matters involved in the contract which were not so referred to in the original complaint. But it would have been perfectly proper and competent or within the issues to have proved all the terms of the contract, under the general issue as framed by the pleadings as originally filed, and this would, of course, have included the additional averments set forth in the amendment to the complaint as to the terms of the contract. The amendments to the complaint, as we have seen, set out in substance the terms of the contract as found by the court and admitted by the defendant to have been the contract which was entered into between it and the plaintiff.

[2] It is, however, true that the averments of the second amended complaint call and the prayer prays for a larger amount of damages than was asked for in the latter pleading. We do not know of any rule of law or any reason against the right of a party suing for damages for any tort to amend his complaint so as to authorize a judgment for a larger amount of damages for such tort than that which was asked for in the complaint as originally filed, if the evidence warranted it. Moreover, it is obvious that the defendant was not prejudiced by a demand for a larger amount of damages than that asked for in the complaint as originally filed, even if the allowance of said amendment so far as it concerned the amount of damages might be said to involve error, since the amount of damages awarded by the court was far below the sum prayed for in the amendments and even below the amount asked in the original complaint. *Stohlman v. Martin*, 28 Cal. App. 338, 347, 152 Pac. 319.

[3, 4] 2. There is nothing in the point that there was no breach of the contract, because, as appellant contends, it had an entire year within which to perform, or at the very least a reasonable time to perform after demand. The contract is for the sale and purchase of a commercial commodity, and a fair and reasonable construction thereof is that the defendant was to furnish the Lactein to

the plaintiff whenever the latter should demand it, provided, of course, that the defendant had on hand such a supply of the article as the plaintiff might require or call for. In other words, we do not think that the defendant was at liberty under the contract to refuse to supply the plaintiff with Lactein in the required quantity at any reasonable time at which the former might demand it. In this connection it is further contended that, if the defendant was in default at all, it was merely for its refusal to supply the plaintiff on its second demand or order for Lactein. The record does not support this contention. To the contrary, it appears from the evidence that the defendant, through its general manager and president, addressed a letter, under date of July 7, 1919, to the plaintiff or its agent, Mr. Gilbert, stating, among other things:

"It will be impossible for us to allow you to sell H. and H. (Hen and Hog Buttermilk) in this territory, as per our first contract; we wish to state that we will make a contract with you turning over the state of Arizona to you and allowing you a commission on any H. and H. sold in this territory, although we intend, if possible, to discontinue the sale of H. and H. entirely."

This letter, it will be observed, was after the plaintiff had made its second demand upon the defendant for Lactein. The trial court construed it to be a repudiation in toto of the contract, and so found, and we think the letter sufficiently supports the court's finding in that particular.

[5] We now return to the proposition that the court erred, to the prejudice of the defendant, in adopting as the measure of damages in this case the profits which the plaintiff would probably have derived from the material mentioned in the contract had the same been supplied to it by the defendant according to the terms of the agreement. Sec. 3300, Civ. Code. Said section provides:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

We are persuaded that the measure of damages in this case, as the record stands before us, is that prescribed by sections 3308 and 3354 of the Civil Code. The first-named section reads:

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled."

Section 3354 provides:

"In estimating damages, except as provided by sections 3355 and 3356, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

The terms of the contract which the court found that the parties actually entered into are substantially set forth in the amendment to the complaint, the averments of which are in substance reproduced hereinabove. The specific provisions of the contract are that the party of the first part "is the manufacturer of a condensed buttermilk known as Lactein or Hen and Hog Buttermilk * * * and desires to sell said product and said party of the second part desires to purchase said product under the terms and conditions hereinafter specified; that it is agreed by and between the parties hereto, in consideration of the conditions and covenants and of the payment of \$1 each to the other, receipt whereof is hereby acknowledged, that the said party of the first part will sell to the said party of the second part," the article mentioned at the prices specified; that "the purchase price is to be paid in cash within ten days from date of shipment, less 2 per cent. discount for cash." Thus it will be seen that the contract is plainly one for the sale and purchase of the article therein referred to. There is nothing in the contract to indicate that the matter of profits to be derived by the plaintiff from the sale of the article entered into the agreement as a consideration or as an element thereof.

These are cases of contracts for the sale and purchase of certain commodities in which the measure of damages adopted by the court in this case would be applicable. These are where the circumstances are such that the vendee cannot go into the open market and supply himself with the same article, in which case the loss of profits would be a just element in the admeasurement of damages. *McKay v. Riley*, 65 Cal. 623, 4 Pac. 667; *National, etc., Mfg. Co. v. Producers' R. Co.*, 169 Cal. 740, 745, 147 Pac. 963, and cases therein cited. The case of *Parkinson v. Langdon*, 36 Cal. App. 80, 171 Pac. 710, like the cases just cited, is one in which profits entered into the contract as a part of the consideration therefor. There is no allegation in any of the pleadings filed by the plaintiff that the latter, after the breach, was unable to purchase Hen and Hog Buttermilk in the open market; nor, so far as we are advised by the record, is there any evidence therein tending to show that Hen and Hog

Buttermilk, such as was manufactured by the defendant, could not be purchased in the open market. The only testimony upon the question of damages was that given by W. B. Gilbert, who testified as to the amount of profits lost by the plaintiff by reason of the failure of the defendant to supply the former with the article according to the terms of the agreement. This is the only testimony to which counsel for the plaintiff refers in support of his contention that the amount of damages found by the court as having been suffered by the plaintiff for the breach of the contract is sufficiently buttressed, evidentially, and from this we have the right to conclude that there is no other testimony in the case upon the question of damages. The finding of the court upon the question of damages is in accord with this testimony, and is based thereon. This testimony was, under the circumstances of this case as disclosed by the record, clearly incompetent, from which proposition it necessarily follows that there is in the record no basis for a proper or legal admeasurement of damages in this case.

The judgment is reversed, and the cause remanded.

We concur: FINCH, P. J.; BURNETT, J.

(28 N. M. 137)

MANN v. KIDDO et al. (No. 2654.)

(Supreme Court of New Mexico. May 23, 1922.)

(Syllabus by the Court.)

Taxation §734(1)—Tax sales can be attacked only because land was not subject to taxation, or because taxes were paid.

Tax sales made under the provisions of chapter 22, Laws 1899, may be attacked only on the ground that the land was not subject to taxation, or that the taxes have been paid. *Chisholm v. Bujac*, 27 N. M. —, 202 Pac. 126, followed.

Appeal from District Court, Eddy County; Brice, Judge.

Action by Harrison Mann against Charles Kiddo and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. B. Atkeson, of Artesia, for appellants.
E. P. Bujac and J. M. Dillard, both of Carlsbad, for appellee.

DAVIS, J. This is a suit to quiet title to certain lands, the complaint being in the usual form. Appellees denied plaintiff's title, and attacked the validity of a tax deed on which it was based.

The principal defects claimed in the proceedings were that the warrant for the collection of taxes did not bear a seal; that no sale record was kept; that no notice of sale

was posted at the courthouse door; and that no notation was made on the assessment roll that the property had been sold to the county.

In *Chisholm v. Bujac*, 27 N. M. —, 202 Pac. 126, this court held that tax sales made under the provisions of chapter 22, Laws 1899, may be attacked only on the ground that the land was not subject to taxation, or that the taxes had been paid, and that the curative provisions of that law continue in effect as to sales made under it, although that law has been repealed. That case is decisive here.

The judgment of the trial court will be affirmed, and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(35 Idaho, 470)

PETERSON v. PETERSON et al. (No. 3695.)

(Supreme Court of Idaho. May 27, 1922.)

1. Husband and wife \S 265—Wife's interest in community property is a vested one, and is the same as that of her husband.

The interest of a wife in the community property is a vested interest, and as to degree, quality, nature, and extent is the same as that of her husband.

2. Divorce \S 330—Wife's obtaining divorce in foreign jurisdiction does not divest her of her interest in the community property.

The dissolution of a marital community, caused by the wife obtaining a divorce in a foreign jurisdiction, cannot divest her of her interest in the community property, where the validity of such divorce proceedings is not challenged by the husband in the proceedings afterward brought by her to establish her interest in such community property.

3. Divorce \S 328—The Idaho courts are not bound to recognize the validity of a divorce granted in another state on constructive service to a spouse abandoning the other in Idaho.

Where either husband or wife abandons the other, and goes to a foreign jurisdiction, and establishes a residence therein, and obtains a divorce from the other, by constructive service, the courts of this state are not bound to recognize the validity of such divorce proceedings, under the "full faith and credit" clause of the federal Constitution.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by Anna M. Peterson against Albert O. Peterson and another to quiet title. Judgment for plaintiff, and defendants appeal. Affirmed.

P. E. Cavaney and James S. Bogart, both of Boise, for appellants.

G. W. Lamson, of Nampa, for respondent.

LEE, J. Appellant and respondent intermarried in 1904, and were thereafter husband and wife until September 26, 1916, when respondent, who had left her husband some three years before and taken up her residence in the state of Washington, secured a divorce from him in the courts of that state, upon constructive service of summons. During the marital relation, appellant filed a homestead entry upon the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 24, township 2 N., Range 2 W. B. M. This husband and wife occupied these premises as their home during the period they were required to live upon the same in order to secure patent, and until the wife took up her residence in the state of Washington, so that the property in question was community property at the time respondent secured her divorce and thereby dissolved the marital community. The decree of divorce was limited to a dissolution of the marriage relation, and did not attempt to adjust any property rights of the parties. Respondent brings this action against her former husband to quiet title in her to an undivided half interest in said homestead, and for an accounting of the personal property and partition of said real estate. Appellant demurred generally and specially, and moved to strike certain parts of the complaint, and, all of said pleas having been overruled, he answered, admitting the marital relation, that said property described in the complaint had been acquired as therein alleged, and that the same was community property, but denied all of the allegations relating to his failure to support respondent while she was his wife, and alleged by way of cross-complaint that she deserted and abandoned him and said homestead, and departed from the state without cause or reason therefor, and procured said divorce in the state of Washington without his knowledge or consent, he never appearing in said action, nor authorizing any appearance on his behalf, and prayed that respondent should be adjudged to have no right, title, or interest in or to said premises.

The cause was tried to the court, who found generally for the respondent as to the material allegations of her complaint; that said premises were acquired under the homestead law by the joint effort and residence thereon of both of them during their four years of joint occupancy; that she made and had recorded her declaration of homestead upon the same; that by reason of her failing health and destitute circumstances she left the state of Idaho and went to friends in Washington, where she procured a divorce, and had not since returned; that after she left said homestead appellant had sold all of their community personal property, and had received certain rentals for the land during the years following her absence, in all

amounting to \$739.43—but also found that the husband had discharged a mortgage of \$600 against said real estate, and as a conclusion held that from the time respondent secured said divorce appellant held an undivided interest in said premises in trust for her, and that she was also entitled to receive from the proceeds of the sale of the personal property and the rents and proceeds of said real estate during said time \$576, less credit for one-half the amount paid by appellant to discharge said mortgage, including interest, and that she was the owner in fee and entitled to the possession of an undivided one-half interest in and to said premises, and a decree was entered in accordance therewith, from which this appeal is taken.

[1] The question here presented for determination is as to whether or not a married woman may remove to a foreign jurisdiction and invoke the power of the courts of such state to dissolve the marital community, upon constructive service of summons, and there after return to this state and through its courts assert a right to her half of the community property. In *Bedal v. Sake*, 10 Idaho, 270, 77 Pac. 638, 66 L. R. A. 60, this court held that one who voluntarily leaves this jurisdiction and the domicile and community property located in this state, and obtains a decree of divorce in a foreign jurisdiction, cannot maintain an independent action thereafter in this jurisdiction for a division of the community property. This would appear to be decisive of the question presented by the instant case, unless the law pertaining to the interest of a wife has been modified since that decision was rendered in 1904, or unless the court now departs from the doctrine announced in that case.

R. S. § 2505, at the time of the *Bedal-Sake* decision, supra, gave the husband the management and control of the community property, with the same absolute power of disposition, other than testamentary, as he had of his separate property, except as to that part of the community property used as a homestead by the husband and wife. This was modified by Laws 1913, p. 425, by providing that the husband could not sell, convey, or incumber any of the community real estate, unless the wife joined with him in executing the deed or other instrument of conveyance. A further amendment was made by Laws 1915, p. 187, by taking from the husband's control the earnings of the wife for her personal services, and the rents and profits of her separate estate. This section is now C. S. § 4666, and has not since been changed.

R. S. § 5713, provided that, upon the death of the husband, one half of the community property, subject to the community debts, should go to the surviving wife, and the other half was subject to his testamentary disposition; in the absence of such testamentary

disposition, it was distributed as the separate property of the husband. This was amended by Laws 1907, p. 346, providing that, upon the death of either husband or wife, one half of the community property should go to the survivor, subject to the community debts, and the other half should be held subject to the testamentary disposition of the deceased husband or wife. The rights of both husband and wife were for the first time recognized as being the same with regard to the power of testamentary disposition. Laws 1911, p. 29, further modified this by limiting the right of both husband and wife to make such testamentary disposition to the children of such deceased person or to the parents of either spouse, and provided that, in case there was no testamentary disposition, it should go to the survivor, and further that upon the death of an intestate wife no administration of her interest in the community estate was necessary. No changes in the devolution of community property have since been made, this now being C. S. § 7803.

In the well-considered case of *Kohny v. Dunbar*, 21 Idaho, 258, 121 Pac. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492, decided in 1912, the statute law defining community property, the husband's right to manage and control the same, its devolution upon the death of either party, and the character of the wife's interest therein, under the law as it then stood, were gone into in an able and exhaustive opinion, wherein, among other things, it is said:

"The foregoing section of the statute recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of half of such property, subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community."

And further that:

"The one-half interest which the wife receives from the community property upon the death of her husband comes to her in her own right, by reason of the death of the community agent and her survival of the dissolution of the community partnership."

In *Ewald v. Hufton*, 31 Idaho, 373, 173 Pac. 247, in an equally well considered opinion, it is held that under the laws of this state no distinction is made between husband and wife as to the degree, quantity, and nature or extent of the interest each has in the community property, and that, upon the dissolution of the community by death of either spouse, the survivor becomes a tenant in common with the heirs of the deceased member in the community property then in existence. This decision reviews the holdings in

the several states having statutory provisions similar to our own, reaffirms *Kohny v. Dunbar*, supra, and distinguishes the difference in the character of the estate held by either spouse under the community property law of this state from what it is held to be in jurisdictions where the interest of the wife is a mere expectancy and not a vested interest. Under the several statutes and amendments mentioned, all of which were in force in their present form at the time the parties to this action acquired title to this homestead, as these statutes have been construed by the last-mentioned opinions of this court, it is clear that, in a marital partnership, the interest of the wife in the community property is a vested interest, which is not divested ipso facto by the wife going to a foreign jurisdiction and dissolving the marital community by securing a divorce, and *Bedal v. Sake*, supra, so far as it holds a contrary doctrine, is hereby overruled.

[2] Counsel for appellant urge with much force the injustice and unwisdom of a community property law which permits a wife to abandon her husband without just cause, go to a foreign jurisdiction, and obtain a divorce from him upon constructive service, thereby dissolving the marital community, and then permits her to return to this state and invoke the power of its courts to quiet title in her to one-half of the community property, and it must be conceded that this condition of the law admits of designing and unscrupulous persons bringing about disastrous consequences to the community estate, because such estates are frequently in a condition that a dissolution in this manner would cause insolvency. However, this consideration is one that must address itself to the law-making power. Courts can only interpret and apply the law as they find it, and unless the doctrine announced in the *Kohny* and *Ewald* Cases, supra, is overruled, and a construction given the several statutes mentioned which would do violence to their plain meaning, there is no escape from the conclusion that the interest of a wife in the community property is a vested interest, and not an expectancy dependent upon her surviving her husband, and that she may dissolve such community by divorce proceedings without necessarily forfeiting her right to afterward assert her interest in such community property.

Both parties to this action earnestly contend that the other was at fault in their marital difficulties. The findings of the trial court indicate that it regarded the husband as the greater offender of the two. From a careful consideration of the testimony, much of which is by way of depositions, we conclude that in this respect honors are about even. But in our view of the law applicable to the essential facts involved in this controversy, which facts are conceded by both parties, that is, that this property is com-

munity property, we do not see wherein the question as to who was at fault in the matter of divorce proceedings is of controlling importance. The wife took up her residence in a foreign jurisdiction because she claims her health was broken by reason of the hard conditions of life she had to undergo while on this homestead, and sets up as grounds for divorce lack of support, cruel treatment, and habitual intemperance on the part of her husband, all of which are grounds for divorce in this state, and she was awarded a divorce a vinculo. As to whether she acted in good faith in obtaining such divorce is not material to this inquiry, for appellant has recognized its validity, and therefore it follows that such proceedings dissolved the marital community as effectively as if the divorce had been obtained in this state.

If it be claimed that the law regulating the rights of husband and wife to the community property, its management, control, and devolution after the death of either party, was intended to have application only where the community is dissolved by death, or, if dissolved by divorce proceedings, where the party causing such dissolution was without fault, in order to claim such right, it may be replied that there is nothing in the language of these decisions, or in the community property law above referred to, that indicates such limitation is intended. In the celebrated case of *Haddock v. Haddock*, 201 U. S. 562, 28 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, that court held that:

"The mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all of the other states by virtue of the full faith and credit clause of the federal Constitution against a nonresident who did not appear and who was only constructively served with notice of the pendency of the action."

In that action, both the husband and wife were residents of the state of New York. She sued the husband in the New York courts in 1899, obtaining personal service upon him, and alleged that they had been married in said state in 1868, where they both resided, and where she continued to reside. She asked for a decree of separation from bed and board, and for alimony. The answer admitted the marriage, but claimed that it had been procured by fraud of the wife, and that by mutual consent a separation had immediately followed. The husband further set up that he had obtained a decree of divorce from her upon constructive service in the state of Connecticut in 1881. At the trial of the cause before a referee, the judgment roll in the suit for divorce in the Connecticut court was offered in evidence by the husband, and was objected to on the ground that the Connecticut court had not obtained jurisdiction of the person of the defendant wife, the

notice of the pendency of the suit being by publication, that she had not appeared in that action, and that the grounds upon which the Connecticut court had granted the divorce were false. The New York courts sustained this ruling, and error from the New York court was prosecuted to the United States Supreme Court, under the "full faith and credit" clause of the federal Constitution. Justices Brown and Holmes filed dissenting opinions, with which Justices Harlan and Brewer concurred; but so far as we are aware this decision of the United States Supreme Court, holding that a state is not bound to recognize a divorce granted in another state upon constructive service, where the adverse party was lawfully domiciled in the state refusing such recognition, has never been overruled or modified, and is still the law.

C. S. § 4650, regulates the disposition of community property, including the homestead, upon a dissolution of a marriage by decree of a court, and subdivision 1 reads:

"If the decree be rendered on the ground of adultery or extreme cruelty, the community property must be assigned to the respective parties in such proportions as the court, from all of the facts of the case and the condition of the parties, deems just."

[3] It is clear that, under the holding in the Haddock Case, state courts are not bound under the "full faith and credit" clause of the federal Constitution to recognize the validity of divorces procured in sister states upon constructive service, where the adverse party is lawfully domiciled in such other state. It is therefore conceivable that, under the provisions of our statute above quoted, the courts of this state may deny relief to either party of a marital community, where such party has wrongfully deserted the other member of the community, gone into another state, and sought to dissolve the marital relation by constructive service, and thereafter returned to this state for the purpose of being decreed her interest in the community property, where the resident member of the community challenges the validity of such divorce proceedings in the foreign state to dissolve the marital community, and sets up his rights under the laws of this state.

But in the instant case no question has been raised as to the validity of the wife's divorce obtained in a foreign jurisdiction, and it results that the marriage community was dissolved upon its procurement. This being true, it follows that the judgment of the court below in quieting title in respondent to an undivided one-half interest in the community property must be affirmed; and it is so ordered. Costs to respondent.

RICE, C. J., and BUDGE, MCCARTHY, and DUNN, JJ., concur.

(35 Idaho, 481)

HAINES v. ROWLAND. (No. 3701.)

(Supreme Court of Idaho. May 29, 1922.)

1. Contracts \S 266(1)—Generally party rescinding must offer to return property.

Generally, to rescind a contract, an offer to return property received thereunder must be made before suit.

2. Sales \S 434—In action for seller's breach, buyer must allege that he relied on the warranty breached.

In an action by the vendee of personal property for breach of warranty, it must be alleged that vendee believed and relied upon and purchased on the strength of such warranty.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by C. O. Haines against Samuel W. Rowland. Judgment for defendant. From an order denying a new trial, plaintiff appeals. Reversed, and new trial granted.

G. W. Lamson, of Nampa, for appellant.
Stone & Jackson and M. H. Eustace, all of Caldwell, for respondent.

DUNN, J. Appellant brought this action to recover on a check for \$78.85, which was given him by respondent as the purchase price of a cow. Payment on said check was stopped by respondent for the reason, as claimed by him, that appellant's warranty had failed. Respondent answered the complaint and filed a cross-complaint alleging breach of said warranty and asking compensation for feeding and caring for said cow. The jury returned a verdict in favor of respondent, allowing him the sum of \$20. Appellant moved for a new trial, which the court denied, and from the order denying such motion he has appealed.

It will be necessary to notice only two of the grounds urged by appellant in support of his motion for a new trial.

[2] The first is the refusal of the court to sustain appellant's objection to the introduction of any evidence in support of the cross-complaint, because said cross-complaint "does not state a defense and does not state a cause of action on counterclaim or cross-complaint." The particular point in this objection is that the cross-complaint contains no averment that respondent relied upon the alleged warranty. This objection was well taken and should have been sustained. 35 Cyc. 376, 450, and cases cited.

The other ground is that the evidence is insufficient to justify the verdict, for the reason that it shows without dispute that respondent purchased the cow on condition that he could rescind the contract of sale by returning the cow, and there is no evidence

that he ever returned or offered to return her.

[1] In his cross-complaint, respondent alleges that he purchased said cow on a warranty by the seller that she would give three gallons of milk per day and that, if she did not conform to said warranty, the purchaser could return her and receive the purchase price. It is undisputed that this was the agreement between the parties, and respondent admits that, prior to the bringing of the action on the check, though claiming a breach of warranty and attempting to rescind, he had not offered to return said cow. Besides, he testifies that appellant offered to take the cow back if he would return her.

"Generally, to rescind a contract, an offer to return property received thereunder must be made before suit." 13 C. J. 620, § 679; 35 Cyc. 445e; *Nichols-Shepard Co. v. Rhoadman et al.*, 112 Mo. App. 290, 87 S. W. 62; *Breshers et al. v. Callender*, 23 Idaho, 348, 356, 181 Pac. 15; 3 *Williston on Contracts*, § 1463.

In this state of the record the motion for a new trial should have been granted, either of said grounds being sufficient. Order denying said motion is reversed, and a new trial granted, with costs to appellant.

RICE, C. J., and BUDGE, MCCARTHY, and LEE, JJ., concur.

(35 Idaho, 568)

STATE v. BECKER et al. (No. 3506.)

(Supreme Court of Idaho. June 2, 1922.)

1. Public lands \Leftrightarrow 17—Mere ownership of undivided interest in sheep does not tend to prove willful intent to herd them on a prior cattle range.

Mere ownership of an undivided interest in a band of sheep does not tend to prove a willful intent to herd and graze them upon a prior cattle range, in violation of the provisions of C. S. § 8333.

2. Public lands \Leftrightarrow 17—Intent is an essential element of the crime of herding sheep on a prior cattle range.

An essential element of the crime of herding sheep on a prior cattle range, in violation of C. S. § 8333, is the intent to commit the act, as well as the commission thereof.

3. Public lands \Leftrightarrow 17—Record held to show no evidence of willful intent to herd sheep on prior cattle range.

On examination of the evidence in the case at bar, it is held that there is no evidence of willful intent to herd sheep upon a prior cattle range.

Appeal from District Court, Lemhi County; F. J. Cowen, Judge.

Jerry Becker, Jr., and Harrison Becker were convicted of grazing and herding sheep

on a cattle range, and they appeal. Reversed, and new trial ordered.

L. El. Glennon, of Salmon, for appellants.
Roy L. Black, Atty. Gen., and James L. Boone, Asst. Atty. Gen., for the State.

RICE, C. J. Appellants were convicted of willfully and unlawfully grazing and herding sheep upon a prior cattle range, in violation of the provisions of C. S. § 8333.

The action of the trial court in overruling their demurrer and motion to quash cannot be reviewed, because of their failure to save exceptions thereto. *State v. Crawford*, 32 Idaho, 165, 179 Pac. 511; *State v. Maguire*, 31 Idaho, 24, 169 Pac. 175. The remaining specifications of error are that the verdict and judgment are contrary to law, in that the evidence is insufficient to sustain either the verdict or the judgment.

[1, 2] In *State v. Maguire*, supra, it was pointed out that the general specification that the evidence is insufficient is not a compliance with the requirements of C. S. § 9068, which provides that—

"If a reporter's transcript of the evidence appears in the record, the ground that the verdict is contrary to the evidence may be considered and determined to the same extent as on an appeal from an order denying a new trial, providing a specification of the particulars in which the evidence is insufficient to sustain the verdict is made in appellant's brief filed with the Supreme Court."

In the body of appellants' brief, however, the argument upon this point is based upon the contention that—

"There is absolutely no evidence in this case even tending to show that the defendants either acted willfully or negligently."

The transcript has been examined to ascertain whether there was any evidence tending to show willfulness or negligence. If any such evidence had been found, we would not have inquired as to its legal sufficiency. In the case of *State v. Omaecheviaria*, 27 Idaho, 797, 152 Pac. 280, in construing section 8333, supra, it was held that—

"The intention to commit the act, as well as the commission of the act, are necessary and essential ingredients of the crime; and if both are established by competent evidence, under proper instructions, such as from our examination were given in this case, in our opinion the verdict of the jury should not be disturbed."

In that case it is stated that among the facts necessary to be established by competent evidence is the following:

"* * * And that the defendant knew, or had information from which a reasonable man under like circumstances would have known, that he was herding, grazing, or pasturing sheep upon a cattle range previously occupied

by cattle in the usual and customary use of such range, and that sheep had not been herded, grazed, or pastured upon said range prior to said time in the usual and customary use of said range."

Appellant Jerry Becker was shown to be the owner of an undivided interest in the sheep in question. Aside from this fact, he was not shown to have been connected in any way with the misdemeanor charged. He cared for the ranch belonging to appellants, while the other appellant, Harrison Becker, managed and cared for the sheep. No attempt was made to show that Jerry Becker conspired with his brother to herd or graze the sheep on the range in question, or any other cattle range, or that he had anything to do with the care of the sheep, or any knowledge or notice that they were upon a cattle range. Mere ownership of an undivided interest in a band of sheep does not tend to prove a willful intent to herd and graze them upon a prior cattle range.

[3] With respect to appellant Harrison Becker, it was shown that he was in charge of the sheep; that in the fall of the year 1918 he was engaged in moving them from Gibbonsville to Buhl, where they were to be wintered; that while passing through the country he came to the range described in the complaint; that there his brother, Jack Becker, was taken sick with the Spanish influenza; that he took him to Salmon City, leaving word with those in charge of the sheep to stay where they were until he returned; that he expected to return the next day; that on reaching Salmon City he himself became seriously ill, and was unable to return to the sheep for several days. It was shown that during his absence his herder and camp tender were informed that the sheep were upon a cattle range and requested to move them off, which they refused to do.

The record of the cross-examination of appellant Harrison Becker contains the following:

"Q. You knew you had no right to graze your sheep and herd them on a cattle range? A. I didn't know it was a cattle range.

"Q. I didn't ask you that. You knew you had no right to graze your sheep and herd them on a cattle range? A. Yes, sir.

"Q. And you so instructed your herder not to graze them on a cattle range? A. Yes, sir. * * *

"Q. If your herder was advised by any person that he was herding your sheep on a cattle range, and he continued to herd them, he was doing so contrary to your orders? A. Yes, sir."

This testimony stands uncontradicted. No attempt was made to show that Harrison Becker had knowledge or notice that his sheep were upon a cattle range, when he directed his employees to hold them there until he returned.

The judgment is reversed as to both appellants, and a new trial ordered.

BUDGE, MCCARTHY, DUNN, and LEE, JJ., concur.

(111 Kan. 368)

MAIN v. YANDELL et al. (No. 23524.)

(Supreme Court of Kansas. June 10, 1922.)

Appeal from District Court, Shawnee County.

On application for rehearing. Denied.
For former opinion, see 204 Pac. 540.

WEST, J. In the defendant's briefs, and in the two motions for rehearing, it has been insisted that the testimony failed to show that Joseph Casson was of unsound mind at the time the will was signed. In the second motion therefore, filed April 10, a résumé is given of the testimony, and it is said there were 18 witnesses who knew Joseph Casson until his death, or nearly so, whose evidence of his sound mind was positive, and based upon close, intimate, and continuous acquaintance, "as against a group of witnesses whose adverse opinions were formed from casual, remote, and intermittent acquaintance and observation, too stale to be entitled to consideration at all."

The opinion recited certain portions of the evidence showing Mr. Casson's excentricities and peculiar conduct, reference being made to the testimony of Dr. McDonald, and also the affidavit of James Acheson made on the motion in support of a new trial touching Mr. Casson's appearance at his house after the will was made. It was said in the opinion to be the settled rule that the trial court's finding of fact is conclusive unless unsupported by the evidence. Not only did the jury find mental incapacity, but the court made a similar finding of its own. While the record presented is one from which different triers of fact might, and doubtless would, have reached different conclusions, the majority of the court feel that there was sufficient to sustain the finding of mental incapacity.

Aside from the unquestioned peculiarities manifested by Mr. Casson, from which numerous witnesses concluded he was of unsound mind, we have the testimony of Dr. McDonald, who from personal observation was unconvinced of such unsoundness, but answered that certain proved conduct indicated insanity. In order that the decision in this case may not be deemed a departure from the settled rule, the somewhat unpleasant duty is undertaken to refer more in detail to the testimony of H. W. Page, partner of the attorney who drew the will, and who was in the office in an adjoining room at the time it was signed. Attention is called to the following:

"Mr. Casson was very feeble. I think he was in the neighborhood of 90 years of age. I doubt whether he could walk alone that day. The day was not cold, but Mr. Casson had on an overcoat and a long red scarf around his neck, and wore a cap."

The three went into Mr. Hazen's private office. There was a partition between the two offices which was boarded up about three feet, and glass above that, and his desk and W. R. Hazen's sat against the partition on opposite sides, and there was a door about the center of the partition wall.

"When Joseph Casson came in, they went into Mr. Hazen's office, and the conversation that was carried on in there was between Mr. Acheson and Mr. Hazen. I didn't hear Mr. Casson say a word. * * *

"Q. Did you hear Acheson say what should go into the will? A. I did. Mr. Acheson was in a few days before that talking over the making of the will and Mr. Hazen told him he would have to bring Casson in; that was a few days prior to the time Casson came. * * *

"Q. Did you hear Joseph Casson say to Judge Hazen anything about the making of the will? A. No, sir; he said nothing. * * *

"Q. Now, after the will was dictated by Judge Hazen, and prepared, what was done with the will then? A. Mr. Hazen read it over in his office. * * *

"Q. He then had the will in his office where Mr. and Mrs. Acheson and Joseph Casson all were? A. Yes, sir.

"Q. And the will was read over there? A. Yes, sir.

"Q. Was anything said between Judge Hazen and Mr. Casson in relation to the will? A. Mr. Hazen said to Casson, he said, 'Joe, is that the way you want it?' Mr. Casson was then where I could see him. Our door was partly open. The telephone rang, and I was in the act of answering the phone, when Mr. Hazen asked Mr. Casson that; Mr. Casson made no reply. Mr. Casson was crying, tears running down his face. * * *

"Q. Did he make any answer to this question? A. No, sir. Mr. Hazen asked him in a loud voice, 'Joe, is this the way you want the will?' and without appearing to understand he said: 'If that's the way these folks want it, I guess it's all right.'

"Q. Did Judge Hazen say to you in this conversation which took place after the parties left in substance: 'That was a job I don't like.' A. I wouldn't say he said that in those words. In substance.

"Q. I will ask you if he said to you in substance that 'old Joe is not going to last long'? A. He did in substance; might not have been just those words. I remember him saying he had failed very much since he last saw him.

"Q. Did he (W. R. Hazen) say, 'They are going rather strong to get all of old Joe's property'? A. I don't know as he said 'rather strong.'

"Q. State what he did say. A. It was in substance that he thought the Achesons had taken advantage of the old man. * * *

"Q. What did you say to the stenographer about it? A. We had a conversation about the Achesons; how they had brought this old

man in there and gotten all of his property. We knew of the fact that he had given them the farm before, and how they had given it to the children instead of taking it themselves, and we thought it strange, and the condition of the old man, appearing not to know where he was that day."

While Mr. Page was not asked his opinion as to the mental capacity of the testator, the foregoing is sufficient to show what it was, and, being familiar with him, and his circumstances and surroundings, and having seen him, and noted his appearance, and heard his answer to the questions on this occasion, his testimony is quite significant.

While the question of undue influence was for some reason taken out of the case, it is held that the findings made by the jury, and also by the trial court, of mental incapacity at the time the will was made were and are sufficiently supported and sustained.

The former opinion is therefore adhered to.

JOHNSTON, C. J., and MASON, PORTER, MARSHALL, and DAWSON, JJ., concurring.
BURCH, J., dissenting.

(110 Kan. 458; 111 Kan. 358)

BURROWS v. FARMERS' ALLIANCE INS. CO. (No. 23486.)

(Supreme Court of Kansas. Feb. 11, 1922.
On Rehearing, June 10, 1922.)

Insurance \S 624(1)—Where fire policy covered total value of property, in which insured had merely an interest, insured could not sue for total loss, either as real party in interest or in a representative capacity.

Where fire policy covering the total value of stacked wheat was issued to owner of one-third interest therein, with knowledge on the part of the insurer that insured was owner of merely a one-third interest, the insured, on destruction of the wheat, could not maintain an action for the total loss as the real party in interest, under Civil Code, \S 25 (Gen. St. 1915, \S 6915), or in a representative capacity, under section 27, but could recover merely the amount of his interest therein.

Appeal from District Court, Cherokee County.

Action by S. G. Burrows against the Farmers' Alliance Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed, and rendered for plaintiff.

Allen, Allen & Allen, of Topeka, for appellant.

C. A. McNeill and Leo Armstrong, both of Columbus, and C. V. McNeill, of Baxter, for appellee.

DAWSON, J. The plaintiff recovered judgment against the defendant on an insurance policy covering four stacks of wheat.

The wheat had been grown on land belonging to W. H. Smith and wife. These persons, desiring to go to California, made a contract with plaintiff that he should harvest, stack, thresh, and sell two-thirds of the crop for their benefit, and that he should have one-third of the crop for these services. After harvest plaintiff obtained from defendant a policy of fire insurance covering the stacked grain. No mention of the two-thirds interest of the Smiths was made in the insurance contract. It was shown, however, by oral testimony, that plaintiff explained to the defendant's local soliciting agent that he only owned one-third of the wheat, and that the Smiths had left it to him to decide whether their interest should be insured or not, and that the agent had told him that the minimum insurance charge was \$3, which would be sufficient to insure not only the value of plaintiff's interest in the wheat, \$200, but also to insure the interest of the Smiths, \$400, so the policy was written for \$600.

When the property burned, and the defendant's adjuster learned that the plaintiff's interest was only one-third, he told plaintiff that, since his interest in the property had not been truly and correctly stated in his written application for insurance, he was not entitled to anything, and that he laid himself liable to criminal prosecution if he attempted to collect on the policy. However, the adjuster offered to settle in full for plaintiff's share of the loss, \$200, and plaintiff agreed to accept this sum, but, when the defendant's check for the agreed amount was mailed to him, he returned it, and brought suit for the entire sum named in the policy, \$600.

Judgment was entered in plaintiff's favor, and defendant appeals.

The first error assigned is based on the proposition that defendant did not deny its liability to plaintiff for his own loss, but that he has no right to recover anything for the loss of Smiths' property. Defendant relies upon section 25 of the Civil Code (Gen. St. 1915, § 6915), which provides that every action must be prosecuted in the name of the real party in interest.

[1] A majority of this court disapprove this contention, and hold that, since the defendant's agent was apprised of all the facts, and induced the plaintiff to enter into the contract of insurance for the benefit of all concerned, he can maintain the action for the benefit of the Smiths as well as himself. Civ. Code, § 27 (section 6917); *Shellberg v. McMahon*, 98 Kan. 46, syl. 2, 157 Pac. 208.

[2] It is next urged that the settlement was binding, and that no fraud was established which vitiated that settlement. The jury made specific findings of fraud, which consisted of the statements of the adjuster narrated above, but these findings need not be considered since there was no consideration for the settlement. Defendant had

agreed to pay \$600 if the wheat stacks were burned. When this happened there was a liability of \$600, and there was no consideration for its diminution nor for the agreement to accept \$200 in satisfaction thereof. Therefore the settlement was not binding.

The third error assigned relates to the admission of evidence touching plaintiff's conversations with defendant's agent who solicited the insurance contract, but, as the particular testimony objected to is not indicated in the brief of counsel, it cannot be considered.

[3, 4] More serious than any of the foregoing, however, are the defendant's objections to the instructions given to the jury. One of these reads:

"(11) You are instructed that if, at the time of the making of the insurance policy herein sued upon, the defendant was informed and knew that the plaintiff was the owner of only one-third interest in the property covered by the insurance, and with that knowledge issued to him said policy, covering the whole of said property, and accepted the premium for the issuance of said policy, then, in that event, in case of a loss by fire, the plaintiff would be entitled to recover the whole of the insurance up to the full value of the property insured."

This instruction is incorrect. No matter what plaintiff told the insurance solicitor touching the extent of his interest, or touching the extent of the Smiths' interest, public policy would not allow the plaintiff to recover for himself a greater sum than the value of his own interest. One difficulty with this entire case was the extent to which the issues were permitted to be enlarged beyond the scope of the pleadings. For instance, there was no allegation that the action was brought for the benefit of the Smiths as well as the plaintiff, no allegation that the policy as written was a mistake, and that the interest of the Smiths was to have been insured as well as that of the plaintiff, no allegation of any contractual obligation between plaintiff and the Smiths touching insurance or insurance proceeds, no allegation touching the Smiths' proof of loss or of waiver of that proof, and no allegation of plaintiff's agency for the Smiths, and yet evidence and circumstances from which most of these matters might be inferred were introduced; but, even so, and assuming that it was the trial court's intention to permit the issues to be thus enlarged, yet there was and is about this case so much silence about important matters that should have been formally pleaded and proved, but which were not pleaded, and not proved with much precision, that it should have been made clear to the jury that plaintiff could not, in any event, recover for himself more than the amount of his own loss, and that, if the policy was mutually designed between the parties that its terms should cover also the loss of the Smiths, a separate verdict for their

loss should be returned. There must be a new trial, and it should proceed on the theory that plaintiff's action is for his own loss, and for the loss of the Smiths, and, if the facts warrant a recovery for both plaintiff and the Smiths, the respective sums to be recovered by plaintiff personally and for the Smiths should be found and adjudged separately.

Reversed, and remanded for a new trial.

MASON, PORTER, WEST, and MARSHALL, JJ., concurring.

JOHNSTON, C. J., and BURCH and DAWSON, JJ., dissent, holding that plaintiff could not maintain the action as the real party in interest under section 25 of the Civil Code, nor in a representative capacity under section 27; that plaintiff's only proper recovery was for the amount of his own loss, and, as this had been tendered in full without litigation, the plaintiff should be charged with the costs of the action; and that, since there was no allegation, and no satisfactory proof that the action was maintained for the benefit of the Smiths, that phase of the action should have been dismissed.

On Rehearing.

DAWSON, J. This is a rehearing. The facts and questions of law are fully stated in the original opinion. 110 Kan. 458, 207 Pac. 431. After reargument and reconsideration, the dissenting opinion is now adopted as the opinion of the court; but our former order, reversing the judgment of the district court, will stand, with this modification: That our order for a new trial be withdrawn, and that judgment be entered for plaintiff for \$200, and that the costs be taxed against him.

It is so ordered.

All the Justices concurring.

(110 Kan. 559; 111 Kan. 520)

KANSAS STATE BANK v. LAUGHLIN. (No. 23739.)

(Supreme Court of Kansas. Feb. 11, 1922.
Rehearing Granted June 10, 1922.)

(Syllabus by the Court.)

Banks and banking § 44—Provision for double liability of stockholders held not repealed by constitutional amendment.

The section of the banking act (Gen. Stat. 1915, § 523), providing that stockholders of a bank shall be additionally liable for a sum equal to the par value of the stock owned by each, was not repealed by the amendment to section 2, art. 12, of the Constitution adopted in 1906, which provides that:

"Dues from corporations shall be secured by the individual liability of the stockholders

to the amount of stock owned by each stockholder, and such other means as shall be provided by law," etc.

Johnston, C. J., and West and Marshall, JJ., dissenting.

Appeal from District Court, Saline County.

Action by the Kansas State Bank against A. W. Laughlin, to recover a statutory liability on stock owned by the defendant in the Kansas State Bank of Salina, which had become insolvent. Judgment for the defendant, and the plaintiff appeals. Reversed.

John L. Hunt, of Topeka, and B. I. Litowich, of Salina, for appellant.

T. L. Bond and Knittle & Knittle, all of Salina, for appellee.

JOHNSTON, C. J. The question presented for determination on this appeal is whether the statute enacted in 1897 (Gen. Stat. 1915, § 523), providing that shareholders in a banking corporation shall be subject to an additional liability equal to the par value of the stock owned by them, is still existent and enforceable.

The question arose in an action brought against a stockholder to recover a statutory liability on stock owned by him in the Kansas State Bank of Salina, which had become insolvent. The trial court held that the stockholders' double liability had been abrogated by a constitutional amendment, and that the statute mentioned was no longer in force. When it was enacted, the constitutional provision relating to the individual liability of stockholders was as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Constitution art. 12, § 2.

It had been determined that this provision was not self-executing but required legislative action to give it effect, *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. An early Legislature enacted statutes for the enforcement of the liability as against the stockholders of all corporations except railway, religious, and charitable corporations. Gen. Stat. 1868, c. 23, §§ 32-44. A slight amendment of these provisions was made in 1898, permitting receivers of corporations to enforce the statutory liability against stockholders. Laws of 1898, c. 10, §§ 14, 15. These provisions applied to banking corporations as well as all other business corporations, and remained in force until 1903, when the Legislature repealed and abrogated the remedies for the enforcement of the liability, making an exception in these words:

"Nothing in this act shall be construed so as in any manner to affect the liability of stock-

holders in any banking corporation, organized under the laws of this state, as now provided by law." Laws of 1908, c. 152.

About five years before that time the Legislature, in enacting an elaborate act for the regulation of banks, included the section already mentioned, which provides that:

"The shareholders of every bank organized under this act shall be additionally liable for a sum equal to the par value of stock owned and no more." Gen. Stat. 1915, § 523.

This provision was cumulative in character and reiterated the individual liability ordained in the Constitution and provided for from the beginning in the Corporation Act, but prescribes different remedies for its enforcement. Following these steps, the people, in 1906, adopted an amendment to the constitutional provision relating to stockholders' liability, which is as follows:

"Dues from corporations shall be secured by the individual liability of the stockholders to the amount of stock owned by each stockholder, and such other means as shall be provided by law, but such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes." Constitution art. 12, § 2.

The parties are divided as to the meaning and scope of the amendment. In behalf of the plaintiff, it is said that the provision relating to the individual liability of a stockholder is not a grant of power, that the Legislature was already vested with legislative power not prohibited by the national or state Constitutions, that the provision was merely a limitation on the power of the Legislature, and that the limitations expressed extended no farther than to fix a minimum of liability.

It is contended that the amendment, prescribing a liability "to the amount of stock owned by each stockholder, and such other means as may be provided by law," restricted the Legislature from imposing a liability less than the amount of the stock owned by the stockholder, but did not prevent the Legislature in the exercise of its general grant of power from imposing a double or greater liability, if it saw fit to do so. We cannot assent to this interpretation of the amendment. The manifest purpose of the people in adopting the amendment was to fix the individual liability of stockholders for the dues or obligations of corporations. The original provision fixed a certain definite liability that is the amount due on the stock and an additional amount equal to the stock owned by each stockholder. The declaration that this should be the liability was a command as well as a limitation on the power of the Legislature. As the provision was not self-executing, legislation was necessary to give it effect. The duty to make provision for enforcing the liability was commanded and the failure to observe the command did not annul

the liability. The history of the times shows there was marked opposition to the double liability, because it tended to prevent capitalists from investing in corporate enterprises in the state and to drive capital to other states, where the added liability was not imposed upon stockholders. Because of this condition and of the well-known hostility to the double liability, the Legislature of 1903 repealed the statutory provisions for enforcing that liability, making an exception as to banking corporations. Provisions for making the liability effective as to banks were continued in force. Then we had the constitutional provision fixing a definite liability without any means of enforcing it. To correct this inconsistency and get rid of the inimical liability, the Legislature of 1905 submitted a proposition to the electors of the state, striking out the double liability, and, at the election of 1906, the amendment which has been quoted was adopted.

It is competent for the court to give attention to the history of the times and to consider the language of the amendment in connection with the well-known conditions which led to its submission and adoption. This rule has been applied in the interpretation of statutes, and it is equally applicable in ascertaining the object and purpose of the adoption of constitutional provisions. *State v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298; 12 C. J. 710. As to the interpretation of a constitutional amendment, it has been said by the Supreme Court of the United States:

"The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." *Maxwell v. Dow*, 176 U. S. 581, 602, 20 Sup. Ct. 448, 456 (44 L. Ed. 597).

Considering the amendment in the light of the known conditions that existed in Kansas when it was adopted, the desire of the people to get rid of a constitutional provision deemed to be a handicap to the development of the state, and the history of the change in the Constitution, there can be little doubt that the purpose or object of the people was the abrogation of the double liability of stockholders. Their purpose was to strike out the added liability and substitute for it the definite liability fixed at the amount of the stock owned by each stockholder. The measure prescribed cannot be regarded as a fluctuating one, ranging from the minimum liability to any measure of liability that the Legislature might see fit to enact, but it was a definite and determined liability, which limited the power of the Legislature, and it can impose no greater or different liability than is fixed in the Constitution itself. In a *Nebras-*

ka case, where there is a constitutional provision quite similar to our own, it was decided:

"The present Constitution not only determines what the liability of a stockholder in a corporation, for the corporate debts thereof, shall be, but it limits this liability, and it is not within the power of the Legislature to extend it." *Van Pelt v. Gardner*, 54 Neb. 701. Syl. 6, 75 N. W. 874.

See, also, *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; *Western Pacific Railway Co. v. Godfrey*, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825; *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913A, 719; *Fletcher Cyc. of Corporations*, § 4142.

That the liability was fixed and certain was recognized by the Supreme Court of the United States, in the interpretation of the earlier provision of the Constitution. In *Whitman v. Oxford National Bank*, 176 U. S. 559, 562, 20 Sup. Ct. 477, 478 (44 L. Ed. 587), Mr. Justice Brewer said:

"By section 1 of article 12, of the Constitution of Kansas, a certain definite liability is cast upon each stockholder in other than railway, religious, and charitable corporations."

Further along in the opinion, in speaking of the nature and measure of the liability, he remarked:

"The words, 'shall be secured,' are not merely directory to the Legislature to make provision for such liability, but of themselves declare it."

The liability prescribed in the amendment is equally certain and definite as in the original, and it applies to the stockholders in all corporations other than railway, religious, and charitable corporations, which are expressly excepted from the provision. That the amendment operated to repeal the double liability was the generally accepted view of its effect. In *Bicknell v. Altman*, 81 Kan. 486, 105 Pac. 694, it was said:

"The present Constitution limits the liability of stockholders for the debts of a corporation to the amount of their stock."

In a later case the subject was brought to the attention of the court, and it was held:

"In 1903 all provisions for the enforcement of stockholders' liability were repealed, and, at the general election of 1906, section 2 of article 12 of the Constitution was amended, abrogating the double liability of stockholders, and leaving each stockholder liable only to the amount of stock owned by him." *Douglass v. Loftus*, Adm'r, 85 Kan. 720, 723, 119 Pac. 74, 75, L. R. A. 1915B, 797, Ann. Cas. 1913A, 378.

The clause "and such other means as may be provided by law," does not extend or affect the individual liability definitely prescribed. It refers to means for securing the debts of corporations other than the individual liability of stockholders. Counsel for

plaintiffs say they can conceive of no means of giving a creditor additional protection, except by providing additional liability against stockholders. As has been suggested, the Legislature might provide that the corporation should not engage in business, until a certain amount of the capital stock had been subscribed and paid for, or that the corporation should set aside a portion of its earnings from time to time, thereby creating a fund to be held as security for the payment of its debts, or it might be required before beginning business, to make and file a bond as a security to creditors, or why might not a scheme be devised somewhat similar to the Bank Guaranty Act, by which creditors of corporations would be secured in some such way as bank deposits are now secured? Still other means of securing creditors might be to provide special remedies for the enforcement of the individual liability of stockholders fixed by the amendment, and other remedies by which the assets of the corporation might be promptly reached and appropriated for the payment of the debts of the corporation. In any event, the other means spoken of cannot refer to the same means already specified. It is some means other than the individual liability of stockholders. As already stated, the amendment covers all corporations, other than those expressly excepted, and applies to banking corporations equally with other business corporations. It not only abrogated the original constitutional provision, which it superseded, but it repealed existing statutes which are inconsistent with or repugnant to its provisions. The abrogation of the double liability effectually annulled the statute providing that the stockholders in banks should be subject to a double liability on the stock owned by them.

It follows that the judgment of the district court must be affirmed.

PORTER, WEST, and MARSHALL, JJ., concurring.

BURCH, MASON, and DAWSON, JJ., dissenting.

On Rehearing.

JOHNSTON, C. J. This controversy involves the effect of a constitutional amendment, relating to the individual liability of stockholders upon a statute fixing the liability of stockholders in banking corporations, which was in force when the amendment was adopted.

The appeal, which was taken from a judgment holding that the amendment operated as a repeal of the statute, has had unusual attention. On the first hearing, the court, one justice not sitting, was equally divided on the question. A reargument of the case was therefore directed, and that hearing, in which all the justices participated, resulted in a decision affirming the judgment of the district court holding that the statute was repealed by the amendment. *Bank v. Laughlin*, 110

Kan. 559, 207 Pac. 433. Following that hearing, an application for a rehearing was granted, and the third hearing has led to a shift of opinion, so that the majority of the court now hold that the amendment did not nullify or affect the statute imposing a double liability on stockholders in banking corporations. As noted in the former opinion, the original constitutional provision on the subject was:

"Dues from corporations shall be secured by individual liability of the stockholders, to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

This provision was changed by an amendment adopted in 1906, which provided:

"Dues from corporations shall be secured by the individual liability of the stockholders, to the amount of stock owned by each stockholder, and such other means as shall be provided by law, but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Before the adoption of the amendment, statutes had been enacted for the enforcement of the double liability as against stockholders and corporations other than those specifically excepted in the constitutional provision. These provisions remained in force with some minor amendments until 1903, when the Legislature repealed the enforcement provisions, except as to stockholders of banking corporations. The exception was made in these terms:

"Nothing in this act shall be construed so as in any manner to affect the liability of stockholders in any banking corporation organized under the laws of this state as now provided by law." Laws 1903, c. 152.

About five years before that time, the Legislature passed an elaborate act for the regulation of banks and in it is the provision, the existence of which is now challenged, that:

"The shareholders of every bank organized under this act shall be additionally liable for a sum equal to the par value of the stock owned and no more." Laws 1897, c. 47, § 10.

Later and in 1906 the constitutional amendment already quoted was adopted, which in effect substituted a single for the double liability of stockholders.

On one side, it is contended that the amendment applies to all corporations other than those organized for railroad, religious, or charitable purposes, that it operates as a repeal of the statute in question, and effectually abrogates the additional or double liability of stockholders in corporations including those holding stock in banks, and because of the obvious conflict between the amendment abolishing the double liability

and the statute in question, the latter is necessarily repealed.

On the other side it is contended that there is no repugnancy between the amendment and the statute, that the amendment prescribes the minimum of liability, but leaves the maximum or extent of liability that may be imposed to the Legislature, and that this is disclosed by the words in the amendment, "such other means as may be provided by law." And it is further contended that the statute which provides "other means," that is the double liability of stockholders in banks being in force when the amendment was adopted, continued in force, and was as effective as if it had been reenacted after the adoption of the amendment. It is further insisted that the interpretation contended for is the practical construction which has been placed upon the amendment by the executive and legislative departments of the state and should be given consideration by the court.

The majority view of the court is that the amendment did not effect a repeal of the statute, and that the plaintiff is entitled to recover the amount claimed from defendant. The theory is that there are no limits upon the legislative power, except such as are prescribed in the state and federal Constitutions, that, under our system, a constitutional provision is not a grant of power but is a limitation on the power the Legislature may exercise, and, where there is no limitation, its power is absolute and plenary. The only limitations imposed upon that body by the constitutional amendment is that no individual liability shall be imposed on stockholders of railroad, religious, and charitable corporations, and that the liability of stockholders in other corporations shall not be less than the amount of stock owned by each of them. Under the amendment, the Legislature is admonished that the debts of the corporation must be secured by stockholders up to the prescribed minimum of liability, and, as no maximum of liability is prescribed, the Legislature under its general power is free to provide for such additional liability as it deems to be wise. The constitutional provision is a measure for the protection of creditors, and under it creditors may look to the stockholders upon their individual liability to an amount equal to the stock held by each of them and to such further liability as the Legislature in its discretion shall provide. The Legislature could not, under the constitutional mandate, fix the protection of creditors at an amount less than the single liability, but under its general power could make it a double or treble liability or any reasonable amount in excess of the minimum fixed by the amendment. The Legislature had provided for a double liability of stockholders in banks, in harmony with the original constitutional limitation, and, as it is not inconsistent with the amendatory provi-

sion as construed, that act continued in force without an express provision to that effect. It has been said that:

"The adoption of a constitutional amendment will not repeal a valid statute, unless the repugnance between them be irreconcilable." *Fischer v. Moore*, 69 Kan. 191, 202, 76 Pac. 403.

See, also, *Leavenworth v. State*, 5 Kan. 688, 693; *Prohibitory Amendment Cases*, 24 Kan. 700, 722.

Under the construction placed upon the amendment, there is nothing approaching repugnancy between it and the statute. Reference has been made to *Bicknell v. Altman*, 81 Kan. 436, 105 Pac. 694, and *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, L. R. A. 1915B, 797, Ann. Cas. 1913A, 378, as being opposed to the construction now given the amendment. It is the view of the court that neither of these cases can be regarded as an authority against the construction adopted, as the corporations dealt with in those cases were not banks, and the statute involved here was not under consideration. It may be said further that the language employed in those cases is to be interpreted in the light of the questions the court had under consideration. They are no more controlling as to the effect of the amendment on an existing and valid statute than *Faulkner v. Bank*, 77 Kan. 385, 94 Pac. 153, and *Bank v. Strachan*, 89 Kan. 577, 132 Pac. 200, 46 L. R. A. (N. S.) 668, in both of which language was used that was open to the interpretation that the double liability of stockholders was still in existence. So far as the practical construction of the amendment is concerned, it is held that the court may call to its aid, not only the history of the times when it was adopted, but also the contemporaneous construction placed upon it for a considerable period by those charged with its application and execution. So attention is called to the fact that the Legislature had framed and submitted the amendment in 1905 and that in 1909 it passed an act which provided for the collection of double liability from stockholders in banking corporations. Laws 1909, c. 59, § 7; Gen. Stat. 1915, § 573. There was a like reference when the bank guaranty law was enacted, for in it was a provision requiring the officer in charge of an insolvent bank to exhaust the double liability of its stockholders. Laws 1909, c. 61, § 4; Gen. Stat. 1915, § 508. It was said in argument that the banking department since 1906, when the amendment was adopted, had interpreted it and the statute as justifying and requiring the enforcement of a double liability against stockholders of insolvent banks, and that this interpretation had been acquiesced in by banks and the stockholders of banks during the period named. The constitutional amendment is of course to be construed in the sense in which it was understood by those who adopted it, and cannot be given a mean-

ing contrary to the import of the language used. However, where there is obscurity or ambiguity in the provision, resort may be had to the aids mentioned to ascertain the purpose and meaning of those who framed and adopted the amendment. Of themselves they are of little weight, none at all unless the construction is a doubtful one, but such light as they throw on the purpose of the authors of the amendment is corroborative of the construction placed upon it. It follows that the former decision is set aside, and that the judgment of the district court is reversed, with the direction to enter judgment against the defendant.

MASON, PORTER, and DAWSON, JJ., concurring.

JOHNSTON, C. J. (dissenting). I am unable to concur in the construction placed upon the constitutional amendment. The view stated in the first and what was then the prevailing opinion sufficiently set forth the views I entertain on the question. *Bank v. Laughlin*, 110 Kan. 559, 207 Pac. 433. A reiteration of them here is unnecessary, and a reference to that opinion is made for the grounds of my dissent.

WEST and MARSHALL, JJ., join in the dissent.

BURCH, J. (concurring). Section 1 of article 2 of the Constitution of this state reads as follows:

"The legislative power of this state shall be vested in a house of representatives and senate." Gen. Stat. 1915, § 141.

We have here delegation to the Legislature of all the power of the people of this state to promulgate laws, and inhibitions upon such power, aside from those which arise from relation of the state to the federal government, must be found in the Constitution itself.

In the case of *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425, the court said:

"The state Legislature have all the legislative power that the people of the state have power to give them." 7 Kan. 506, 12 Am. Rep. 425.

In the case of *Ratcliff v. Stockyards Co.*, 74 Kan. 1, 86 Pac. 150, 6 L. R. A. (N. S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016, the syllabus reads:

"There are no limits upon the legislative power of the Legislature of the state, except such as may be found in the state and federal Constitutions." Paragraph 3.

In the case of *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486, it was said:

"Full legislative power is, save as specially restricted by the Constitution, vested in the Legislature. Taxation is a legislative power. Full discretion and control therefore, in reference to it, are vested in the Legislature, save when specially restricted." 81 Kan. 154, 1 Pac. 200, 47 Am. Rep. 486.

Restrictions are not to be lightly inferred. They are not to be derived from axioms, or from supposed fundamental principles, or from conceptions of the essential nature of constitutional government. *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207. There must be some provision of the Constitution itself which abridges legislative power. Abridgment may be express or it may be implied. One form is as potent as the other, but abridgment by implication must be as plain as express abridgment, and, in order that this may be so, the implication must arise from an express provision. When an express provision, relating to some subject of legislative cognizance, is found, the provision is to be given full effect, but it will not be extended further than necessary to give it full effect, and the Legislature is at liberty to deal with all phases of the subject not clearly covered by the provision. All this was said in the opinion of the court, formulated by Justice Brewer, in the case of *Prouty v. Stover*, Lieut. Governor, 11 Kan. 235, the syllabus of which reads:

"Constitutional inhibitions need not always be express. They are equally effective when they arise by implication. To create an implied inhibition there must be some express affirmative provision. The mere silence of the Constitution creates no prohibition. To sustain an implied inhibition, the express provision must apply to the exact subject-matter, and the inhibition will not be extended further than necessary to give full force to the provision." Paragraph 3.

These principles have been applied in numerous cases. The Constitution provides that judicial districts shall be formed of compact territory, bounded by county lines, and that new or unorganized counties shall be attached for judicial purposes to the most convenient judicial district. Article 3, §§ 14, 19. In the case of *In re Holcomb*, Petitioner, etc., 21 Kan. 628, it was held the Legislature had authority to attach to a county, for judicial purposes, a section of the state not divided into counties, either organized or unorganized. In the opinion it was said:

"The grant of power to attach, existing though unorganized counties to judicial districts, carries no implication of a denial of power to so attach undivided territory. There is nothing exclusive in such grant, i. e., nothing excluding the exercise of similar power upon different objects and under different conditions." 21 Kan. 635.

The legislative article of the Constitution contains the following section:

"The Legislature may confer upon tribunals, transacting the county business of the several counties, such powers of local legislation and administration as it shall deem expedient." Article 2, § 21.

In the case of *City of Emporia v. Smith*, 42 Kan. 433, 22 Pac. 616, it was held this grant of power did not exhaust the subject, and by implication forbid the Legislature to confer power of local legislation on other local agencies.

The Constitution directed that the state be divided into five judicial districts, provided for increasing the number of judicial districts provided for election in each district of a district judge, and provided for election of a judge pro tem, to act when the district judge was unable or disqualified to act. Article 3, §§ 5, 14, 20. In the case of *State v. Hutchings*, 79 Kan. 191, 98 Pac. 797, it was held these provisions did not, by implication, prevent the Legislature from providing for more than one district judge in a judicial district.

In 1880, the Constitution was amended by addition of the following section:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific and mechanical purposes." Article 15, § 10.

In the case of *State v. Durein*, 70 Kan. 13, 80 Pac. 987, it was held the Legislature was not impliedly inhibited from further restraining the manufacture and sale of intoxicating liquor. In the opinion it was said:

"The amendment to the Constitution of this state already quoted does not limit or abridge the power of the Legislature further to prohibit the traffic in intoxicating liquors. It restrains the Legislature in its power to tolerate only, and not in its power to suppress. * * * It is elementary law that grants of power by state Constitutions to state Legislatures include all legislative power that is not expressly withheld." 70 Kan. 35, 37, 80 Pac. 994, 995.

To the same effect is the decision in the case of the *State v. Weiss*, 84 Kan. 165, 113 Pac. 388, the syllabus of which reads:

"The constitutional amendment, forever prohibiting the manufacture and sale of intoxicating liquors in this state, except for medical, scientific, and mechanical purposes, is not a restriction upon the power of the Legislature to prohibit by a statute. In the absence of such amendment, the Legislature would possess such power, and its authority is not diminished thereby." Paragraph 1.

The amendment to the Constitution under consideration reads as follows:

"Dues from corporations shall be secured by the individual liability of the stockholders to the amount of stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corpora-

tions for religious or charitable purposes." Article 12, § 2.

Full force is given to the first sentence when dues from corporations are secured by individual liability of stockholders to the amount of stock owned. To that extent the sentence restricts the power of the Legislature. The Legislature may not do less, but that is the full extent of the restriction, and the implication that it may not do more is forbidden by the method of reading the Constitution accepted for the last 50 years.

The words, "and such other means as shall be provided by law," add nothing by way of restriction on legislative power. To secure dues from corporations, the Legislature shall resort to individual liability to a stated extent, and shall resort to such other means as it may choose. In resorting to individual liability, the Legislature may not come short of the extent stated. There constraint ends. There is no prohibition against going further with that kind of security, and there is full choice of other means. The statute in question reads as follows:

"The shareholders of every bank organized under this act shall be additionally liable for a sum equal to the par value of stock owned, and no more." Laws 1897, c. 47, § 10; Gen. Stat. 1915, § 523.

If it be said that individual liability to the amount of stock owned, mentioned in the Constitution, is a specific means of security, and that, looking elsewhere for security, the Legislature must choose other means, the statute provides other means. The constitutional provision is that the common-law obligation of stockholders, enforceable by common-law remedies, shall be available as security for dues of corporations. The banking act provides an independent statutory liability, enforceable by a receiver for the corporation. The subjects are not the same, either in law or in popular understanding, and are not the same according to the decisions in Stover's case and Holcomb's case.

The Blackstone rule of considering the old law, the mischief, and the remedy, when interpreting written law, is a good one. The former section read as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount, equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Const. art. 12, § 2.

Under the peculiar economic conditions which prevailed during the particular period in which the change was made, it was believed double liability was too severe and

kept out capital needed for development of the state's resources. These were evils which it was believed outweighed the supposed benefits of double liability. The Supreme Court of the United States has held the provision of the Constitution to be self-executing. This court subsequently held the provision was not self-executing, but required supplemental legislation to make it effective. Following the decision of this court, the Legislature repealed the supplementary legislation which it had enacted, except with respect to the liability of stockholders in banks. The provision of the Constitution was plain, and was morally obligatory; and to relieve the Legislature from the appearance of disobedience to the Constitution which created it, an amendment to the Constitution was desirable.

Except for the first sentence, the original section is identical with the amendment. The requirement that the Legislature should provide for double liability was eliminated, and the milder requirement of single liability was substituted. The grant of power contained in the first section of the legislative article of the Constitution was unmistakably unlimited. The Legislature knew that withdrawal of a specific subject of legislative cognizance from this grant must be equally unmistakable. With this knowledge, the Legislature chose the words of the amendment. Presumably they express the legislative thought, and the intention of the people who, by their votes, made the amendment effective. In the former opinion appears the following:

"The manifest purpose of the people in adopting the amendment was to fix the individual liability of stockholders for the dues or obligations of corporations." Bank v. Laughlin, 110 Kan. 559, 207 Pac. 433.

The only manifest purpose of the people of which I am assured is the authenticated purpose to put into the Constitution the amendment framed and submitted to them by the Legislature. It will be recalled that when, in the midst of agitation of the subject, the Legislature repealed the supplementary measures which made the original provision effective, it saved double liability of stockholders in banks. Generally the people were bank depositors and, judging from the action of the Legislature, hostility to double liability did not embrace all classes of stockholders. If the purpose of the amendment was to tie the hands of the Legislature for the future and, no matter what the welfare of the state might demand, prohibit the Legislature from imposing greater liability on holders of bank stock and some other kinds of corporate stock than would exist without Constitution or statute, express words to that effect were

manifestly avoided. The proposed restriction must be derived by implication only, and, unless the understanding of constitutional provisions, which has prevailed during the greater part of the state's history, is to be disregarded, the implication is forbidden.

The result is that, however the subject may be approached, the statute imposing double liability on holders of bank stock is constitutional and valid, and the judgment of the district court should be reversed.

(109 Kan. 484; 111 Kan. 356)

STATE ex rel. BURNETT, Co. Atty., v. CITY OF HUTCHINSON. (Nos. 23292, 23564.)

(Supreme Court of Kansas. July 9, 1921. On Rehearing, June 10, 1922.)

(Syllabus by the Court.)

1. Municipal corporations §33(9)—In quo warranto held that after 30 years tract will be presumed to have been legally included in city.

In 1889 a city of the second class presented a petition to the judge of the district court asking permission to extend the city limits so as to include several described tracts of land. Permission was granted to include some of the tracts and denied as to others. The city passed an ordinance including one of the tracts denied, and immediately thereafter and continuously for more than 30 years exercised unquestioned authority over that tract by giving police and fire protection, levying taxes, and building sewers. About a year after the passage of the ordinance another ordinance was passed defining the city limits as they then existed. It included the questioned tract described in the first ordinance. *Held* that, in an action commenced by the state on the relation of the county attorney, after the lapse of 30 years, it will be presumed that the tract was legally included within the city limits, and that presumption should not be overthrown except by the most clear and convincing evidence.

On Rehearing.

2. Former opinion adhered to.

The opinion in *State ex rel. v. City of Hutchinson*, 109 Kan. 484, 207 Pac. 440, is approved, and the judgment there rendered is adhered to.

3. Former opinion followed.

State ex rel. v. City of Hutchinson followed.

Appeal from District Court, Reno County.

Two actions in quo warranto by the State, on the relation of W. H. Burnett, County Attorney of Reno County, against the City of Hutchinson. Judgment for relator in one action, and for defendant in the other, and both parties respectively appeal. Reversed,

with directions, as to first cause, and affirmed as to second.

W. A. Huxman, Eustace Smith, and F. Dumont Smith, all of Hutchinson, for appellant.

William Burnett, C. M. Williams and D. C. Martindell, all of Hutchinson, for appellee.

MARSHALL, J. In this action, one in quo warranto, the plaintiff asks that the defendant, a city of the first class operating under the commission form of government, be required to show by what authority it exercises jurisdiction over the southeast quarter and the southwest quarter of section 17 in township 23 south of range 5 west in Reno county, and over that part of the northwest quarter of that section lying south of the center line of the right of way of the Atchison, Topeka & Santa Fé Railway Company, and asks that such authority be held void and in excess of the corporate powers of the city.

[1] The principal phase of the controversy revolves around the extension of the corporate limits so as to include the southeast quarter of section 17. Four ordinances extending and defining the boundaries of the city of Hutchinson are set out in the abstract: One, No. 93, passed on February 28, 1888; another, No. 152, passed on May 1, 1889; yet another, No. 241, passed on July 24, 1890; and the last, No. 1378, passed on July 8, 1919. Ordinance No. 93 is so indefinite that the court is unable to ascertain whether or not the territory in question was embraced within it, and that ordinance will not be further considered. Ordinance No. 152 attempted to extend the corporate limits of the city so as to include the southeast quarter of section 17; but an examination of the order of the court on the petition of the city of Hutchinson, then a city of the second class (it became a city of the first class on February 21, 1911), to extend its limits, reveals that authority was not given to the city to extend its boundaries so as to include that territory. However, the evidence showed that the city of Hutchinson has been exercising authority over the southeast quarter of section 17 continuously since May 20, 1889.

That part of the northwest quarter of section 17 lying south of the Atchison, Topeka & Santa Fé Railroad track was included within the city limits by Ordinance No. 152. Both the ordinance and the order of the court included that territory, and it was by those proceedings included within the city limits, but the southeast quarter of section 17 was not included in the order of the court.

The next ordinance concerning this matter was No. 241, the title to which read:

"An ordinance declaring and defining the entire boundary line of the line of the city as at present constituted."

The ordinance read:

"That hereafter the corporate limits and entire boundary of the city of Hutchinson shall be as follows."

This was followed by a description of the territory which included the southeast quarter of section 17, but specifically excluded the southwest quarter of that section. When Ordinance No. 241 was passed, Hutchinson was still a city of the second class. The statute then required that such a city desiring to extend its limits should present a petition to the judge of the district court—

"with proof that notice of the time and place said petition shall be so presented has been published for three consecutive weeks in some newspaper published in said city, he shall proceed to hear testimony as to the advisability of making such addition; and upon such hearing, if he shall be satisfied that the adding of such territory to the city will be to its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be so added, he shall so find; and thereupon the city council of said city may add such territory to said city by an ordinance providing for the same." Gen. Stat. 1889, § 884.

It has not been shown that this section of the statute was complied with. Ordinance No. 241 defined the city limits as they existed at the time of its passage. If it correctly described the city limits at that time, the southeast quarter of section 17 must previously thereto have been included within those limits. No ordinance extending the city limits so as to include the southeast quarter of section 17 other than No. 152 appears in the record.

It might be successfully contended that the burden of proof was on the state to show that the city of Hutchinson had not extended its boundaries so as to include the southeast quarter of section 17. *State ex rel. v. City of Harper*, 94 Kan. 478, 484, 146 Pac. 1169. There is no question that the city by Ordinance No. 1378 has attempted to include the southwest quarter of section 17 within the city limits. When it appeared that by Ordinance No. 241 the city attempted to define its boundaries as they then existed and included the southeast quarter of section 17, and that for more than a year prior to the passage of that ordinance the city had continuously exercised authority over the territory, in the absence of any showing to the contrary, a presumption arose that the ordinance correctly described the city limits, and that the southeast quarter of section 17 had been regularly included within the limits. In *State ex rel. v. City of Atchison*, 92 Kan. 431, 140 Pac. 873, Ann. Cas. 1916B, 500, this court said:

"Where an ordinance which has been regularly passed by a city council and approved by the mayor is offered in evidence, and the validity of such ordinance depends upon the existence

of one or more facts at the time of the enactment thereof, the existence, and not the nonexistence, of the necessary facts to sustain the validity of the ordinance, should be presumed in the absence of evidence to the contrary." Syl.

In the *State ex rel. v. City of Hutchinson*, 103 Kan. 370, 175 Pac. 147, an action brought by the state on the relation of the county attorney to determine the authority of the city of Hutchinson over the land occupied by the reformatory, it was said:

"Under the facts stated in the opinion, the presumption that a certain ordinance adding to the territory of the defendant city was preceded by the requisite statutory preliminaries will not be permitted to be overthrown by the claims of the city to the contrary." Syl.

For more than 30 years the city has exercised authority over the southeast quarter of section 17; police and fire protection has been given, taxes have been levied, and sewers have been constructed, the assessments for a portion of which apparently remain unpaid and for which bonds have probably been issued. After that length of time, in the absence of proof to the contrary, it should be presumed that the city complied with the law and presented a proper petition to the judge of the district court; that an order was made authorizing the city to extend its limits so as to include that quarter section; and that subsequent to the passage of Ordinance No. 152 another ordinance had been passed extending the city limits in accordance with an order of the court. That presumption should not be overthrown except by the most clear and convincing evidence. The time will soon come when cities will be unable to prove either their corporate existence or their territorial limits by proper record evidence. When that time comes, presumptions in favor of the cities must be resorted to. The following authorities support the conclusion reached: *People v. Farnham et al.*, 35 Ill. 562; *Belknap, etc., v. City of Louisville*, 93 Ky. 444, 20 S. W. 309; *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252; *State ex rel. Bridge Co. v. Columbia*, 27 S. C. 137, 3 S. E. 55; *McQuillin's Municipal Corporations*, §§ 260, 289. However, in none of the cases cited was the authority of the corporation directly questioned by the state.

With the southeast quarter included within the city limits, the southwest quarter of section 17, at the time Ordinance No. 1378 was passed, was mainly within the city limits, because that quarter was bounded by the city on three sides; and the city had authority, under section 1462 of the General Statutes of 1915, to extend its corporate limits so as to include such territory. Section 1462 in part reads:

"Whenever any unplatted piece of land lies within (or mainly within) any city * * * said lands, platted or unplatted, may be added

to, taken into and made a part of such city by ordinance duly passed."

The presumption compels the court to hold that the southeast quarter of section 17 had been included within the city limits, and therefore Ordinance No. 1378 extended the city limits so as to include the southwest quarter of that section.

The judgment is reversed, and the trial court is directed to enter judgment for the defendant.

All the Justices concurring.

On Rehearing.

In case No. 23,292, *State ex rel. v. City of Hutchinson*, 109 Kan. 484, 207 Pac. 440, an opinion was filed July 9, 1921. A rehearing was granted, and No. 23292 is now disposed of on rehearing.

[2] 1. The statement of facts contained in the former opinion is correct, but this additional statement should be made. Ordinance No. 1378 attempted to include within the city limits all that part of the northwest quarter of section 17 in township 23 south, of range 5 west, in Reno county, lying south of the right of way of the Atchison, Topeka & Santa Fé Railway Company. The city limits had previously been extended, so as to include all that part of the northwest quarter of that section lying north of that right of way. The right of way had not been annexed to the city limits previous to the passage of Ordinance No. 1378. The court is of the opinion that the failure to include the right of way of the Santa Fé Railway Company within the city limits by Ordinance No. 1378 did not invalidate that ordinance. With this addition, the former opinion of this court is approved, and the judgment there rendered is adhered to.

[3] 2. After judgment was rendered in the district court from which the appeal in No. 23292 was taken, the city passed Ordinance No. 1442, by which the city attempted to annex all that part of the northwest quarter of section 17 in township 23 south, of range 5 west, lying south of the north line of the right of way of the Atchison, Topeka & Santa Fé Railway Company, and all of the southwest quarter of section 17 in township 23 south, of range 5 west, in Reno county. The plaintiff then commenced this action, No. 23564, one in quo warranto, and asked that the defendant be ousted from exercising municipal powers over the territory described. The action was tried, judgment was rendered in favor of the defendant, and the plaintiff appeals.

The only difference between the two actions is that by Ordinance No. 1378 the defendant did not include the right of way of the Atchison, Topeka & Santa Fé Railway Company within the limits of the city, and

by the Ordinance No. 1442 that right of way is included. The opinion in No. 23292, *State ex rel. v. City of Hutchinson*, 109 Kan. 484, 207 Pac. 440, is controlling, and compels an affirmance of the judgment in case No. 23564.

The judgment is affirmed.

All the Justices concurring.

(86 Okl. 242)

BRIDGES v. BALDRIDGE et al. (No. 13070.)

(Supreme Court of Oklahoma. May 18, 1922.
Rehearing Denied June 18, 1922.)

(Syllabus by the Court.)

Appeal and error \S 781(1)—Abstract or hypothetical questions, involving only the appeal costs, will not be determined.

Abstract or hypothetical questions, disconnected from the granting of actual relief or from the determination of which no particular result can follow other than the awarding of the costs of the appeal, will not be decided by this court. *Snelson v. Bodovitz*, 80 Okl. 7, 193 Pac. 878; *McCullough et al. v. Gilcrease*, 40 Okl. 741, 141 Pac. 5; *Parker v. U. S. Smelter Co. et al.*, 80 Okl. 129, 194 Pac. 897.

Appeal from District Court, Nowata County; C. W. Mason, Judge.

Action by J. W. Bridges against Charley Baldrige and another. Judgment in favor of the defendants, and the plaintiff appeals. Appeal dismissed.

C. H. Baskin and William J. Morrow, both of Nowata, for plaintiff in error.

Hamilton & Pendleton, of Nowata, for defendants in error.

JOHNSON, J. Now on this day comes on for consideration the motion of defendants in error to dismiss the petition in error of the plaintiffs in error, alleging that the same is frivolous and without merit, and is taken for the purpose of delay only; that the only question that could possibly be presented on this appeal is an abstract, hypothetical, and moot question.

The record discloses that the plaintiff in error, who was plaintiff below, in his amended petition sought to have reformed a certain contract of purchase of the land involved, and to recover and have quieted in plaintiff the title to the same, and that a certain deed from the defendant Charlie Baldrige to the defendant Ellen Baldrige be canceled as having been fraudulently executed without any consideration for the purpose of defeating the just rights of the plaintiff, and that she, and all persons holding under or by virtue of said deed, be perpetually enjoined from claiming the lands or any

interest therein, and that plaintiff have judgment for costs.

Thereafter, on the 19th day of August, 1921, the defendants filed a general and special demurrer to the plaintiff's amended petition, in which they allege that there was misjoinder of causes of action in his attempt to join in this cause of action a suit for reformation of instrument and for special performance of contract and for cancellation of instrument, and to declare lien upon real estate, and to quiet title; that the petition did not state facts sufficient to constitute a cause to action in favor of the plaintiff and against the defendants, or either of them.

Thereafter, on the 30th day of August, 1921, the defendants demurred to the amended petition, aforesaid, of plaintiff, which was sustained by the court, to which ruling of the court the plaintiff then and there excepted.

The record further discloses that thereafter, on the same day, to wit, August 30, 1921, the cause proceeded to trial before the court, and the court rendered judgment on the cross-petition of the defendant Ellen Baldridge against the plaintiff, to which judgment the plaintiff excepted at the time, and gave notice of appeal. The court made an order which was indorsed upon the minutes, allowing 60 days in which to make and serve case-made and 10 and 5 days in which to settle the same. The journal entry of judgment recites the foregoing proceedings, after which it further recites the filing of the defendants' cross-petition on the 16th day of July, 1921, and there had been no pleadings filed on the part of the plaintiff as his answer or other pleadings to said cross-petition, and that—

"The plaintiff and the defendant and cross-petitioner, Ellen Baldridge, agree in open court that judgment may be rendered on said cross-petition for and in favor of the said Ellen Baldridge and against the said J. W. Bridges, canceling the instruments asked to be canceled in said cross-petition, and quieting the title of said real estate in the said Ellen Baldridge."

Then follow the orders and decrees of the court accordingly, concluding with the judgment that all costs of this cause of action are assessed against the plaintiff, J. W. Bridges.

The correctness of this judgment was not challenged by the plaintiff in a motion for a new trial or otherwise. On February 28, 1922, and within 6 months from the date of the rendition of the judgment on August 30, 1921, the plaintiff filed a petition in error in this court, with copy of case-made attached, the assignments of error in his petition being that the court erred in sustaining the general demurrer of defendants to the amended petition of plaintiff and dismissing such causes of action.

We think the defendants' motion to dis-

miss the appeal is well taken, and should be sustained for the reason that the question of the correctness of the court's ruling sustaining the demurrer of the defendants to the plaintiff's petition and dismissing the same is moot.

The judgment of the court thereafter rendered in the cause upon the agreement of the parties sustaining the defendants' cross-petition, and quieting title to the land in controversy in her, and confirming the same, having become final, and the correctness thereof not being challenged by this appeal, it is therefore ordered that the plaintiff's appeal be, and the same is hereby, dismissed.

MCNEIL, NICHOLSON, MILLER, and KENNAMER, JJ., concur.

(87 Okl. 106)

WOLFE v. KILLINGSWORTH et al.
(No. 10430.)

(Supreme Court of Oklahoma. March 21, 1922.
Rehearing Denied June 13, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 526—Evidence made a part of referee's report held a part of the record and subject to review.

Under an order of reference, the referee was directed to take the testimony and report his findings of fact and recommendations of law thereon. The referee filed his report to which was appended all the evidence taken by him, and was made a part thereof. The report so filed was approved by the court, and incorporated in the case-made, which was acknowledged by the attorneys for the appellee as being a true, complete, and correct statement and transcript of all the pleadings, motions, orders, evidence, findings, decisions, reports, and judgments and proceedings had in the cause, and that the same was a true and correct case-made. *Held*, that the evidence taken by the referee was made a part of the record, and is subject to review by this court.

2. Trusts \S 86—Generally the court will not presume a resulting trust and the burden of establishing it is on the party asserting it.

As a general rule the law will not presume a resulting trust, except in a case of necessity, and the burden of establishing such a trust as against the holder of the legal title is on the party who asserts it.

3. Bankruptcy \S 148—Property acquired by bankrupt after adjudication does not pass to trustee.

Property acquired by the bankrupt after the adjudication of bankruptcy does not pass to the trustee.

4. Bankruptcy \S 303(3) — Judgment against the trustee held not against clear weight of evidence.

Record examined, and found that the judgment of the trial court is not against the clear weight of evidence.

Appeal from District Court, Seminole County; J. W. Bolen, Judge.

Action by A. C. Aldridge against M. E. Killingsworth and another, for recovery of land, in which O. Dale Wolfe, trustee of G. F. Killingsworth, bankrupt, filed his petition of intervention, alleging that the defendant was the wife of the bankrupt, and that the premises were purchased in her name when the bankrupt was insolvent, and from a judgment therein, the intervenor appeals. Affirmed.

A. M. Fowler and O. Dale Wolfe, both of Wewoka, for plaintiff in error.

A. S. Norvell and M. E. Killingsworth, both of Wewoka, for defendants in error.

PITCHFORD, V. O. J. On May 14, 1914, A. C. Aldridge, as plaintiff, filed in the district court of Seminole county, Okl., his petition against M. E. Killingsworth and J. Van Buskirk, seeking the recovery of 60 acres of land described in the petition. Both plaintiff and defendant deraigned title from Joseph Carolina, duly enrolled as a Seminole freedman. The deed to plaintiff bears date of 23d of May, 1908; the deed to the defendant J. Van Buskirk bears date of January 25, 1911, and the deed to the defendant M. E. Killingsworth bears date of December 13, 1912.

On December 5, 1914, C. Dale Wolfe, trustee of G. F. Killingsworth, bankrupt, filed in said cause his petition of intervention, alleging that the defendant M. E. Killingsworth was the wife of G. F. Killingsworth; that the premises involved were purchased in the name of defendant M. E. Killingsworth, as the wife of G. F. Killingsworth, at a time when the said G. F. Killingsworth was insolvent, and that the said M. E. Killingsworth and G. F. Killingsworth well knew that the said Killingsworth was insolvent; that the land was purchased at a time immediately preceding the adjudication of the said G. F. Killingsworth as a bankrupt, and was purchased with money belonging to the said G. F. Killingsworth, and was purchased and placed in the name of M. E. Killingsworth pursuant to a verbal understanding and agreement; that said property was to be purchased in the name of the defendant M. E. Killingsworth, and to be held by her for the use and benefit of her husband, G. F. Killingsworth, and to be kept in her name so as to be placed beyond the reach of the creditors of G. F. Killingsworth, and that said purchase in the name of M. E. Killingsworth was had and obtained for the purpose of and with the design to place said real estate beyond the reach of the creditors of the said G. F. Killingsworth.

The defendant Van Buskirk made no defense.

On February 27, 1918, the cause was referred to John W. Willmott, Esq., "to take

the testimony and hear the evidence herein and report his findings of fact, together with his recommendations of law thereon, to this court on or before the 1st day of May, 1918."

On July 1, 1918, the report of the referee was filed, containing the following preamble:

"Comes now John W. Willmott, duly appointed and qualified as referee herein, and respectfully reports to the court that at various times, commencing with the 19th of March, 1918, and concluding on the 16th day of April, 1918, he heard all of the evidence offered on behalf of the plaintiff, the defendants, and intervenor; a full, true and correct transcript of all of which evidence is hereto appended and made a part hereof, marked Exhibit A."

On June 22, 1918, intervenor filed his motion for new trial, which was by the court overruled. From the judgment of the trial court, we quote the following:

"Now on this the 8th day of July, 1918, the same being a regular judicial day of the June, 1918, term of said court, this cause coming on to be heard upon the report of the referee, heretofore appointed in said cause, to hear and report the evidence and his findings of fact and conclusions of law based thereon, the court hears and considers said report and the exceptions thereto filed by said plaintiff and said intervenor before said referee, doth overrule said exceptions, and approve and adopt said report, findings of fact and conclusions of law, to which action of the court said plaintiff and said intervenor except."

The plaintiff Aldridge failed to appeal. The only controversy on this appeal is between the plaintiff in error, C. Dale Wolfe, who will hereafter be designated as intervenor, and M. E. Killingsworth, who will hereafter for convenience be designated as defendant.

[1] The main ground relied upon by the intervenor for reversal is that the judgment of the trial court is against the clear weight of the evidence. The defendant, on the other hand, contends that the order referring the hearing of this cause to the referee only authorized the referee to take testimony and hear the evidence and report his findings of fact, together with his recommendations of law thereon; that the referee was not directed to report the testimony or evidence; that the record fails to disclose that any bill of exceptions was allowed by the referee; insisting that, where the referee is not ordered to report the evidence, the evidence must be incorporated in a bill of exceptions before the trial court or appellate court can consider the same. We are of the opinion that this contention on the part of the defendant would be correct if nothing further appeared in the record than the order of reference.

In *Kingfisher Imp. Co. et al. v. Board of County Commissioners of Jefferson County et al.* (Okla. Sup.) 168 Pac. 824, it is said:

Where a referee for the trial of a cause in the district court is not ordered to report the evidence, but is ordered to hear the evidence and report his findings of fact and conclusions of law, the evidence so taken can only be made a part of the record and subject to review by the trial or Supreme Court by having the referee allow and sign a bill of exceptions containing the evidence taken by him. In the absence of such bill of exceptions the court cannot consider the question of the sufficiency of the evidence to support the findings of the referee, and cannot consider the evidence taken before the referee for the purpose of making independent findings therefrom, or for any other purpose."

However, in the instant case all the evidence was appended to and made a part of the report of the referee; no exceptions were filed against the report on the ground that the evidence was made a part thereof. The judgment of the trial court recited that the cause had been referred to the referee to hear and report the evidence and his findings of fact and conclusions of law based thereon. No exceptions were taken by either party to this portion of the judgment. It seems to have been understood by all the parties at the time the report was filed that the cause had been referred to the referee, not only to report his findings of fact and conclusions of law, but also to hear and report the evidence.

The attorneys representing the defendant acknowledged due, legal, and timely service of the case-made, waived the right to suggest any amendments, and acknowledged the case-made as a true, complete, and correct statement and transcript of all pleadings, motions, orders, evidence, findings, decisions, reports, and judgment and proceedings had in the cause, and that the same was a true and correct case-made.

If the order of reference had ordered the referee to report the evidence heard before him, and the evidence had been made a part of the report, there is no question but the same would thereby be made a part of the record, and subject to review by virtue thereof, and in that case there would have been no necessity for a bill of exceptions; and when the referee and the parties and the court recognized that the referee was to report the evidence, and the same was reported, and all this appears in the case-made, and no exceptions by either party, we are of the opinion that the order of reference should be treated as authorizing the referee to report the evidence.

[2] The legal title being in the defendant, the burden is on the intervener to establish the trust; that is, the title of the property was held by the defendant for G. F. Killingsworth. This well-known rule is enunciated in 39 Cyc. p. 152, as follows:

"As a general rule the law will not presume a resulting trust except in a case of necessity,

and the burden of establishing such a trust, as against the holder of the legal title, is on the party who asserts it. In case of resulting trust arising from payment of the purchase-money by one person and conveyance to another, the burden of proof, in the first instance, is on the party claiming the trust, to prove that the purchase was made with money or assets furnished by or belonging to him, and, if it has been only a part payment, to prove the precise amount so used, as well as the total consideration."

It is insisted by the defendant that the rule controlling in the instant case is that, if there was any evidence reasonably tending to support the judgment, the judgment should not be disturbed by this court. There is no doubt of the correctness of this rule, provided this was a law action. The action as originally filed by Aldridge against the defendant, seeking to recover the possession of the land, was purely a legal action, and the parties were entitled to a trial by jury, and, had the cause been tried by the jury, and the verdict returned, or if a jury had been waived, and the cause tried to the court, then the rule insisted on by the defendant would obtain. But when the intervener filed his petition, seeking to have a trust declared as against the defendant, the issues between the intervener and the defendant were purely of an equitable nature. No objections appear to have been made by any of the parties to the order of reference. It therefore follows that, the judgment of the trial court having become final as to all of the parties, except the intervener and the defendant, the action in so far as they are concerned is of equitable cognizance. This being true, this court has the power to go into and examine the evidence, and the judgment of the trial court should not be disturbed unless the same is found to be clearly against the weight of the evidence. We have carefully examined the evidence, and, while we find the same to be voluminous, and more or less conflicting, and in some respects contradictory, we are not prepared to say that the following conclusions could not reasonably be drawn therefrom; that the land was purchased at the time when G. F. Killingsworth was in failing circumstances; that the first payment of \$50 was borrowed from the First National Bank of Seminole, a note being executed for this amount by the said Killingsworth in the name of his wife, two notes for \$100 each to the vendor, the name of the defendant being signed thereto by G. F. Killingsworth, arrangements made with a brother of G. F. Killingsworth to allow Joseph Carolina, the grantor in the deed, merchandise to the amount of \$150, the balance of the consideration; within a very short time after the date of the deed G. F. Killingsworth made an assignment for the benefit of his creditors, and was at a later date adjudicated a bankrupt; that no part

of the consideration paid for the land in controversy was taken out of the business of G. F. Killingsworth. The note executed to the bank for the \$50, the two notes for \$100 each, and payment for the merchandise furnished, were not paid until several months after the adjudication. At the time the assignment was made for the benefit of creditors, G. F. Killingsworth had \$6.20 in cash. Soon after the assignment he and his wife, the defendant, moved on the farm of the defendant, and here G. F. Killingsworth labored and saved, and the major portion of the indebtedness incurred for the purchase of the land was paid with funds derived from the sale of crops raised on the farm.

It therefore follows that, as no rights of creditors were affected by the deed being made to the defendant, the trustee in bankruptcy is not entitled to have the land declared as part of the assets of the bankrupt.

[3] The rule is stated in 7 C. J. 132, as follows:

"Property acquired by the bankrupt after the adjudication of bankruptcy does not pass to the trustee."

The court in *Progressive Building & Loan Co. v. Hall*, 220 Fed. 45, 135 C. C. A. 613, says:

"Wages of a bankrupt earned after adjudication are not properly a part of the 'assets' to be administered."

[4] We are not prepared to say that the judgment of the trial court is clearly against the weight of evidence. This being our conclusion, the judgment of the trial court is therefore affirmed.

JOHNSON, McNEILL, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 192)

NORTH BRITISH & MERCANTILE INS. CO. v. LUCKY STRIKE OIL & GAS CO. (No. 10734.)

(Supreme Court of Oklahoma. May 30, 1922.)

(Syllabus by the Court.)

1. Insurance §388(2) — Where insured's agent requested insurer's agent to indorse on policy the making of contract of sale and insurer's agent stated it would not be necessary, insurer waived forfeiture.

Suit was brought on an insurance policy, which provided: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if any change * * * take place in the interest, title or possession of the subject of insurance. * * *" The insured had, prior to the loss, entered into an executory contract of sale of

the property insured but retained possession thereof, prior to the loss the agent of the insured submitted said contract of sale to the issuing agent of the insurance company and requested him to make such indorsement on the policy as he saw fit. The agent of the insurance company stated that it was unnecessary to make such indorsement, that the policy was all right. *Held*, that the insurance company waived the forfeiture incurred by the execution of the contract of sale of the subject of insurance, and was estopped to plead such forfeiture.

2. Insurance §388(1)—Insurer, recognizing contract after cause of forfeiture, waives such cause.

Any act of an insurance company, recognizing as an existing contract with it the policy of insurance sued upon, after knowledge that the cause of forfeiture has occurred, is a "waiver" of such cause of forfeiture.

Error from District Court, Garvin County; F. B. Swank, Judge.

Action by Lucky Strike Oil & Gas Company against North British & Mercantile Insurance Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Albert L. McRill, of Oklahoma City, for plaintiff in error.

J. T. Blanton, of Pauls Valley, for defendant in error.

NICHOLSON, J. This action was commenced in the district court of Garvin county on the 21st day of January, 1915, by the Lucky Strike Oil & Gas Company as plaintiff against the North British & Mercantile Insurance Company as defendant, to recover the sum of \$1,000 upon a fire insurance policy, issued by the defendant and covering one standard rig, derrick, belt and attachments located in Carter county. Upon a trial, judgment was rendered for the plaintiff from which an appeal was by the defendant prosecuted to this court, and the judgment was reversed for the reason that plaintiff had failed to prove that proof of loss had been by it furnished to the defendant, or that such proof of loss had been waived. The opinion on that appeal being reported in (Okl. Sup.) 173 Pac. 845. Upon a second trial a verdict was returned in favor of the plaintiff for the sum of \$960, with interest thereon at the rate of 6 per cent. per annum from January 1, 1915, upon which judgment was entered, and the case is again brought to this court for review.

The question of proof of loss is not now presented, but the insurance company contends that the contract of insurance had been breached by the plaintiff; that the court erred in giving certain instructions to the jury; and that the verdict of the jury was excessive, unauthorized by and contrary to law.

[1, 2] In the answer of the defendant it is averred, as a second defense, that, after the issuance of said policy and on or about the 23d day of July, 1914, the subject of said insurance became incumbered by a chattel mortgage, made, executed, and delivered by the plaintiff to Limbocker Oil Company, which was not authorized by any indorsement upon said policy, and that said chattel mortgage incumbrance constituted a violation of the insurance contract sued upon, and rendered the same wholly null and void, and, as a third defense, the defendant pleaded that, after the issuance of said policy, a change, other than by the death of the insured, took place in the interest and title of the subject of said insurance, by the voluntary act of the insured, in that the plaintiff sold, transferred, and conveyed to Limbocker Oil Company a certain interest in the subject-matter of such insurance, by entering into a certain agreement in writing, a copy of which is set out in the answer, and that said change of interest and title in the subject-matter of said insurance violated the express terms of said insurance policy and rendered the same wholly null and void.

In its reply the plaintiff admitted the execution of the contract set out in the answer, and pleaded that, immediately upon the execution of said contract, the plaintiff, by its agent J. H. Mathers, submitted said contract to the agent of the defendant issuing said policy of insurance, who was then the local agent of the defendant in Ardmore, and requested said defendant to make such indorsement upon said policy showing the execution of said contract as the agent might see fit, but that said agent at said time expressed it as his opinion to said Mathers that the execution and delivery of said contract did not require the indorsement of the same upon said policy; that said agent expressed it as his opinion that said instrument was not a chattel mortgage, but was a mere contract and that the policy did not require the fact of its execution to be indorsed thereon, in order that said policy might remain in full force and effect; and further pleaded that said defendant is now estopped by reason of said conduct of its said agent, who was authorized to make such indorsement, and who declined to do so upon the submission of all the facts to him, and that the defendant has waived the provisions of said policy as to said contract and agreed that said instrument was not a chattel mortgage, and waived the provisions of said policy requiring the indorsement upon said policy of such change in the title of the plaintiff in said property; that, but for the conduct of the agent of said defendant upon said occasion, this plaintiff would have had said indorsement made.

The policy of insurance on which this suit

was brought is the regular Oklahoma standard form and the provisions therein material on this appeal are as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. * * * This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of insured or otherwise."

The contract entered into between the plaintiff and the Limbocker Oil Company, and referred to by the defendant as both a chattel mortgage and contract of sale is in effect an executory contract of sale, but in our opinion it is immaterial whether it be treated as a mortgage or a contract of sale, as in either event its execution and delivery, without the consent of the insurance company indorsed thereon, would violate the terms of the policy, unless the insurance company, by its act or the acts of its agent, waived the indorsement required by the policy, and this brings us to the consideration of the statements and acts of Mr. Jones, the agent of the defendant at Ardmore, and the one who issued the policy to the plaintiff in regard to said contract.

J. H. Mathers, secretary and director of the plaintiff, testified, in substance, that Mr. Jones, a member of the firm of C. H. Clements & Co. solicited the insurance and delivered the policy upon which the action was brought, and that the plaintiff paid the premium thereon; that, on or about the 23d day of July, 1914, he had a conversation with the agent, Jones, in regard to the contract with the Limbocker Oil Company; submitted said contract to Jones and, after stating that he could not remember the exact language used, said:

"But the substance of it was that I had the contract there on the desk and I showed it to Mr. Jones and we discussed whether or not it would be necessary to attach a copy of this contract to the insurance policy or to indorse permission to enter into this contract on the insurance policy, and I advised him that I had had no experience in fire insurance. I had never had a loss and I didn't know their technical rules. And Mr. Milburn and the directors had asked me to speak to him about it, and he and I both agreed that it would not be necessary, and he then asked me where the policy of insurance was and I told him that Mr. Vaughn, who was our treasurer, and Mr. Milburn, who was our secretary, had the policy at Pauls Valley at their office. And if it was necessary, I would send and get it if he wanted it to attach a copy of this contract to it with our indorsement. He said it was all right but

it was not necessary, but he said: 'However, I will look into it and if I find that it is necessary I will let you know.' Now that was the substance of the conversation, the best I remember it."

From this evidence, which is undisputed, it clearly appears that the plaintiff sought to comply with the terms of the policy and submitted the contract of sale to the issuing agent of the defendant for the purpose of having the defendant make such indorsement on the policy as was necessary to preserve the insurance, and that the agent stated that such indorsement was not necessary; that the policy was all right, however, that he would look into the matter, and, if he found that an indorsement was necessary, he would so advise the plaintiff.

It is obvious that this statement of the agent had a tendency to lead the plaintiff into the belief that the policy would remain in full force and effect without such indorsement, and that it was through the fault of the agent that the indorsement was not made, and, as the agent never afterward indicated to the plaintiff that it was necessary that the indorsement be made, it was but natural that the plaintiff should believe that the policy would remain in force. This, in our opinion, constituted a waiver of the cause of forfeiture, and the defendant was estopped to plead such forfeiture when sued on the policy.

The defendant insists that it has been established by the decisions of this court that a policy writing agent at the inception of the contract may waive provisions of the policy, but that an oral waiver cannot be made by the agent after the policy has been issued and delivered, for the reason that the assured is advised of the limitations of the power of the agent, as set forth in the contract of insurance.

The provision in the policy as to limitations of the agent's authority reads as follows:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions and agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the forms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer or agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached"

—and cite in support of this contention the case of *Des Moines Insurance Co. v. Moon*, 33 Okl. 437, 126 Pac. 755, wherein the court held:

"A provision of a policy of fire insurance, executed in the Indian Territory before the admission of the state, which provided that 'this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * if the interest of the insured be other than unconditional and sole ownership, * * *' was not waived by reason of the fact that the agent, countersigning said policy, had knowledge at the time the policy was issued that the insured did not have unconditional and sole ownership, or by the act of the agent thereafter indorsing upon the policy a vacancy permit, where the policy provided that no officer, agent, or representative of the company shall have power to waive any provision or condition of the policy, unless such waiver, if any, shall be written upon or attached to the policy"

—but that case involved a policy issued in the Indian Territory before the admission of the state into the union, and this court held that it was bound to follow the rule announced by the Supreme Court of the United States in *Northern Assurance Co. of London v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. However, in *Western National Insurance Co. v. Marsh*, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991, this court refused to follow the rule of *Northern Assurance Co. of London v. Grand View Building Association*, in cases arising on contracts of insurance issued since the admission of the state, and, as to such contracts, adopted the rule supported by the great weight of authority of the state courts that, where the issuing agent had authority to make the contract of insurance an authority to indorse thereon the consent of the company to the existence of other insurance, that when he was advised of other insurance and had full knowledge thereof, and executed and delivered the contract and received the premium from the insured, the company was bound by his knowledge and could not defeat recovery because of such other insurance.

To the same effect is *Insurance Co. of North America v. Little*, 34 Okl. 449, 125 Pac. 1098. While, in the first case mentioned, the agent had knowledge of other insurance, and, in the other, had knowledge of a chattel mortgage on the subject of insurance at the time the policy was issued, no good reason appears why the doctrine of these cases should not apply to the facts in the case at bar. The issuing agent had authority to indorse on said policy an agreement authorizing the contract between the plaintiff and the Limbocker Oil Company, and, had this indorsement been made by him, the validity of such insurance could not have been questioned, and when he was advised of said contract and was requested to make such indorsement but failed to do so, because he considered such indorsement unnecessary, and so notified the plaintiff, thereby recognizing as still existing the contract

of insurance, the defendant is bound by his knowledge and conduct and should not be permitted to question the validity of such policy on the ground that such indorsement in writing was not made. This is supported by the following: *Springfield Fire & Marine Ins. Co. v. E. B. Cockrell Holding Co.* (Okl. Sup.) 169 Pac. 1060; *Fidelity-Phenix Fire Ins. Co. v. School Dist. No. 62 of Jackson County* (Okl.) 174 Pac. 513; *American Surety Company of New York v. Stinnett*, 78 Okl. 31, 188 Pac. 1060; *British American Assur. Co. v. Francisco*, 58 Tex. Civ. App. 75, 123 S. W. 1144; *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, 111 Pac. 507; *Liquid Carbonic Acid Mfg. Co. et al. v. Phenix Ins. Co.*, 126 Iowa, 225, 101 N. W. 749; *Briefs on Laws of Insurance by Cooley*, vol. 3, p. 2514.

The instructions complained of fairly state the principles of law applicable to this case, and the court did not err in giving the same to the jury.

The verdict was for the sum of \$960, with interest thereon from January 1, 1915. In *St. Paul Fire & Marine Insurance Co. v. Robison* (Okl. Sup.) 180 Pac. 702, it was held that interest cannot be recovered upon unliquidated damages, where it is necessary for a judgment or verdict to be had in order to ascertain the amount of such damages. Counsel for defendant in error do not question the correctness of the rule there announced, but suggest that, if the decision in that case is followed, this court should modify the judgment by eliminating the item of interest up to the date of the judgment. This in effect is a confession of error, and, without considering the correctness of the rule announced, we will follow counsel's suggestion.

The judgment will therefore be modified, by deducting interest on the damages allowed from January 1, 1915, to the date of the verdict, viz. January 16, 1919, and, as so modified, is affirmed.

JOHNSON, KANE, McNEILL, and ELTING, JJ., concur.

(86 Okl. 185)

SCOTT et al. v. WOODS LUMBER CO.
(No. 10727.)

(Supreme Court of Oklahoma. May 30, 1922.)

(Syllabus by the Court.)

1. Pleading \S 205(5) — A general demurrer should not be sustained to a petition, which, stripped of unnecessary verbiage, states cause of action.

Where the plaintiff's petition, stripped of surplus and unnecessary verbiage, states a cause of action against the defendant, a general demurrer thereto should be overruled.

2. Pleading \S 350(3)—Motion for judgment on pleadings presents questions whether there is an issue of material fact, and, if not, which party is entitled to judgment.

A motion for judgment on the pleadings presents two questions to the court in the following order: (1) Is there any issue of material fact? And if no issue of material fact is presented by the pleadings (2) which party is entitled to the judgment?

3. Appeal and error \S 553(1)—Two methods of bringing up record on petition in error stated.

There are two ways of bringing a record to this court in support of a petition in error: (a) The party appealing may attach to his petition in error a case-made containing all the record, including evidence and statements of the exceptions, without the necessity of having the exceptions reduced to writing, allowed, and signed by the trial judge; (b) or, the appealing party may attach to his petition in error a transcript of the record, and if he desires to bring to the court any part of the record other than the pleadings, the process, the return, reports, verdict, orders, and judgments, as provided for in section 5146, Rev. Law, 1910, he must incorporate same into the record by a bill of exceptions.

4. Record held to show that trial court did not err in rendering judgment on pleadings for plaintiff.

Record examined and held, that the trial court did not err in rendering judgment in favor of the plaintiff on the pleadings.

(Additional Syllabus by Editorial Staff.)

5. Appeal and error \S 880(3)—Defendants against whom no personal judgment was asked held foreclosed to question amount owing by another defendant.

Where no personal judgment was asked against two of the defendants, they were foreclosed to question the amount due and owing by another defendant.

6. Vendor and purchaser \S 240—Party seeking benefit of law as to innocent purchasers must plead it.

To have the benefit of the law as to innocent purchasers, parties claiming such benefit must plead it.

Appeal from District Court, Craig County; A. C. Brewster, Judge.

Action by the Woods Lumber Company, a partnership composed of O. E. Woods and another against John W. Scott and another. Plaintiffs' motion for judgment on the pleadings was sustained and judgment rendered for plaintiffs, and defendant Scott and defendant First National Bank of Miami, Okl., appeal. Affirmed.

F. W. Church and Andrew J. Jones, both of Miami, for plaintiffs in error.

O. Caldwell, of Vinita, for defendants in error.

JOHNSON, J. This is an appeal from the district court of Craig county. On the 18th day of April, 1918, Woods Lumber Company, a partnership composed of O. E. Woods and W. J. Woods, commenced an action in the district court of Craig county, Okla., against Mary Smith, John W. Scott, and the First National Bank of Miami as defendants, praying for judgment against the defendant Mary Smith for the sum of \$418.35, and to foreclose a materialman's lien on the buildings and land described in the said petition for said amount, and that said lien be adjudged superior to the rights of the defendants Scott and the First National Bank; that the lien be foreclosed and the property ordered sold to pay said amount, costs, and attorney's fees.

No personal judgment was sought against Scott or the bank. Service was had on Mary Smith by publication, and she made default. Personal service was had on the other two defendants, and they answered.

The plaintiff filed a motion for judgment on the pleadings as against the two answering defendants, and the trial court sustained the same and rendered judgment accordingly, to reverse which this proceeding in error was commenced by the defendant Scott and the bank by petition in error with a transcript of the record attached thereto.

The parties will be referred to hereinafter as plaintiffs and defendants, respectively, as they appeared in the trial court. The plaintiffs' petition in error contains six specifications of error, which are as follows:

(1) "The court erred in sustaining the motion for judgment on the pleadings. (2) The court erred in overruling the general demurrer of said plaintiffs in error filed in said cause. (3) The court erred in denying the right of trial by jury in said cause. (4) The court erred in overruling the motion to strike filed by the plaintiffs in error in this cause. (5) The court erred in overruling the motion to require plaintiffs to make petition more definite and certain filed by plaintiffs in error in this cause. (6) The court erred in rendering judgment against the defendants in said cause."

The third specification of error, supra, was expressly waived by counsel in their brief. Counsel for defendants have argued together specifications of error numbered 4 and 5, in their brief. These assignments cannot be considered by this court, because the motions therein referred to are not part of the record.

[3] As hereinbefore stated, this appeal is prosecuted by a transcript of the record which does not contain any case-made or bill of exceptions, in which the motions referred to are incorporated as required by law.

In the case of Stonebraker-Zea Cattle Co. v. Hilton, 34 Okl. 225, 124 Pac. 1062, this court stated, in paragraph 1 of the syllabus as follows:

"Motions presented in the trial court, the rulings thereon, and exceptions are not properly

part of the record, and can only be preserved and presented for review on appeal by incorporating the same into a bill of exceptions or case-made. The record proper in a civil action consists of the petition, answer, reply, demurrers, process, rulings, orders, and judgment; and incorporating motions, affidavits, or other papers into a transcript will not constitute them a part of the record, unless made so by bill of exceptions. Motions and proceedings which are not part of the record proper can only be presented for review by incorporating them into a case-made, or by preserving them by bill of exceptions and embracing them in the transcript."

See, also, the following cases for the same ruling: Brown-Beane Co. et al. v. Rucker, 36 Okl. 698, 129 Pac. 1; Craig v. Greer, 33 Okl. 302, 124 Pac. 1096; Green et al. v. Incorporated Town of Yeager, 23 Okl. 128, 99 Pac. 906; Lamb et al. v. Young et al., 24 Okl. 614, 104 Pac. 335; Nelson et al. v. Glenn et al., 28 Okl. 575, 115 Pac. 471; Tribal Development Co. v. White Bros. et al., 28 Okl. 525, 114 Pac. 736; Richardson v. Beidleman (Okla.) 126 Pac. 816; Vann et al. v. Union Central Life Ins. Co. et al., 79 Okl. 17, 191 Pac. 175.

In the latter case, supra, in quite an elaborate opinion by Ramsey, J., speaking for the court, it was stated, in syllabus 8 and 9, as follows:

(8) "There are two ways of bringing a record to this court in support of a petition in error: (a) The party appealing may attach to his petition in error a case-made containing all the record, including evidence and statements of the exceptions without the necessity of having the exceptions reduced to writing, allowed, and signed by the trial judge; (b) or, the appealing party may attach to his petition in error a transcript of the record, and, if he desires to bring to the court any part of the record other than the pleadings, the process, the returns, reports, verdict, orders, and judgments, as provided for in section 5148, Rev. Laws 1910, he must incorporate the same into the record by a bill of exceptions.

(9) "The bill of exceptions must be reduced to writing during the term of court at which the proceedings were had, unless the ruling and decision excepted to is made in vacation or at chambers, allowed and signed by the trial judge, and filed with the pleadings as a part of the record. The bill of exceptions never becomes a part of the record until it is filed in the trial court; and unless filed in that court it cannot be incorporated into a transcript in support of the petition in error in this court."

[1] The defendants' second specification of error, that the court erred in overruling the general demurrer of defendant to plaintiffs' petition, is without merit. The petition in substance alleges that Pearl H. Smith and Mary Smith were husband and wife, and that Pearl Smith is now dead. That, in October, 1910, said Pearl Smith became the owner of the property (describing it) by conveyance to him by a warranty deed; that they lived on the said farm together and, in

December, 1911, Pearl Smith conveyed the land to his wife, Mary Smith, and they continued to live on it; that said Pearl Smith and Mary Smith purchased the materials from plaintiff to build buildings on the said land; that plaintiff did not know of the transfer of the title to Mary Smith and charged the materials to Pearl Smith; that plaintiff did not know whether the conveyance was bona fide or not, but if so Pearl Smith was acting as the agent of his said wife in purchasing the materials and with her knowledge and consent; that the last of the materials were furnished on the 17th day of August, 1917, amounted to \$418.35, and that, on the 8th day of September, 1917, plaintiff filed a lien statement in the office of the court clerk of Craig county, Okl., the county in which the land lies, against the buildings and the farm. The property is particularly described and is a correct description. The name of the owner was given as Pearl Smith. Plaintiff alleges that, after this was done, Mary Smith sold the property to defendant Scott and he in turn mortgaged it to the bank. The petition alleged that Scott and the bank had notice of the lien of plaintiff, and before they purchased or loaned. It is obvious that the petition stated a cause of action against the defendants, therefore the defendants' demurrer was properly overruled by the trial court.

[2] The defendants' first and sixth assignment of error are that the court erred in sustaining the motion for judgment on the pleadings, and in rendering judgment against the defendants in said cause. The answer of the defendants was as follows:

"Comes now the defendants John W. Scott and the First National Bank of Miami and for answer to plaintiff's petition deny each and every material allegation therein contained, except such as are hereinafter specifically admitted, and demand strict proof thereof. Defendants admit that, in January, 1918, the defendant Mary Smith sold and transferred the land upon which a lien is herein sought to be established and foreclosed, together with all the improvements thereon, to the defendant, John W. Scott, such conveyance being by deed of general warranty dated January 24, 1918, excepting only a mortgage in favor of Gum Bros. Defendants further admit that, on the 2d day of February, 1918, said defendant, John W. Scott, executed a mortgage upon the said land and improvements in favor of the defendant, First National Bank of Miami, Okl."

As we have seen, Mary Smith was the principal debtor. No personal judgment was sought against the defendant Scott and the bank. The only question between plaintiff and the defendant Scott and the bank was the one of priority of rights. The petition was verified, the copy of the record of the court clerk as to filing the lien was verified, and the defendant Mary Smith made default. By making default, she, in effect, confessed the amount of the claim of the plaintiff.

The defendants' answer admits that in January, 1918, the defendant Mary Smith sold and transferred the land upon which a lien is sought to be established and foreclosed, together with all improvements thereon, to the defendant John W. Scott. Such conveyance was by warranty deed, dated January 24, 1918, excepting only the mortgage in favor of Gum Bros. Defendants further admit that, on the 2d day of February, 1918, said defendant John W. Scott executed a mortgage upon said land and improvements in favor of the defendant First National Bank of Miami.

In the case of *Sierzek et al. v. Smith et al.* (Okl. Sup.) 206 Pac. 611, this court, in an opinion filed June 28, 1921, not yet officially reported, in an action wherein the plaintiff sought personal judgment and foreclosure, and made other persons parties defendant on account of liens they claimed, and wherein the principal defendant made default, the court said:

"They tried to place themselves in the position that the defendants in error Mary and Robert West occupied, and argued that the law is likewise applicable to them. Had the Wests appeared and contested this suit of the plaintiff and demanded a jury, then, no doubt, error would have been committed by the refusal to grant them a jury trial because a personal judgment was asked against them on the plaintiff's contract and mortgage. However, by their default, they admitted the questions raised as to them. As to the appealing parties, the action as to them was the foreclosure of the plaintiff's mortgage. The plaintiff did not ask a money judgment against the defendants, who are not plaintiffs in error, but asked that his mortgage and lien be declared a prior lien, the cancellation of deeds and mortgages, the subjects of suit, dismissed, which is purely an equitable matter."

So, in the instant case, the questions raised as to Mary Smith, she being in default, were admitted.

[5] When no personal judgment was asked as against defendants Scott and the bank, they were foreclosed as to the question of the amount due and owing by the defendant Mary Smith.

[6] They did not plead that they were bona fide purchasers, neither was their answer verified. To have the benefit of the law on innocent purchasers it must be pleaded. *Bruce et al. v. Overton et al.*, 54 Okl. 350, 154 Pac. 340; *Adams Oil & Gas Co. v. Hudson*, 55 Okl. 386, 155 Pac. 220; *Tucker v. Leonard et al.*, 76 Okl. 16, 183 Pac. 907; *Mobley v. Rhoades et al.*, 77 Okl. 64, 186 Pac. 230; *McIntosh v. Holtgrave et al.*, 79 Okl. 63, 191 Pac. 739.

In the case of *Bruce v. Overton*, supra, the second syllabus of the case is as follows:

"A person seeking protection as an innocent purchaser of real estate without notice of an outstanding title must both allege and prove the facts constituting him such innocent pur-

chaser, and, unless he does so, that issue is not raised."

In the body of the opinion the court said:

"It is an affirmative defense, and the facts constituting the same are usually peculiarly within the knowledge of the person claiming to be an innocent purchaser. He knows whether or not the consideration was paid, and, if so, what it was, and whether he had knowledge of the outstanding title or notice of any fact that would tend to put him upon inquiry, and he is called upon to plead and prove such facts."

In the case of *Mobley v. Rhoades*, supra, the first paragraph of the syllabus is as follows:

"An answer, setting up the defense of innocent purchaser without notice, must state facts sufficient to show a bona fide purchase. It should state the consideration, which must appear from the averment to be 'valuable' within the meaning of the rules upon the subject, and should show that it has actually been paid, and not merely secured. It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not."

[4] In the circumstances disclosed by the record, we think the trial court committed no error in sustaining the plaintiff's motion for judgment on the pleadings.

The judgment of the trial court is therefore affirmed.

McNEILL, NICHOLSON, ELTING, MILLER, and KENNAMER, JJ., concur.

(86 Okl. 190)

SNOUFFER v. FIRST NAT. BANK OF MEDFORD. (No. 10748.)

(Supreme Court of Oklahoma. May 30, 1922.)

(Syllabus by the Court.)

1. Trial \S 260(1)—Refusal of instruction on a matter covered by instructions given, not error.

It is not error to refuse a requested instruction that correctly states the law, if substantially the same instruction is embodied in the charge of the court to the jury, and the instructions as a whole correctly state the law applicable to the facts in the case.

2. Trial \S 193(1)—Refusal of instruction amounting to an intimation of the court's opinion not error.

It is not error to refuse a requested instruction, which calls the attention of the jury to particular facts in the evidence, or the inference that may be drawn therefrom, in such

a manner as to amount to an intimation of the court's opinion, as to the weight of the evidence.

3. Bills and notes \S 327—Maker is liable to a bona fide holder for value taking in due course before maturity.

The general rule may be said to be that, when a person executes a negotiable instrument fair on its face with nothing to indicate defects, possible defenses, or equities in his favor, he does so with the knowledge that it will pass current in the market, and may fall into the hands of an innocent purchaser. The maker takes this risk; and if it does so pass in the regular course of business, before maturity for value, into the hands of a person who takes it in good faith without knowledge of defects, imperfections, or defenses that may be urged against its payment, the maker is liable to such innocent holder, no matter what defenses he might have as between himself and the original payee.

4. Appeal and error \S 100(1)—Where the instructions fairly and clearly state the law and the evidence supports the verdict, it will not be reversed.

When the instructions taken as a whole fairly and clearly state the law applicable to the case, and there is sufficient evidence to support the verdict of the jury, the judgment will not be reversed on appeal.

Appeal from District Court, Grant County; J. W. Bird, Judge.

Action by the First National Bank of Medford, Okl., against A. T. Snouffer. Verdict and judgment for plaintiff, and the defendant appeals. Affirmed.

S. B. Amidon, D. M. Dale, S. A. Buckland, H. W. Hart, and Glenn Porter, all of Wichita, Kan., for plaintiff in error.

E. H. Breeden, of Medford, for defendant in error.

McNEILL, J. The First National Bank of Medford commenced this action against A. T. Snouffer to recover judgment on a promissory note executed by Snouffer to M. M. Wilford dated the 21st day of August, 1917, which note was purchased by the plaintiff before maturity in due course and for a good and valuable consideration. The defendant filed an answer and an amended answer. The amended answer denied the execution of the note, and pleaded the note was obtained by Wilford by fraud, and alleged that Wilford offered to sell the defendant 50 shares of stock in the Dixie Engineering Company at \$20 per share and delivered 50 additional shares of stock free, making 100 shares of stock, for the sum of \$1,000. It was alleged that Wilford represented that the Dixie Engineering Company had a large plant and was a large manufacturing concern at Enid, Okl., manufacturing farm elec-

tric light plants. It was further alleged Wilford also agreed to install a light plant within 30 days as a part of the consideration. It was further alleged at the time of executing the note Wilford executed a written agreement whereby he agreed to sell 50 shares of stock at \$20 per share within six months, and, if not, to return the note, and it is alleged that all the statements and representations made by Wilford were false, fraudulent, and untrue; that defendant relied upon said representation; and that Wilford had never installed the light plant and the consideration failed. With the issues thus framed, the cause was submitted to the jury, and the jury returned a verdict in favor of the plaintiff. From said judgment the defendant has appealed.

The material facts are substantially as follows: The Dixie Engineering Company purported to be manufacturers of electric light plants for farm and rural use, and was located at Enid. The company had never manufactured but one plant, and Wilford was an agent for the company. It is also uncontradicted the stock was worthless. Wilford went into the bank and asked the cashier regarding the financial standing of Mr. Snouffer, and was advised that it was good. He then went to Snouffer's home and secured the note and agreed to put up an electric light plant, and gave a contract to Snouffer reciting he was selling 50 shares of stock in the corporation, and as a special inducement agreed when this stock was selling at \$20 per share and before six months he would sell 50 shares at \$20 per share. On the bottom of the contract was written that, if the stock is not selling at \$20 per share before the note is due, the same will be returned. Wilford took the note to the bank, the cashier was out clerking a sale, and Wilford went to the cashier and negotiated the note, discounting it 5 per cent., and received a draft for \$950. No light plant was ever put up, and the note became due. The plaintiff was notified, and he refused to pay the note, and this suit was brought.

The defendant for reversal assigns numerous assignments of error regarding the instructions of the court. The trial court gave 17 separate and distinct instructions.

It is first contended the court erred in refusing to give instruction No. 1, requested by the defendant. This instruction was very lengthy. It first advised the jury the law as announced in section 4105, R. L. 1910, and then advised the jury in substance of the representations that were made by Wilford to Snouffer, and if Snouffer relied upon said statements, and the statements were false and untrue, the note was obtained by fraud, and if Wilford owned the note, he could not recover if they believed the note was obtained fraudulently. The requested instruc-

tion then recited the fact that the bank claims to have purchased the note before due and claims to be a holder in due course. The instruction then recites if the plaintiff purchased the note in good faith, without any notice of fraud practiced upon the defendant, or without any notice of defect of title of Wilford, and without any notice of the agreement of Wilford not to negotiate the note, then the defense of fraud cannot be made against the plaintiff. The instruction then advised the jury what constitutes a purchaser in good faith as provided in section 4106, R. L. 1910. The requested instruction then advised the jury, if the bank had any notice of any infirmity of the instrument or defect of title, or the bank purchased the note in bad faith, then the plaintiff could not recover, provided they found the note was obtained by fraud. The requested instruction then recites that the notice may be of two kinds: first, actual; second, notice of facts and circumstances that would amount to bad faith on the bank, and if the bank purchased the note in bad faith, it would not be necessary to have actual notice of fraud practiced upon the plaintiff. We think there was no error in refusing this instruction, for the reason the court gave the substance of this instruction in instructions Nos. 3, 4, 6, 7 and 12 and in the statement of the case to the jury, as it was stipulated that the parties might take the pleadings as the issues in the case without the court making a statement in the instructions as to the issues.

[1] This court in a long line of cases has held:

"It is not error to refuse to give a requested instruction that correctly states the law, if substantially the same instruction is embodied in the charge of the court to the jury, and the charge as a whole correctly states the law applicable to the facts in the case."

See *Carden v. Humble*, 76 Okl. 165, 184 Pac. 104.

It is next contended the court failed to give any instruction covering the defendant's theory of the case. This assignment is not well taken, for the reason it was stipulated and agreed that the court might send with the jury the pleadings making up the issues in the case instead of making a statement of the issues in the instructions. This permitted the defendant's answer to go to the jury which contains defendant's theory of the case.

[2] It is next contended that the court erred in refusing to give defendant's requested instruction No. 3. We think there was no error in refusing to give this instruction. This requested instruction advised the jury they should take into consideration the fact that Wilford was a stranger to the officers of the bank, take into consideration the

knowledge and information that the officers of the bank or cashier had in reference to the stock of the Dixie Engineering Company and light plant, also the fact that the note was fraudulently procured, and determine whether or not the cashier in said bank purchased said note in good faith.

This court, in the case of Bilby v. Owen, 181 Pac. 724, stated as follows:

"The court, in its instructions to the jury, should not call attention to particular facts in evidence in such a manner as to amount to an intimation of the court's opinion as to the weight of the evidence."

The instruction requested attempted to do the identical thing this court announced in the above case should not be done.

[3, 4] It is next contended that the court erred in giving instruction No. 5. Instruction No. 5 was a statement of the law as announced by this court in the case of Cedar Rapids National Bank v. Bashara, 39 Okl. 482, 135 Pac. 1051, and being the third syllabus in that case.

It is next contended that the court erred in refusing to give requested instructions No. 6. The requested instruction was in substance that if the plaintiff bank had notice that Wilford agreed that said note would not be negotiated, but would be returned if the stock in the company was not sold as alleged in defendant's answer, and if the bank had notice of this agreement or notice of facts and circumstances before the purchase of the note, this would amount to bad faith, and the plaintiff cannot recover. The substance of this instruction was covered by the general instructions of the court. The case was tried upon the theory that the contract which had the provision regarding the return of the note was a part of the fraud. These questions were all covered by the instructions given by the court. An examination of the instructions given by the court disclosed that they were more favorable to the defendant than to the bank. The burden of proof was placed upon the bank to prove that it was an innocent purchaser for value, which was a correct statement of the law, but the instructions regarding innocent purchasers were very favorable to the defendant, and in fact more favorable to him than he was justly entitled to. An examination of the instruction disclosed that there was no prejudicial error in the record, so far as the plaintiff in error was concerned, either in giving the instruction or in refusing the requested instruction.

For the reasons stated, the judgment is affirmed.

JOHNSON, KANE, ELTING, and NICHOLSON, JJ., concur.

JOLLIFFEE v. STATE. (No. A-3763.)

(Criminal Court of Appeals of Oklahoma.
May 27, 1922.)

(Syllabus by the Court.)

1. Criminal law §541, 543(1, 2)—It must be shown that witness is dead, insane, sick, or beyond reach of process, before testimony at preliminary hearing may be introduced; in absence of collusion, it is not incumbent on state to try to have witness under arrest in another state returned for final trial; but it is otherwise if the officers of the court are responsible for witness' absence.

Before the evidence taken at a former trial or a preliminary hearing can be introduced against the accused at the final trial it must appear that the witness is dead, insane, sick, or beyond the reach of the process of the court, and that the presence of the witness with reasonable diligence cannot be procured.

a. Where such witness escapes from jail, and becomes a fugitive from justice, and is held in confinement to answer criminal charges in another state, in the absence of collusion it is not incumbent upon the state to make an effort to have such witness returned for final trial as a condition precedent to the introduction of his evidence taken at a former hearing.

b. If the officers of the court by collusion or agreement are responsible for the absence of such witness, his testimony taken at a former hearing should not be permitted to be used at the final trial.

2. Larceny §46—Where value of cattle at time and place of theft is at issue, purchase price of other cattle in distant places 30 days either before or after theft inadmissible.

In a prosecution for the larceny of cattle, where the value of the cattle at the time and place of the theft is at issue, the purchase price of other cattle at distant places 30 days before or 30 days after the theft is inadmissible.

3. Criminal law §742(2), 780(2)—Whether witness is an accomplice held a question of law for court, and jury should be so instructed.

Where it is admitted that, if the defendant is culpably implicated in the theft at all, the witness was an accomplice, the question of whether he was an accomplice is a question of law for the court, and not a question of fact for the jury, and the jury should be so instructed.

4. Criminal law §776(4)—Charge on good moral character qualifiedly approved.

An instruction relating to the previous good character of the defendant qualifiedly approved.

5. Criminal law §511(3)—Conviction will be set aside on accomplice testimony, corroborated only by circumstances not inconsistent with innocence.

A conviction will be set aside where the state's case rests almost wholly upon the testimony of an accomplice, corroborated only by circumstances not inconsistent with the innocence of the accused, amounting at most to a mere suspicion.

Appeal from District Court, Nowata County; C. W. Mason, Judge.

D. W. Joliffree was convicted of cattle larceny, and he appeals. Reversed and remanded.

Bert Van Leuven, of Nowata, J. I. Howard, and A. M. Beets, both of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

BESSEY, J. D. W. Joliffree, plaintiff in error, hereinafter referred to as the defendant, was by information filed in the district court of Nowata county, March 18, 1919, charged with the theft of 12 head of cattle, the property of Marion Dawson. At the trial, November 4, 1919, the jury returned a verdict finding the defendant guilty as charged, without assessing the penalty. After a motion for a new trial was heard and overruled, on November 8, 1919, the court pronounced judgment upon the verdict, assessing the punishment at confinement in the state penitentiary at McAlester for a term of 7 years. Thereafter, on the 28th day of January, 1920, the defendant filed a motion for a new trial on the ground of newly discovered evidence, which motion was later by the court overruled. From the judgment and orders made the defendant appeals.

The undisputed evidence is to the effect that Marion Dawson was the owner of the 12 head of cattle involved in this action; that he had resided at Watova in Nowata county for a number of years, during which time he had been extensively engaged in grazing and raising cattle; that during the fall of the year 1918 he had placed 140 head of steers on premises belonging to Ocie Freeman; that Ocie Freeman was a negro, residing about a mile from the pasture or inclosure in which these cattle were running; that about the 3d day of December, 1918, Freeman discovered that the fence inclosing this pasture had been broken down, and that some of the cattle had escaped to the commons and lands adjacent; that Freeman had these cattle rounded up and driven back into the pasture, and the fence repaired, and upon counting the cattle found that 12 head of steers were missing. Later he discovered a place in the wire fence inclosing the pasture where there were indications that some posts had been pulled up and the fence laid on the ground, and cattle tracks and tracks of two horses were found, leading away from the pasture. Later these tracks were traced some miles distant, towards Coffeyville, Kan. Dawson and his employes made inquiry at Coffeyville, and found that H. D. Barnett, the owner of a meat market there, and an extensive dealer in cattle, had purchased these 12 head of cattle from Al Spencer. It appears that the defendant

Joliffree was a son-in-law and associate or employe of Barnett in the buying and disposing of cattle; that he was for some time the chief buyer for the concern; and that he negotiated the purchase of these 12 head of cattle. Four of the 12 head so purchased by Barnett had been slaughtered and the other 8 head had been placed in a wheat pasture of Barnett's, along with a number of other cattle belonging to him. Upon inquiry by Dawson, Barnett exhibited the hides of the slaughtered animals, which were identified by Dawson by the brand used by him. Barnett then informed Dawson and his employe where the other 8 head could be found. Barnett, being satisfied that the cattle were stolen and belonged to Dawson, voluntarily turned them over to him.

The testimony of Al Spencer is to the effect that he, assisted by one Hill, stole these cattle from the Freeman pasture the night before they were sold to Joliffree, pursuant to a previous agreement with the defendant, and that the defendant met Spencer with the cattle about 5 miles south of Coffeyville, where he paid for them with a check of the amount of \$500, drawn on the account of Barnett; that Spencer, before reaching the Kansas line, turned and rode back towards Lenapah. Later he appeared in Coffeyville, and, with the aid of the indorsement of an employe of Barnett, cashed the check given him by Joliffree. Spencer was arrested soon afterwards for this and other thefts, and placed in jail in Nowata county. After the preliminary trial in this case, and while the case against Spencer was pending, Spencer escaped from jail and fled to Kansas, where he committed other thefts, and fled to Colorado, being later apprehended in that state. He was then returned to the Kansas authorities, where he was being held at the time of the trial of this defendant.

The main portions of the testimony of Al Spencer taken at the preliminary hearing, constituting the foundation of the state's claim that this defendant was an accomplice and implicated in the theft, are as follows:

Examination by State.

"Q. Are you acquainted with D. W. Joliffree? A. Yes, sir.

"Q. How long have you known him? A. About 3 or 4 years.

"Q. What, if any, transaction did you have with him on the 3d day of December, 1918? A. Sold him some cattle.

"Q. Did you have any agreement with him about these cattle? A. Yes, sir.

"Q. Just state to the court what that agreement was. A. Well, I made a deal with Mr. Joliffree to sell him some cattle.

"Q. Where were you? A. At Coffeyville.

"Q. Just state exactly, as well as you can, just what the conversation was. A. We was talking about some cattle, and I said I would sell him some; I first was going to sell him some heifers

of my own, and I talked to him about some other cattle.

"Q. Did you tell him who the cattle belonged to? A. I told him when he got them.

"Q. Al, state what the conversation was—as near as you can the words you used. A. Well, when he took the cattle I told him where they belonged, and I told him after he took them he would have to get away with them—that they might get him—and he asked me which ones to kill first, and I said I didn't know, that there was some big steers there.

"Q. This was on the day on which you had this agreement to go ahead and get these cattle? A. I made the deal with him, and we had talked about who they belonged to, and he said he would buy the cattle.

"Q. What was the date on which you first talked to him about the cattle? A. I believe it was about a week before I took them to him.

"Q. At that time did you have an arrangement about when and where you was to meet him? A. We was to meet along the road between Lenapah and Howden—no particular place.

"Q. Now, did you see him any more from that time up until the date you delivered them to him? A. No, sir.

"Q. Did he meet you there as per your agreement? A. Yes; we met along the main road.

"Q. Now, what kind of cattle was these? A. Well, they was going on 3 and 4 old steers; that's what I would take them to be.

"Q. Did they belong to you? A. No, sir.

"Q. Did you take them away from somebody else? A. Yes, sir.

"Q. When did you get them? A. I got them the night before he received them.

"Q. You are acquainted with the value of cattle, are you not—you are a cattle man? A. I have handled a good many cattle; yes, sir.

"Q. Do you know what the market price of stock was at that time? A. No, I don't.

"Q. I will ask you to state what was the agreement had between you and Mr. Jolliffe as to the splitting of the proceeds? A. Well, the only talk we had, he asked me what they was worth, and I told him what I thought they ought to be worth.

"Q. What did you tell him they ought to be worth? A. Around \$900, and I finally agreed to take \$500.

"Q. I will ask you to state at the time you had the first conversation with Mr. Jolliffe if you told him who those cattle belonged to? A. I never told him at that time, but he knew they did not belong to me. I told him when I delivered them to him.

"Q. You did tell him when you delivered them to him who they belonged to? A. Yes, sir."

Cross-Examination.

"A. I never told him I was a thief, but he knew that I was going to steal them.

"Q. You think a man buying cattle is a thief? A. If he knows that I am a thief.

"Q. Will you please tell what that understanding was? A. Well, he knows what the understanding was.

"Q. Then you told him you was going to steal some cattle? A. Yes, sir; that was our understanding.

"Q. Now, I want to discuss another question,

Had you ever stolen any cattle before? A. No, sir.

"Q. Ever stolen anything else? A. No, sir. * * *

"Q. Did you know what cattle you was going to steal when you made this bargain? A. I had an idea.

"Q. Yes; you knew what cattle you was going to steal? A. I knew what I figured on getting.

"Q. And if the figures did not turn out just right you was going to steal somebody's else cattle? A. I don't know whether I would or not. I figured on taking some out of the bunch I got.

"Q. Since you admit you stole the cattle, who helped you steal them; who helped you steal those cattle? Did you have any assistance to steal those cattle? I would like to know what is the matter with that question, Did you have assistance in stealing them? A. Yes; there was somebody with me.

"Q. Who was it? A. I don't know that I have to tell.

"Q. The court put you under oath, and I have asked you who helped you steal those cattle, and—I don't believe I want to ask you any more questions. That is all. I don't want to push you. * * *

"Q. Where was that arrangement put through? A. We were together at Coffeyville, Kan.

"Q. Where at? A. Well, I believe I saw Mr. Jolliffe at the meat market.

"Q. Barnett's meat market? A. Yes, sir.

"Q. Who was present? A. I was in the shop, and he was in the back end.

"Q. Back end; do you mean Mr. Barnett's meat market? A. Yes, sir.

"Q. Yes; but what do you mean by the back end? A. The back part of it.

"Q. You mean behind the counter? A. No, sir; back there.

"Q. Where they make sausage? A. Yes, sir.

"Q. Who was present? A. Nobody; there was a man in the building, but he did not hear our conversation. * * *

"Q. How did you come to start that talk? A. I had sold him some cattle before that, and we was up there, and I had some cows to sell, and we got to talking about this other stuff, and he said he would buy it.

"Q. Wait a minute; pardon me; what do you mean by this other stuff? A. The cattle Mr. Jolliffe bought.

"Q. You was talking to him about this other stuff, and how did you come to talk to him about it? A. First I asked him if he wanted to buy some cattle of my own, and the next time I saw him I decided to keep mine, and I said I had some stuff in view—

"Q. What do you mean by stuff? A. Wet stuff; stolen property.

"Q. How did you get it in your craw to talk to Mr. Jolliffe about taking that kind of property? A. I heard that he was that kind of a man; he came to my place and told me that they was going to look in my pasture for wet stuff, and if I had any stolen to get rid of it.

"Q. And you never did that before? A. No, sir."

From the testimony of others it appears that, after Spencer was arrested and put in jail, the sheriff accorded him the privileges

of a trusty, and while he was in the sheriff's office, on the pretext of using the telephone, he walked out and made his escape in a stolen automobile, and fled to Wilson county, Kan. There he committed burglary and larceny, and fled to Colorado, where he was arrested and returned to the sheriff of Wilson county, Kan. After the trial of this case he was again returned to the custody of the sheriff of Nowata county, where he pleaded guilty to and was sentenced to the penitentiary on three separate criminal charges. One of these was a theft subsequent to the theft involved in this case, and another was prior to this theft.

Defendant Joliffée claims that he purchased these cattle in good faith, in the usual course of business, and that, as he estimated it, he paid for them the current market value, about 6 cents per pound, for cattle in their condition; that some of these cattle were in very poor condition and had to be fed for a season before they would be fit for slaughtering. After the cattle were purchased they were driven onto the scales near the slaughter pens and weighed, their total weight being 8,830 pounds.

The testimony as to the prevailing price and value of steers of the kind and character of these here in question was conflicting, the estimated market price fixed by different witnesses varying from \$45 to \$80 per head.

A number of witnesses testified that the defendant's reputation for truth and honesty was good, and there was no evidence to the contrary.

That this defendant was implicated in the theft of these cattle, as stated by Spencer, was nowhere corroborated, unless by the fact, if it be a fact, that the price paid by the defendant for these cattle was so inadequate as to raise an inference of guilt, or unless the fact that the defendant and his helper met Spencer with the cattle some distance from town, and before reaching their destination gave Spencer a check for the cattle, and that Spencer did not accompany the cattle to the slaughter pens, but went into town alone later that day to cash the check for the purchase price, raises such inference. These facts constituted an unusual transaction, and might possibly be deemed a corroboration of a part of Spencer's story. On the other hand, these facts are not inconsistent with the defendant's claim that he bought these cattle in good faith. There is no direct testimony on the part of any other person implicating the defendant in the original theft; the only testimony to that effect is the testimony of the confessed thief, Spencer, coupled with the circumstances just related.

[1] The defendant objected to the introduction of the testimony of Spencer taken at the preliminary hearing, on the ground that the presence of Spencer was available; that the

sheriff of Wilson county, Kan., had offered to surrender Spencer to the sheriff of Nowata county upon payment of the expense incurred in procuring his return from Colorado; and that the obligors on Spencer's bond in one of the cases pending against him in Nowata county offered to pay this expense. It is claimed that the county attorney of Nowata county did not want Spencer returned at that time, possibly to avoid a further damaging cross-examination of this witness on the stand in the presence of the jury, and because, as was shown, the county attorney had a personal pecuniary interest in allowing Spencer to remain in the custody of the Kansas sheriff in order that he might profit personally in the forfeiture of Spencer's appearance bond. In support of this contention the defendant introduced the following stipulation;

"In the District Court of Nowata County, Okl.

"State of Oklahoma, Plaintiff, v. Al Spencer, J. R. Martin, Wendell Powell, R. L. Holland, and J. L. Armstrong, Defendants. No. 3409.

"It is hereby stipulated and agreed by and between C. F. Gowdy, county attorney for Nowata county, and E. E. Sams, attorney for Al Spencer, the principal defendant on the bond sued upon in said cause, as follows, to wit:

"That said suit shall be compromised and settled upon the following terms and conditions, to wit:

"(1) The attorney for the defendant is to confess judgment in the sum of \$1,000.

"(2) The county attorney is to consent to the setting aside of the forfeiture of the defendant's bonds in cases numbered 792, 800, and 815, being all of the appearance bonds of Al Spencer in Nowata county.

"(3) It is agreed that the \$2,000 cash in the hands of the court clerk is to be disbursed as follows:

"(a) \$750 to the county treasurer of Nowata county, being the county's three-fourths interest in the judgment to be confessed.

"(b) \$250 to C. F. Gowdy, county attorney, being 25 per cent. of the recovery in the above-entitled suit.

"(c) \$750 to Mrs. Al Spencer, she being the person who furnished the money now in the hands of the court clerk.

"(d) \$250 to E. E. Sams as attorney fees.

"The above stipulation to be subject to the approval of the district court for Nowata county, and not to be of any force or effect or binding on the parties until the district court by its order shall approve the same.

"C. F. Gowdy,

"County Attorney.

"E. E. Sams,

"Attorney for Defendant Al Spencer."

The court subsequently refused to approve this stipulation.

The defendant urged that the transcript of the testimony of Spencer taken at the preliminary hearing should not be introduced, for the reason that the presence of the witness in court was available, and that, under

these circumstances, the defendant had a constitutional right to be confronted with this witness; that his detention in Kansas was collusive and unfair to the defendant; and that his escape and absence from the state was due originally to the negligence of the sheriff of Nowata county in permitting his escape from the county jail.

If the witness can with reasonable diligence be obtained at the final trial it is the right of the defendant to require his presence. It frequently happens that the cross-examination of a witness at a preliminary hearing, occurring as it does soon after the offense has been committed, when not all of the facts relating to the commission of the crime are known, is more or less perfunctory, and that, by the time the cause comes on for final trial, the defendant is better able, by reason of more time and research, to conduct a thorough cross-examination in the presence of the jury. Clearly, the county attorney, representing the state, would have no right to take any affirmative action calculated to prevent the personal appearance of the witness. As to whether the county attorney did not desire the presence of the witness Spencer, and whether he did anything to prevent his presence at the trial, was an issue raised before the court at the trial, upon which testimony was heard and considered, and the finding of the trial court that the witness was not absent by reason of any collusive conduct on the part of the county attorney will not be disturbed. In the case of *Davis v. State* (Okla. Cr. App.) 201 Pac. 1001, it was stated:

"To say that no diligence is required to produce the witness in open court, where it is possible to do so, is not in keeping with the spirit nor the letter of the constitutional guaranty that a defendant in a criminal action has a right to be confronted face to face with the witnesses against him."

For the reasons and application to particular cases of this rule, see the body of the opinion in the *Davis Case*, and other cases therein cited. In the instant case the prosecuting attorney was in no way responsible for the fact that this witness was a fugitive from justice in another state; the most that can be said is that he refused to put into motion the means by which he might have obtained his surrender by the officers of the other state to the officers of the trial court. We think it would have been commendable in the county attorney to have done this, but we are not ready to disturb a long line of decisions of this and other courts, and say that it is necessary for a county attorney, in the absence of actual collusion, to make an effort to procure the attendance of a witness then held in custody by officers of another state, as a condition precedent to the right to introduce in evidence a transcript of the tes-

timony of such fugitive from justice taken at a preliminary hearing or former trial.

[2] From a perusal of all the testimony in this case it appears that the state at various times sought to show that the price paid to Spencer for these 12 head of cattle was inadequate. It is urged that the court erred in permitting testimony to be introduced as to the price of other cattle purchased and sold at other times and places; among other such instances Dawson, the owner of the stolen cattle, over the objections of the defendant, testified as follows:

"Q. Was there any difference in the market price of that class of steers, that age and weight, between December 1, 1918, and January 1, 1919? A. Yes, sir.

"Q. What was the difference? A. Well, they got higher all along from the fall on up to spring; they got higher.

"Q. I believe you said you had about 600 head of the same class and grade of cattle as the 140-odd head you had up there. Where were they running in the early fall of 1918? A. Part of the time at the ranch and part of the time in the Osage.

"Q. Where did you buy them? A. Bought them of Pat Manning. He bought them on the Fort Worth market, and shipped them up here.

"Q. How many? A. About 1,200 head.

"Q. Did you have occasion to sell any of the cattle about the latter part of October? A. I sold 517 head to Henry Faulkner.

"Q. What was the age of those cattle? A. Just the same as these, coming 3's and 4's.

"Q. How did they compare in weight? A. Just about the same.

"Q. When did you make that sale? A. I made it the 29th day of October.

"Q. What did you get per head for those cattle?

"Mr. Van Leuven: We object to this as not proper rebuttal, incompetent, irrelevant, and immaterial.

"Mr. Moses: We think it is in rebuttal of the testimony of witnesses Burnett and Kimes for the defendant as to the market value of cattle.

"Mr. Van Leuven: The sale of cattle that he made to Faulkner, other cattle in October, is not proper rebuttal.

"Mr. Moses: We think it is.

"The Court: I think so. Overruled.

"Mr. Van Leuven: Give us an exception.

"A. \$73.

"Q. Now I will ask you if you had occasion, or if some one for you had occasion, to sell any of those steers in the month of December on the Kansas City market? A. My brother did at one time.

"Q. How did that steer compare in age, size, and weight with the remainder of the cattle that were up there at this darky's? A. I suppose they were the same kind—came out of the same bunch.

"Q. I will ask you to state whether or not this is the account sale (handing witness a paper) of what that animal brought on the Kansas City market? A. Yes, sir.

"Mr. Moses: We offer this account sale in evidence.

"Mr. Van Leuven: We object to the evidence of this particular sale as not being proper re-

buttal testimony, and not competent to prove the market value of the steers involved in this case.

"The Court: What is the date of that?"

"Mr. Van Leuven: December 31, 1918."

Then followed an extended argument between counsel and court with reference to the admissibility of this class of testimony. Finally the objection was overruled, and the witness was permitted to testify that this particular steer was sold on the Kansas City market on December 31, 1918, for \$88.75.

To set out all of the testimony of this character that was introduced would prolong this opinion unnecessarily. Suffice it to say that we think that this and other like testimony found in the record was incompetent and prejudicial. This theft, excluding the testimony of the accomplice Spencer, was nowhere brought home to the defendant, and the jury might have inferred, and possibly did infer, that because the defendant bought these cattle at approximately \$45 per head he at least had guilty knowledge that they were stolen property. We think the price paid for and received for cattle culled out of a herd of 1,200 head at another time and place was improper, and constituted no correct standard by which the jury would be authorized to estimate the value of the particular cattle here in controversy.

[3] On redirect examination of Mr. Barnett, the father-in-law and business associate of the defendant, defendant sought to show, as affecting the motive, possible bias and malice and the credibility of the witness Spencer, that Barnett had made complaint against Spencer in Nowata county for the theft of these cattle, and the court refused to permit this showing to be made. The record elsewhere discloses that Barnett, and possibly the defendant, did sign the original complaint against Spencer. Originally complaint was made against Joliffiee and Barnett, jointly, and upon the hearing of the motion for a new trial on the ground of newly discovered evidence the county attorney stated:

"Well, my first information about any case at all was a complaint charging Barnett and Spencer, and possibly Joliffiee, and when I found it out I think I had them signing complaints against each other."

The exclusion of the testimony of witness Barnett, of which complaint is made, is as follows:

"Q. Did you after these cattle, or after these steers—after you turned them over to Dawson, and found out that Spencer had stolen them before he sold them to Mr. Joliffiee here, did you take any action against Spencer?"

"Mr. Moses: Well, that is objected to as incompetent, irrelevant, and immaterial."

"Mr. Van Leuven: To show his attitude in this case, if your honor please."

"Mr. Moses: This man is not on trial for any offense."

"The Court: Sustained."

"Mr. Van Leuven: Well, Spencer is an accomplice, and he has testified here."

"Q. Did you swear out a warrant for Spencer?"

"Mr. Moses: Objected to as incompetent, irrelevant, and immaterial. We think the court has passed on that once."

"The Court: Sustained."

As affecting the interest, bias or prejudice of the witness Spencer towards the defendant, we think it was proper and competent to show that the witness himself was being prosecuted for this offense by Barnett and the defendant, and that it was prejudicial error to exclude such showing. *Yoder v. State* (Okla. Cr. App.) 197 Pac. 848; *Cassady v. State* (Okla. Cr. App.) 179 Pac. 171; *Gilbert v. State*, 8 Okla. Cr. 543, 128 Pac. 1100, 129 Pac. 671.

The defendant objected and excepted to instruction No. 7 given by the court, as follows:

"You are instructed that the prosecution in this case uses the testimony of a witness who may be culpably implicated in the commission of the crime of which the defendant is accused; that is, he may be one who knowingly and voluntarily co-operated or aided or assisted in the commission of the crime of which the defendant is accused; and whether or not he is such a person is a question of fact for you to determine from the evidence before you. If you believe from the evidence in the case that such witness is implicated in the crime charged in the information, as above defined, then in law such witness is an accomplice and you are instructed that a conviction cannot be had upon the testimony of an accomplice unless such accomplice be corroborated by such other evidence as tends to connect the defendant with the commission of the offense and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, but such other evidence, to be sufficient to corroborate the evidence of an accomplice, must tend to connect the defendant with the commission of the crime of which the defendant is accused."

The whole foundation of the state's case rested on the theory that the witness Spencer was an accomplice. If the defendant was culpably implicated in this transaction at all, the things done by Spencer, as shown by the evidence, as a matter of law made him an accomplice; otherwise the defendant under the testimony was guilty of no crime, and it was error to submit that issue as a question of fact to the jury. Where the acts and conduct of a witness are admitted, it becomes a question of law for the court to say whether or not these facts and acts make the witness an accomplice. *McKinney v. State* (Okla. Cr. App.) 198 Pac. 108; *Moore v. State*, 14 Okla. Cr. 292, 170 Pac. 519; *Cudjoe v. State*, 12 Okla. Cr. 246, 154 Pac. 500, L. R. A. 1916F, 1251. This error may not have been prejudicial, because the jury from the testimony must have concluded

ed that Spencer was indeed an accomplice. Under the testimony, no other conclusion could have been reached.

[4] The defendant also objected and expected to instruction No. 8, which is as follows:

"When a person is charged with a crime the courts permit such person to introduce testimony of his previous good character for the consideration of the jury. You should consider the evidence permitted to go to you in this case on that point with all the other evidence and give it such weight as you may deem it to be entitled, and yet, the court instructs you that evidence of good character is no defense against crime proven beyond a reasonable doubt. If the defendant is proven guilty of the crime charged beyond a reasonable doubt, any good moral character borne by him in his community is no defense in this prosecution."

While this instruction, upon careful analysis, is not a misstatement of the law, the qualifying clauses after the word "yet" might have confused the jury. Up to that point the instruction was complete and sufficient. The defendant's previous good character, of itself, considered along with all the other testimony, might have raised a reasonable doubt in the minds of the jury.

In an early case (*Wilson v. State*, 3 Okl. Cr. 714, 109 Pac. 289) a general instruction on the good character of the defendant, similar to the one given here, excluding the qualifying clauses, was approved. This was practically followed in *Holmes v. State*, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300. See, also, *Edgington v. U. S.*, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467, and annotations in 10 A. L. R. 83.

[5] It is next urged that, as a matter of law, the testimony of the accomplice Spencer to the effect that the defendant was implicated in the theft of these cattle was not corroborated. In the case of *Thompson v. State*, 9 Okl. Cr. 525, 132 Pac. 695, the defendant was convicted of a violation of the prohibitory law. Presiding Judge Doyle, speaking for the court in reversing the case, said:

"There is no evidence in the record, except that of the complaining witness, that tends to connect the defendant with the commission of the offense charged. Upon his own testimony the complaining witness is an accomplice, and a conviction cannot be sustained upon his uncorroborated testimony."

That no person shall be convicted of a crime upon the testimony of an accomplice must be construed to mean that the person accused must in some manner be culpably implicated in the commission of the crime. *Hendrix v. State*, 8 Okl. Cr. 530, 129 Pac. 78, 43 L. R. A. (N. S.) 546.

In this case there is no corroboration of the testimony of the confessed thief, unless

it may be deduced from the evidence that the defendant purchased these cattle for a grossly inadequate price, upon which point the testimony is conflicting, or unless the fact that the defendant met the witness Spencer with the cattle outside of Coffeyville, as they were being driven towards that point, and paid for them there, shows that he had guilty knowledge of their being stolen property. To us it seems that neither of these facts, though established to the satisfaction of the jury, is inconsistent with the good faith and innocent motives of the defendant.

Neither the defendant nor his associate, Barnett, made any effort to conceal the transaction; on the contrary, the hides of the slaughtered cattle were promptly exhibited to the owner, Dawson, upon his making inquiry; Dawson was informed by Barnett of the whereabouts of the other cattle, and steps were taken immediately by Barnett and the defendant to prosecute the witness Spencer. We think that as a matter of law the testimony of the accomplice was not corroborated in the sense contemplated by our statute (section 5884, R. L. 1910), providing:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

For the reasons stated in this opinion, this cause is reversed and remanded.

DOYLE, P. J., concurs.

MATSON, J., concurs in the result.

(60 Utah, 203)

HARDMAN v. INDUSTRIAL COMMISSION et al. (No. 3805.)

(Supreme Court of Utah. May 31, 1922.)

1. Master and servant §417(7)—Question as to number of employer's employes is jurisdictional, and reviewable by Supreme Court.

The question whether an employer had three or more employes in his service, so as to be within the Industrial Act (Comp. Laws 1917, § 3110, subd. 2, as amended by Laws 1919, c. 63), is a question of jurisdiction, as to which it is the Supreme Court's duty to review the facts as well as the law.

2. Master and servant §361—Commission bound to deny compensation on finding employer had only two employes.

Where the Industrial Commission reached the conclusion that an employer had only two employes in his service at the time of an injury, it was not justified in proceeding except to deny the application for compensation for want of jurisdiction.

3. Master and servant —405(2)—Evidence held to justify denial of compensation for lack of statutory number of employes.

In a proceeding for compensation under the Industrial Act, defended on the ground that the employer did not have three employes in his service, so as to come within the act, evidence held to show that plaintiff's brother, who accompanied him and the employer on a trip by automobile truck, did so merely for his own pleasure and convenience, and that he was not in the employer's employ.

Proceeding under the Industrial Act by Jesse C. Hardman, for compensation for injuries, opposed by Bud Jensen, employer. Compensation was denied, and plaintiff brings writ of review. Affirmed.

S. P. Armstrong, of Salt Lake City, for plaintiff.

Harvey H. Cluff, Atty. Gen., and John Robert Robinson, Asst. Atty. Gen., for defendants.

THURMAN, J. On November 7, 1921, plaintiff, an employe of defendant Jensen, while driving a truck from Salt Lake City, Utah, to Pocatello, Idaho, received an injury which afterwards became infected. Blood poisoning developed, and plaintiff has since been incapacitated for any kind of manual labor. The injury occurred within the state of Utah, and on December 10, 1921, plaintiff filed his application with the defendant Industrial Commission of Utah for compensation under the Utah Industrial Act. Testimony was thereafter taken by the Commission for and against the application and on March 10, 1922, the application was denied, for the alleged reason that the employer, Jensen, at the time of the injury complained of by applicant, had only two workmen in his employ, and therefore the case was not within the provisions of the Industrial Act. Application for a rehearing was thereafter made, but, as no new evidence was offered, the same was denied.

[1] The case comes before us on a writ of review. The only question presented is whether or not there were more than two employes in the service of defendant Jensen when the injury occurred. This, under the Utah Industrial Act, presents a question of jurisdiction as to which it becomes our duty to judicially review and determine the facts as well as the law.

[2] Complaint is made by plaintiff that the findings of the Commission are defective, and that at most they are only conclusions. As to this objection, it is sufficient to say that, having arrived at the conclusion that there were only two employes engaged in the service of defendant Jensen at the time the injury occurred, the Commission were not justified in proceeding further than to deny the application for want of jurisdiction. To

have proceeded further, and assume to pass upon the merits of the application, would have been to usurp authority not conferred by the Industrial Act.

Comp. Laws Utah 1917, § 3110, subd. 2, as amended in Sess. Laws 1919, c. 63, provides:

"Every person, firm and private corporation, including every public utility, that has in service three or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers who have in service less than three employes and employers of agricultural laborers and domestic servants shall have the right to come under the terms of this title by complying with the provisions thereof and all rules and regulations of the Commission. The term 'regularly,' as herein used, shall include all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession or occupation of an employer."

The question to be determined is: Were there "three or more workmen or operatives regularly employed in the same business" in which plaintiff was employed at the time he received the injury?

[3] The solution of this question renders it necessary to briefly review the facts as shown by a preponderance of the evidence. The defendant Jensen was the owner of three automobile trucks, and together with his employes was making a trip transporting secondhand goods from Salt Lake to Pocatello. One of the trucks was driven by plaintiff, one by an employe named Westover, and one by the defendant Jensen. There is no dispute but that Westover and plaintiff were in Jensen's employment. The question arises as to Roy Hardman, a younger brother of the plaintiff, who accompanied them on the trip. They left Salt Lake City November 5, 1921, and on the seventh day of the same month, at a point near Wellsville, Utah, the injury occurred. The circumstances connected with the injury and the extent thereof are immaterial. The injury did not seriously affect the plaintiff until two days after his arrival at Pocatello, when blood poisoning developed.

Concerning the question as to whether Roy Hardman was in his employ defendant Jensen testified, in substance, that he did not need Roy Hardman on the trip, and did not employ him; that plaintiff told him Roy would like to go for the trip. Jensen further testified that he paid Roy's expenses, but paid him no wages; that he never talked with Roy about employing him, and had no arrangements with him; that he was a member of the crowd, and defendant paid the expenses of the crowd. He further testified that Roy had never claimed any salary for

the trip to Pocatello, but after plaintiff became incapacitated from the injury defendant employed Roy to drive the truck, and he made one load. Jensen admitted that Roy helped to load and unload the trucks on the Pocatello trip, but was emphatic in his testimony that he had told plaintiff he did not need Roy, and that plaintiff said Roy wanted to go for a trip. This testimony is not contradicted.

Jesse C. Hardman testified, but we find nothing in his testimony that materially conflicts with the testimony of Jensen.

The testimony developed that prior to making the trip to Pocatello plaintiff and Roy had been driving a truck for Jensen on what they called a fifty-fifty basis, plaintiff and Roy receiving one-half of the proceeds after all expenses were paid, and Jensen the remainder. The trip to Pocatello, however, was under a different arrangement, plaintiff and Westover each receiving \$4 per day.

Roy Hardman testified that the night before they started to Pocatello he helped to load the trucks, and Jensen told him to come up early in the morning so they could get started. He said he thought Jensen wanted him to work. At Pocatello he asked Jensen for \$1, and Jensen gave it to him. On cross-examination he stated that he never had any understanding with Jensen about a salary; that nothing was said about paying him anything; that nothing was said about any arrangement for working for him, except Jensen told him to be up there in the morning; that he knew Jensen was not going to pay him anything; that he never looked to Jensen to pay him anything; that Jensen never asked him to work except to be there next morning, and never said anything about paying him.

Such, in substance, is all the evidence that is in any sense material.

In the opinion of the writer it is clearly deducible from the evidence in the case that Roy Hardman was not an employé of the defendant Jensen at the time of the injury of which the plaintiff complains; that he simply desired to make the trip to Idaho for his own pleasure and convenience, and, as substantially admitted by himself, never expected any compensation therefor. The reason why Jensen told Roy to come up early next morning so they could get started is perfectly manifest, in view of the evidence, which is uncontradicted. Jensen had been told by plaintiff that Roy wanted to make the trip, and Jensen was willing he should go. The payment of Roy's expenses was evidently a mere courtesy, for which the defendant should not be mulct in damages.

To hold under such circumstances that Roy Hardman was an employé of Jensen in order to bring the case within the provisions of the Industrial Act, and thereby compel

Jensen to compensate plaintiff for his injury, would, in our judgment, be a travesty upon justice, and a perversion of the literal terms of the statute under which plaintiff seeks relief. It is impossible to deduce from the evidence even a casual employment, much less a regular employment, such as the statute requires. The plain fact is there was no employment at all as far as Roy Hardman was concerned. There is, therefore, no justifiable reason for citing or reviewing the authorities referred to by either of the parties. It would unnecessarily incumber our opinion and serve no useful purpose.

The order of the Commission denying compensation is affirmed.

CORFMAN, C. J., and WEBER, GIDEON, and FRICK, JJ., concur.

(60 Utah, 197)

BROWNING v. BANK OF VERNAL (No. 3695.)

(Supreme Court of Utah. May 31, 1922.)

1. Jury \S 92—Relationship of debtor or creditor gives right to challenge for cause.

The fact that a juror sustains the relationship of debtor or creditor to a party to an action does not disqualify the juror to act, but it gives to the litigant the right to challenge for cause.

2. Jury \S 110(6)—Right to challenge may be waived.

The right to challenge a juror sustaining the relationship of debtor or creditor to a party to an action is waived where the parties, knowing the fact of relationship, neglect to interpose a challenge.¹

3. Appeal and error \S 1004(1)—Scope of review on claim of excessive damages.

On review of an assignment that damages were excessive and appeared to have been given under the influence of passion or prejudice, the only question for determination by the appellate court is whether it can be determined as a matter of law under the circumstances that the damages were so excessive as to appear to have been given under the influence of passion or prejudice.

4. Banks and banking \S 143(7)—Bank refusing to pay check of mercantile depositor liable in damages without proof.

Failure of a bank to pay checks of depositor engaged in a mercantile business having sufficient money on deposit to pay the checks entitles the depositor to recover substantial damages without proof of actual damages.

¹ State v. Morgan, 23 Utah, 212, 64 Pac. 356; State v. Thompson, 24 Utah, 314, 67 Pac. 789; Tarpey v. Madsen, 26 Utah, 294, 73 Pac. 411.

5. Banks and banking \Rightarrow 143(7)—\$500 held not excessive for failure of bank to pay checks of mercantile depositor.

A verdict for \$500 damages against a bank refusing to pay checks of a mercantile depositor having sufficient funds to cover held not so excessive as to warrant reviewing court in disturbing the same, or to conclude as matter of law that it was given under the influence of passion or prejudice, though evidence was indefinite as to any specific amount of damages sustained.²

Appeal from District Court, Uinta County;
A. B. Morgan, Judge.

Action by Mrs. W. J. Browning, otherwise Mary B. Browning, against the Bank of Vernal. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles De Moisy, of Vernal, for appellant.

Wallace Calder, of Vernal, for respondent.

GIDEON, J. Respondent (plaintiff below) instituted this action against appellant (defendant below) to recover judgment upon two counts or causes of action separately stated in the complaint. The appellant is a banking corporation.

In the first cause of action it is alleged that the respondent was a depositor with the appellant. In the month of October, 1918, it is stated, appellant wrongfully applied to its own use certain moneys in such deposit against the will and without the consent of the respondent, and has refused and still refuses to pay her checks or orders upon such deposit. Judgment was asked for the amount claimed to have been thus applied and for interest. In the second count respondent seeks to recover damages for the refusal of appellant to pay checks or orders drawn by her against the account. The answer admitted the deposit of certain amounts to the credit of respondent, but denied that the money so deposited was the property of respondent, or that it had wrongfully or without respondent's consent applied to its own use any of the moneys placed to the credit of respondent. The jury gave respondent judgment on the first count for the full amount claimed, and upon the second count for \$500 damages.

A motion for a new trial was denied. The ruling of the court in denying that motion is the only error assigned. Two of the grounds stated in the motion for a new trial are (a) misconduct of jury, and (b) "excessive damages, appearing to have been given under the influence of passion and prejudice." Other grounds are stated in the motion, and, while not waived by appellant, are not discussed at any length in the brief.

The two grounds above stated are the only ones, in our judgment, that require consideration.

[1, 2] It appears from the affidavit of the assistant cashier of appellant that one of the jurors sustained the relationship of debtor to the bank at the time of the trial. It likewise appears that in the examination of such juror he failed to disclose the fact of such relationship. From the affidavits submitted on the motion for a new trial it appears that the juror had executed a note with others as a joint maker. This note was, on the morning of the trial, presented to the appellant bank and by it accepted and a loan made. It does not appear, however, that the juror was aware that the note had been presented to the bank or that a loan had been made at that time. Be that as it may, it is also made to appear that the assistant cashier had personal knowledge of the relationship of the juror to the bank, was present in court at the time of the examination of the jurors respecting their qualifications to act as jurors, made no objections to the juror serving, and did not advise appellant's counsel of the fact of the relationship. The fact that a juror sustains the relationship of debtor or creditor to a party to an action does not disqualify the juror to act, but it gives to the litigant the right to challenge for cause such juror. That is a right that can be waived. Under all the authorities that we have examined, where the parties knowing the fact of the relationship neglect to interpose a challenge, the right to afterwards object is lost. The law applicable is concisely stated in 17 Std. Ency. Pro. 132 as follows:

"No matter how good one's cause of challenge may be, it is clearly waived where no objection is made when the jury is impaneled, especially when he knew the facts constituting the grounds of challenge. It must appear that neither the party nor his counsel had knowledge of the disqualification."

See, also, 16 R. C. L. 287.

Counsel for appellant cites, in support of its contention, the opinions of this court in *State v. Morgan*, 23 Utah, 212, 64 Pac. 356; *State v. Thompson*, 24 Utah, 314, 67 Pac. 789; *Tarpey v. Madsen*, 26 Utah, 294, 73 Pac. 411. These cases do not support counsel's position. It will be found upon an examination that in each case neither the party complaining nor his counsel knew of the disqualification at the time of impaneling the jury. To permit appellant now to insist upon the disqualification of the juror as grounds for new trial, when the fact of such disqualification was known to the officers of the appellant at the time of the trial, would be to permit litigants to trifle with the court.

[3] Respecting the second ground urged, it

² *Stephens R. & L. S. Co. v. Union Pacific*, 48 Utah, 538, 161 Pac. 463.

is made to appear from the complaint and from the evidence that the respondent was engaged in business at Pleasant Grove, Utah county, or was opening up a millinery business at that place. The checks drawn by her were in payment of goods to be used in said place of business. It also appears that the respondent had been engaged in business at other places within the state of Utah, if not continuously, at least intermittently, for the past 20 years. Her testimony was that she had been damaged by the failure of appellant to honor her checks, that she had been humiliated in not having such checks paid, and that certain goods which she had ordered for her business had to be returned to the wholesalers. It is true that the testimony is indefinite as to any specific amount of damage sustained, and it must be admitted that the jury was quite liberal in the amount of damages awarded. However, the only question for determination by this court is, Can it be determined as a matter of law, under the circumstances, that the damages were so excessive as to appear to have been given under the influence of passion or prejudice?

[4] That a commercial bank refusing to pay a check drawn upon an open account of a depositor is liable in nominal damages cannot and will not be disputed, assuming that at the time the check is presented for payment there are sufficient funds to the credit of the drawer to pay the same. The relationship of a bank to the depositor is such that a failure to honor a check, drawn on an account and not in excess of the amount on deposit is a breach of the contract existing between the parties. The courts generally hold, and such is the common-law rule, that failure of a bank to pay the check of a merchant or trader entitles the drawer to substantial damages without any proof of actual damages. The rule under the common law, and in this country in the absence of statute, as the same affects a merchant or trader, is concisely stated by the Court of Appeals of California in the second headnote to *Reeves v. First Nat. Bank*, 20 Cal. App. 508, 129 Pac. 800, as follows:

"Where it appears that the plaintiffs suing the bank for the wrongful dishonor of their check were established in business, such wrongful dishonor raises the presumption that the drawers have sustained substantial damages, the amount of which it is for the court or jury trying the case to fix, as general compensatory damages, in the absence of any showing of special damages."

In 5 R. C. L. p. 549, the same principle is stated as follows:

"Although the right to recover substantial damages does not depend on the depositor's occupation, yet it is held that there is a distinction between an ordinary depositor and a depositor who is a merchant or trader. If the

depositor is a merchant or trader it will be presumed without further proof that substantial damages have been sustained. * * *"

In 2 Morse, Banks and Banking (5th Ed.) p. 63, it is said:

"But the better authority seems to be that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof. It is as in cases of libel and slander, which description of suit, indeed, it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and reputation in the business world. Special damage may be shown, if the plaintiff be able; but, if he be not able, the jury may nevertheless give such temporary [temperate] damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted, according to the ordinary course of human events."

Other authorities are found in the notes to *McFall v. First Nat. Bank*, 138 Ark. 370, 211 S. W. 919, 4 A. L. R. 947. The same case is reported in 138 Ark. 370, 211 S. W. 919, 4 A. L. R. 940.

As indicated, it appears in this record that the respondent was engaged in a mercantile business. Applying the principle of law stated in the foregoing authorities, can it be said that the amount of the verdict is so excessive that it must be held to have been given under the influence of prejudice or passion?

In *Stephens R. & L. S. Co. v. Union Pacific*, 48 Utah, 538, 161 Pac. 463, this court, in considering whether the amount of the verdict had been influenced by passion or prejudice, says:

"We can discover nothing in this case, except the amount allowed, which indicates passion or prejudice, and, as we have seen, passion or prejudice may not be inferred alone from the fact that an excessive amount is allowed by a jury unless the amount is so grossly excessive that it shocks the ordinary man's sense of justice."

[5] The jury, by returning a verdict in favor of respondent on the first cause of action, necessarily must have found that she had on deposit with the appellant sufficient money to pay the checks which she drew against the account. Under that state of facts, failure on the part of appellant to pay such checks entitles the respondent to recover substantial damages without proof of actual damages. By reason of this presumption, and in the light of the testimony, we do not feel justified in holding that the verdict of the jury is so excessive as to warrant the court in disturbing the same, or to conclude as matter of law that it was

given under the influence of passion or prejudice.

We find no reversible error in the record. Judgment affirmed, with costs.

CORFMAN, C. J., and THURMAN, WEBER, and FRICK, JJ., concur.

(24 Ariz. 175)

LAUB et al. v. STATE. (No. 527.)

(Supreme Court of Arizona. June 16, 1922.)

1. Criminal law §520(2)—Admission of confession not error.

In a prosecution for robbery, a confession obtained by the statement of a police officer to defendants that it would be best for them to tell the truth was properly admitted in evidence.

2. Criminal law §736(2)—Question of whether confession is voluntary is for the trial judge.

Whether the confession of an accused person is voluntary is for the trial judge.

3. Criminal Law §532(1/2)—In considering admission of confession, evidence should be examined to determine probable truth of statement.

In passing upon the admission of a confession, and in all cases involving the admissibility of statements questioned as to their voluntary character as confessions, the evidence should be examined in its entirety to ascertain whether, under all the circumstances, it is probable that the temptation or inducement to speak falsely was so great as to render the offered statement untrustworthy.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

George O. Laub and Ruby Laub were convicted of robbery, and they appeal. Affirmed.

William J. Fellows and Thos. F. Croaff, both of Phoenix, for appellants.

W. J. Galbraith, Atty. Gen., and R. E. L. Shepherd, Co. Atty., of Phoenix, for the State.

FLANIGAN, J. The appellants, husband and wife, were jointly charged by the county attorney of Maricopa county with the crime of robbery. During the trial of the cause the state offered and the court admitted, over the objections of appellants, two written confessions subscribed, respectively, by each of the appellants, reciting the circumstances of the crime. The jury found the defendants guilty as charged, and from the judgment entered upon the verdict this appeal is taken.

[1] The first assignment of error is that the court erred in admitting the purported confessions in evidence, for the reason that the same were not voluntary. It is argued

that the testimony of the defendants shows that the arresting officers used coercion, threats, duress, and deception to secure the confessions; and reliance for reversal is especially placed upon the statement made to appellants by Police Officer Crowe, who was present when the confessions were made, that it would be best for them to tell the truth, this being, it is claimed, such an inducement and hope of favor and reward to the appellants by one in authority as would render the alleged confessions involuntary.

[2] Whether a statement by an accused person is to be considered the free expression of the circumstances of his guilt, and therefore a voluntary confession, or, on the other hand, involuntary, as being in fact induced or obtained by means which render it untrustworthy as evidence, is to be determined when the confession is offered by the judge of the trial court upon a preliminary investigation into the circumstances surrounding the confession. 1 R. C. L. p. 579. See, also, on this point, *Berry v. State*, 4 Okl. Cr. 202, 111 Pac. 676, 81 L. R. A. (N. S.) 849, and *Kermeen v. State*, 17 Ariz. 263, 151 Pac. 788.

There are many cases which hold that the mere statement to the accused that it would be better for him to tell the truth constitutes such an inducement as will make a confession obtained in consequence of it involuntary. Upon the theory that the accused, although advised to tell the truth, supposes that what the authorities mean is that he is to say he is guilty, in other words, that the advice is equivalent to advice to confess, and this, coupled with the statement that it would be better for the accused to do so, supplies the inducement which is supposed to render the statement untrustworthy, many of the authorities, especially some English cases, hold that a confession so procured is inadmissible. See annotation to *Ammons v. State*, 80 Miss. 592, 32 South. 9, 18 L. R. A. (N. S.) 768, at page 816, 92 Am. St. Rep. 607. The decisions, numerically, and in our firm conviction the better reason, are with the proposition that the use of the language referred to does not in itself vitiate a confession so procured.

"On principle, the advice by any person whatever that it would be better to tell the truth cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession. The confessor is not obliged to choose between silence and a false confession having powerful advantages, the advantages are attached to the utterance of the truth, and, however tempting we may suppose them to be, there is nothing in the nature of the temptation to make the statement untrustworthy; for if it has availed at all, it has availed to bring out the truth." *Wigmore on Evidence*, vol. I, sec. 8322.

See, also, cited notes to *Ammons v. State*, supra, and *Roman v. State* (Ariz.) 201 Pac. 551-554.

In the decision last cited it is recognized that the circumstances may be such that the adjuration to an accused person "that it will be better to tell the truth" may imply or convey such a threat or promise as will, if it induces a confession, render it inadmissible in evidence. The real question must therefore be whether, considering all the circumstances, the statement offered as a confession may be relied upon as probably stating the truth. The language used is but a circumstance, though an important one, which may or may not be determinative of the question.

[3] In this case, therefore—as in all cases involving the admissibility of statements questioned as to their voluntary character as confessions—the evidence should be examined in its entirety to ascertain whether under all the circumstances it is probable that the temptation or inducement to speak falsely was so great as to render the offered statement untrustworthy. *Roman v. State*, supra. We have accordingly examined very carefully the evidence taken at the time the confessions were offered, to ascertain whether error was committed in admitting them. The appellants were given unrestricted and full opportunity to present to the judge and jury all testimony offered by them tending to show that the confessions were induced by the unfair means they alleged. We apprehend that no useful purpose will be subserved by detailing the evidence on these issues. It is sufficient to say that the testimony was in decided conflict, the appellants stating they were in various ways coerced to sign the statements, while the testimony of the officers was to the effect that no coercion, threats, or duress was used.

In the case of *State v. Rogoway*, 45 Or. 601, 78 Pac. 987, 81 Pac. 234, 2 Ann. Cas. 431, it is held that the determination of the admissibility of a confession will not be disturbed on appeal unless there is clear and manifest error. The court, quoting with approval from the decision of the Supreme Court of New Hampshire in *State v. Squires*, 48 N. H. 364, proceeds to show that the ruling on the objection to admission involves only the decision of a question of fact, as much so as the question whether a witness whose testimony is offered was interested or not, or was qualified to testify as an expert, or whether the loss of a paper has been shown, so as to allow the introduction of secondary evidence of its contents, or the like. Quoting with approval, also, from

the decision of *Fife v. Commonwealth*, 29 Pa. 429, the court proceeds to say:

"But the principle is well settled that where the admissibility of evidence depends upon a preliminary question of fact, to be tried by the court, its decision is not to be reversed unless in a case of clear and manifest error. The court that sees and hears the witnesses must be presumed to have better means of judging on a question of fact than the appellate tribunal, where the witnesses are neither seen nor heard, and where it often happens that their testimony is very imperfectly reported.' Now, in this case the evidence for the state tended to show that the alleged confession of the defendant was voluntarily made; and, while this evidence is controverted and contradicted, there is not sufficient in the record to justify this court in saying that the trial court erred in holding that the confession was competent and admissible as testimony. The admissibility of the testimony was for the court, and its credibility and weight were for the jury, and were properly submitted to them."

See, also, *State v. Storms*, 113 Iowa, 385, 85 N. W. 610, 86 Am. St. Rep. 380.

Applying this rule to the testimony introduced in the case at bar, we must hold that there is no such showing of clear or manifest error on the part of the court below in admitting the confessions as to call for our disapproval of such rulings. We will presume that the judge of the court below, who saw and heard the witnesses, correctly decided the fact in dispute, on the investigation preliminary to the admission of the confessions.

The second assignment of error is that the sentences imposed are invalid, in that the same are in conflict with sections 1127 and 1448 of Penal Code 1913. In just what this invalidity consists the brief for appellants does not say and we can only speculate as to the precise basis of the assignment. Because of the similarity of the sections cited in this case to those cited in the case of *Clark v. State* (Ariz.) 204 Pac. 1032, by the same counsel of record in this court, raising the question as to the validity of the judgment under the indeterminate sentence provisions of section 1127, we surmise that it was intended to present here the question made and decided there. If such be the basis of the assignment—and none other is suggested or perceived—the decision in that case must govern here, and the assignment is consequently held to be without merit.

There being no error, the judgment is affirmed.

ROSS, C. J., and McALISTER, J., concur.

(104 Or. 418)

ADLER v. ROSEN.

(Supreme Court of Oregon. June 13, 1922.)

1. Sales \S 271—Implied warranty that goods furnished shall be equal in quality to sample shown.

There is an implied warranty that goods sold by sample shall be equal in quality and value to the sample exhibited, and furnishing goods of an inferior quality is a breach of such warranty justifying buyer in refusing to accept the goods.

2. Sales \S 354(7)—Answer alleging generally that goods furnished were inferior to sample held insufficient.

In an action for refusing to accept goods, an answer, alleging generally that the goods did not come up to the samples exhibited, is insufficient to raise any issue, as facts must be alleged showing what the difference is, so that the court may see whether there was any substantial difference, and that the party charged with having warranted the quality of the article may be informed from the pleading as to the extent of the warranty and the particulars of the breach.

3. Trial \S 396(1), 404(2)—Finding as to effect of retention of goods held conclusion of law and not within issues.

In an action for refusing to accept goods, a finding that by receiving and retaining the goods the defendant had waived the right to refuse payment for breach of warranty held not within the issues, and a mere conclusion of law neither adding to nor detracting from the force of other findings.

In Banc.

Appeal from Circuit Court, Multnomah County; George Tazwell, Judge.

Action by Simon C. Adler against Sam Rosen. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an appeal from a judgment of the circuit court in favor of plaintiff upon a complaint quantum valebant for goods sold to defendant. The complaint was in the usual form in such cause of action.

The defendant answered, denying generally all of the allegations of the complaint except that he admitted that about September 4, 1920, he ordered a "certain lot" of shoes from plaintiff and later received certain shoes, which have not been paid for. He alleged that, upon the date above mentioned, plaintiff solicited an order for shoes of a certain kind, size, and last, and in accordance with samples then furnished; and that as a result of said solicitation and samples defendant gave to plaintiff an order for shoes of such kind, which plaintiff undertook to fill. The answer avers, however, that the shoes sent by plaintiff and received by defendant under that order did not conform to the representations and samples of plaintiff, and for such reason the defendant re-

fused to accept the same, and so notified the plaintiff.

For a second further and separate cause of defense, the defendant sets up the same facts as in the preceding answer, and in addition a counterclaim for \$7, the amount of freight and transfer charges paid by him upon the shoes in question.

The plaintiff replied, denying the new matter in the answer.

By agreement the cause was tried before the court without a jury, and the court made the following findings of fact:

"I. That on or about September 4, 1920, the plaintiff, at the special instance and request of defendant, sold and delivered to defendant goods, wares and merchandise of the reasonable value of \$175.

"II. That upon the receipt of the aforesaid merchandise, the defendant accepted and retained the same.

"III. That defendant has failed and refused to pay the whole or any part of the purchase price of the aforesaid merchandise and the whole thereof is now due and owing.

"IV. That the plaintiff has demanded payment of the purchase price of the aforesaid merchandise, and that defendant has failed and refused to pay the same. That by receiving, retaining, and accepting the merchandise, the defendant has waived the right to refuse payment of the purchase price on account of any alleged breach of warranty.

"V. That the defendant has failed to establish any of the allegations set forth in the first further and separate answer and defense to plaintiff's complaint.

"VI. That the defendant has failed to establish any of the allegations set forth in the second, further and separate answer and defense and counterclaim to plaintiff's complaint."

Thereafter the court made conclusions of law in accordance with the findings, and entered judgment for plaintiff for the amount claimed, with interest and costs, from which the defendant appeals.

Hodges & Gay, of Portland, for appellant.

Beach & Simon and S. J. Bischoff, all of Portland, for respondent.

McBRIDE, J. (after stating the facts as above). A perusal of the record of this petty case shows that the real difference between the parties was never more than \$35 on a bill of \$193.70. The defendant was willing to accept and retain the goods (35 pairs of shoes) at a deduction of \$1 per pair, and the plaintiff was willing to deduct \$18, which deduction defendant refused to accept; and because of this difference the case has been dragged through two trials and comes here for the third. That the law permits this sort of litigation may explain why this court in a state of considerably less than a million inhabitants has to pass upon as many appeals as the Court of Appeals of the state of New York, which state has over ten million inhabitants. We do not suggest

a remedy for such an evil, but feel that the public interest and the delay caused in the consideration of really important matters by these small cases justify us in at least referring to it.

The affirmative defenses are really the pleader's own conclusions of law from facts not stated.

[1, 2] There is an implied warranty that goods sold by sample shall be equal in quality and value to the sample exhibited, and possess the same characteristics. To furnish goods of an inferior quality is a breach of such warranty and a fraud upon the buyer, justifying him in refusing to accept them. But it is not enough for the buyer to urge generally as a defense that the goods do not correspond to samples exhibited to him. He must state facts showing wherein they differ, so that the court can see whether there is or can be any substantial difference.

There is no material difference, so far as pleading is concerned, between a complaint in an action for breach of warranty and an answer alleging a breach of warranty as a defense to an action for nonpayment of the purchase price. In either case the party charged with having warranted the quality of the article is entitled to be informed from the pleading the extent of the warranty and the particulars of the breach. It is not enough to allege generally that a seller warranted an article and that he breached the warranty, which is the legal effect of the pleading here, in substance that the plaintiff sold by a sample and representations as to quality and that the goods did not come up to the sample and representations. *Aermotor Co. v. Earl*, 18 Ind. App. 181, 47 N. E. 685; *Hough v. Gage*, 74 Ill. 257; *Spinks v. Washington*, 96 Ga. 756, 22 S. E. 326; *Plano Mfg. Co. v. Richards*, 86 Minn. 94, 90 N. W. 120.

[3] The special defenses urged are not sufficiently pleaded to raise any issue. The findings are sufficient to cover all the issues actually raised, and there is some evidence to sustain each finding. That part of finding IV which states that by receiving and retaining the goods the defendant has waived the right to refuse payment on account of any alleged breach of warranty is outside the legal issues and is a mere conclusion of law, neither adding to nor detracting from the force of the other findings.

The judgment is affirmed.

(104 Or. 198)

FLINT et al. v. KOPLIN et al.

(Supreme Court of Oregon. May 23, 1922.)

1. Taxation \S 749—Deed prematurely issued is void.

A tax deed prematurely issued is void, and conveys no title to the grantee.

2. Taxation \S 749—Tax deed, given within three years from date of sale, held void.

Tax deed, issued less than three years from the date of the sale in violation of B. & O. Comp. \S 3127, held void.

3. Descent and distribution \S 71(4)—Deceased presumed to have left heirs capable of inheriting.

A person will be presumed upon his death to have left heirs capable of inheriting.

4. Trusts \S 366(3)—Tax purchaser whose deed was void on its face not a necessary party to action to declare a trust.

In action to declare a trust after an invalid tax sale, tax sale purchaser was not a necessary party to the suit where his tax deed was void on its face.

5. Judgment \S 501—Judgment for tax sale purchaser binding on parties before court, notwithstanding invalidity of tax deed.

Judgment for tax sale purchaser, in suit to quiet title from which no appeal was taken, held binding upon the parties before the court, even though the tax deed was void on its face.

6. Abatement and revival \S 71—Decree not conclusive as to heirs or devisees of defendant who died pending action, where suit not revived as to them or his personal representative.

Where suit to quiet title was not revived as to personal representative, heirs or devisees of a defendant who died pending the action, the decree did not conclude the interest or right of the heirs or devisees of such defendant.

7. Judgment \S 671—Decree for plaintiff quieted title as against unknown heirs served in accordance with statute.

In suit to quiet title as against the unknown heirs of a decedent, served under Or. L. \S 10141-10144, the decree for plaintiff quieted title in plaintiff as against the unknown heirs.

8. Judgment \S 680—Judgment against one tenant in common did not bind cotenants not parties.

A judgment against one tenant in common in suit to quiet title does not bind his cotenants who are not parties to the action.

9. Judgment \S 812(3)—Suit to declare trust a proceeding quasi in rem.

A suit to have trust declared is a proceeding quasi in rem, and was effectual to establish the interest of plaintiff in the lands, but was not conclusive as to persons who were not parties to the action.

Department 1.

Appeal from Circuit Court, Lane County; John S. Coke, Judge.

Action by Sarah Mildred Flint and others against Allisa Koplin and others. Decree of dismissal, and plaintiffs appeal. Modified.

John M. Williams, of Eugene (Williams & Bean, of Eugene, on the brief), for appellants. Donald Young, of Eugene (S. P. Ness, of Leaburg, and Young & Ray, of Eugene, on the brief), for respondents.

MCCOURT, J. The plaintiffs commenced this suit to quiet title to 180 acres of land situated in Lane county, Or., the title to which land was claimed by A. C. Jennings, deceased, in his lifetime, under a tax deed. Together, plaintiffs are the heirs of the said decedent and the beneficiaries under, and the executors of, his last will. A trial was had, and the circuit court, at the conclusion thereof, dismissed plaintiffs' suit, holding that the tax deed upon which plaintiffs relied was void, and that defendants were not concluded by the decree in the case of A. C. Jennings against the unknown heirs of John W. Tully, deceased, which decree was introduced in evidence by plaintiffs in support of the title claimed by them. This appeal is prosecuted from the decree dismissing plaintiffs' suit.

[1, 2] Upon the trial, plaintiffs offered in evidence, to prove their allegations of title and ownership, a tax deed issued to A. C. Jennings by the sheriff of Lane county on February 15, 1904, wherein the said sheriff undertook to convey to Jennings the title to the land in controversy. The deed recited, among other things, that the real property was assessed for the year 1900 to John W. Tully, and, based upon such assessment, taxes were levied upon the land in the year 1901, and were not paid, and that to satisfy said unpaid taxes, the sheriff, by virtue of a warrant duly issued by the county court of Lane county, did on the 1st day of February, 1902, sell the premises to A. C. Jennings for \$41, and issued to him a certificate, as provided by law; that two years had elapsed since the sale, and no redemption of the premises had been made by any one. The statute in force at that time regulating the issuance of tax deeds provided that the purchaser at a tax sale should be entitled to a deed at the expiration of three years from the date of the sale. Section 3127, B. & C. Codes. Where a tax deed is prematurely issued, it is void, and conveys no title to the grantee. *Smith v. Algona Lbr. Co.*, 73 Or. 1, 136 Pac. 7, 143 Pac. 921; 37 Oyc. 1424; *Black on Tax Titles* (2d Ed.) § 382; *Blackwell on Tax Titles* (5th Ed.) vol. 2, §§ 736, 737. Plaintiffs' tax deed was therefore ineffective to establish the title which they alleged.

[3] The record title to the land was vested in John W. Tully in 1900, when the assessment upon which plaintiffs' tax title is based was made. Tully died intestate in October, 1902; so far as known Tully left no heirs. His estate was in process of administration from 1904 until 1912. Several suits have been prosecuted involving the lands in question, in one of which a summons was published against his unknown heirs, yet no one has appeared as his heir to claim his estate. Upon his death, however, a presumption arose that he left heirs capable of inheriting. 21 C. J. 857.

On May 26, 1904, A. C. Woodcock, who was

apparently the only creditor of Tully's estate, was appointed administrator thereof. Tully was indebted to Woodcock in the sum of \$100, evidenced by a promissory note and a mortgage on the lands in suit. On December 12, 1906, one M. Martineau brought a suit against Tully's estate and named Woodcock, the administrator of the estate, as the sole defendant. Martineau alleged that the lands in suit were purchased by Tully with funds in his possession, one-half of which belonged to Martineau, and that Tully made the purchase with the understanding that the lands should be held in trust by Tully, for himself and Martineau, and prayed for a decree declaring Martineau the owner of one-half of the lands, subject to the lien of the mortgage for \$100 given by Tully in his lifetime to Woodcock. Woodcock appeared in the suit and filed an answer, setting up his mortgage and denying any knowledge or information as to the facts alleged by Martineau of an equitable interest in the land. A hearing was had, and on July 3, 1907, the court entered a decree in favor of Martineau in conformity with the prayer of his complaint, and ordered Woodcock to execute and deliver to Martineau a deed conveying to the latter an undivided one-half of the premises, and directed that in case Woodcock should fail to execute and deliver the deed that the decree should operate and be in lieu thereof. The court in its findings recited: "That the said John W. Tully left no heirs that can be found after diligent search."

[4] Martineau in his complaint erroneously described the lands, and the error was carried into the findings and decree. The mistake was later discovered, and another suit to correct the error in the description of the lands was instituted by Martineau on October 15, 1909; Woodcock in that suit was again made sole defendant. He appeared and consented that the relief prayed for in the complaint might be granted, and a decree was entered on October 18, 1909, reforming the earlier decree so as to correctly describe the land. Jennings was not made a party to those suits, and it was not necessary that he should be, as his tax deed was void upon its face.

On November 21, 1907, Woodcock assigned his mortgage against Tully to Jennings, and the latter professed to take possession of the lands thereunder, though it is not clear that he ever actually occupied the lands, either by himself or another. Martineau, upon obtaining the second decree in his favor, having received conveyances from Woodcock as directed by the decrees, executed a deed under date of February 18, 1910, in which his wife joined him, purporting to convey to Mary S. Ness the lands in suit, and the latter on the 14th day of April, 1911, for a consideration of \$1,250, conveyed an undivided one-half interest in the lands to Louis W. Hunzicker.

Subsequently, on the 29th day of March, 1912, Mary S. Ness, in consideration of the further sum of \$1,750, executed a deed purporting to convey an undivided one-half interest in the lands to Fred Hunzicker. The deed last mentioned conveyed no title, as Mary S. Ness parted with all of her interest in the land by her prior deed to Louis W. Hunzicker, who took possession of the lands with the consent of Mary S. Ness, and as her tenant, in 1910, and excluded Jennings therefrom.

Louis W. Hunzicker occupied and maintained possession of the lands continuously from 1910 until the time of his death in 1913. His administrator, John Hunzicker, and the defendants in the instant suit openly asserted possession to the lands from the death of Louis W. Hunzicker, until the time this suit was heard, and have actually occupied the lands most of the time, either by themselves or their tenants. Defendants assert title to the lands in suit, and in support thereof set up the decree above mentioned in favor of Martineau, and allege they have had adverse possession of the lands for more than 10 years.

Plaintiffs introduced in evidence a decree given in favor of A. C. Jennings, by the circuit court of Lane county, on the 27th day of November, 1917, declaring A. C. Jennings, plaintiffs' ancestor, to be the owner of the land in suit, and that the unknown heirs of John W. Tully, deceased, had no right, title, or interest in the premises, as against the plaintiff, and that the interveners in said suit (none of the parties here) had no right, title, or interest in or to the premises, and quieted the title of plaintiff against all claims of said interveners and of said unknown heirs.

[5] The suit in which the above-mentioned decree was entered was instituted in 1912 by A. C. Jennings against "the unknown heirs of John W. Tully, deceased," as defendants (No. 8152), and service of summons by publication was made upon such unknown heirs, pursuant to the provisions of the statute of 1911 (Or. L. §§ 10141-10144, inclusive). In the affidavit for publication of summons it was shown, and the court found in its order of publication, that no heirs of Tully could be discovered or found after diligent search; none appeared in the suit. Jennings based his right to relief in that suit, as do plaintiffs in this suit, upon the tax deed above mentioned, and the court held the same valid, and also that the Martineau decree, above mentioned, was void as against the plaintiff therein. No appeal was taken from that decree, and though an unwarranted effect was given plaintiff's tax deed therein, the decree is binding upon the parties who were before the court.

[6] Louis W. Hunzicker and Fred Hunzicker intervened as defendants in that suit,

and claimed to own said land, or an interest therein. While the suit was pending, Louis W. Hunzicker died, and Jacob Hunzicker, the father and sole heir of Louis W. Hunzicker, intervened as defendant in place of the latter. Before the case was heard, Jacob Hunzicker died testate, and in his will devised all his real property to his children, the defendants in the instant suit and John and Fred Hunzicker, share and share alike; the suit was not revived as to the personal representative, heirs, or devisees (the defendants in this case) of Jacob Hunzicker, and the decree subsequently entered therein did not conclude the interest or right of the heirs or devisees of the said Jacob Hunzicker to the premises, except that of Fred Hunzicker, who is not made a defendant in the instant suit.

[7] The decree last mentioned quieted title in Jennings to the land as against the unknown heirs, if any, of John W. Tully. 5 R. C. L. 645; Phillips v. Thompson, 73 Wash. 78, 131 Pac. 461, L. R. A. 1918F, 599, Ann. Cas. 1914B, 672; Buck v. Simpson (Okla. Sup.) 166 Pac. 146; L. R. A. 1918F, 604, and comprehensive note, p. 609. The decree also quieted title in Jennings as against Fred Hunzicker, both as to any claim made by him under his deed from Mary S. Ness and as devisee under the will of Jacob Hunzicker, but it did not have the effect of transmitting to Jennings the legal or other title theretofore vested in the presumptive heirs of Tully or in Fred Hunzicker.

[8] The claims of the defendants in this suit to ownership and interest in the lands were not determined by that decree, as they were not parties thereto. Neither are they concluded by the decree against Fred Hunzicker. The latter was a tenant in common with defendants, and tenants in common are not in privity with each other, and a judgment against one tenant in common does not bind his cotenants who are not parties thereto. Coan v. Osgood, 15 Barb. (N. Y.) 583, 588; Allred v. Smith, 135 N. C. 433, 47 S. E. 597, 65 L. R. A. 924.

It follows that the adverse claims of plaintiffs and defendants, set up in this suit, to the lands in question, were not determined by the decree in the suit against the unknown heirs of John W. Tully, and if the interest or claim of the defendants extends to the entire beneficial title to all of the land, plaintiffs are not entitled to any relief in this suit. If, however, the interest, if any, of defendants is an undivided interest—less than the whole title—the decree (No. 8152) establishes a right in plaintiffs' ancestor and in them to the undivided interest not embraced in the interest, if any, to which defendants are entitled.

Defendants in their brief disclaim any desire for affirmative relief, though in their answer they pray that their title be quieted

as against the plaintiffs; thereby defendants have in this suit measured their title against that of plaintiffs. As indicated, numerous suits have been prosecuted in respect to the title to the lands in suit, and that title should be adjudicated in this suit, if there are sufficient facts before the court to authorize the same.

[9] The suit brought by Martineau was a proceeding quasi in rem; (Hawkins v. Doe, 90 Or. 437, 119 Pac. 754, Ann. Cas. 1914A, 765; State v. First Nat. Bank of Portland, 61 Or. 551, 555, 123 Pac. 713, Ann. Cas. 1914B, 153), and was effectual to establish the interest of Martineau in the lands, except that it was not final as to the heirs, if any, of Tully.

At the time the Martineau suit was brought, there was no statutory or other authority which authorized Martineau to proceed against unknown heirs in a case where it could not be ascertained that the decedent actually left heirs. Woodcock was the only person within the jurisdiction of the court having any relation to the property, and accordingly was the only person that Martineau could properly make a party to the suit. The court obtained jurisdiction of the property and the only party within its jurisdiction connected therewith, and the decree entered by the court in the suit brought by Martineau declared him the owner of a one-half interest in the property, and was effective for that purpose, subject to the right of the heirs, if any, of Tully, in a subsequent suit to establish that their ancestor did not hold the land subject to the trust asserted by Martineau.

An undivided half interest was all that Martineau ever claimed in the lands, and was all that the decree awarded him. And Louis W. Hunzicker did not at any time claim to own more than an undivided half interest in the lands, and his deed from Mary S. Ness conveyed to him an undivided half interest only therein.

As successors to the rights of Martineau established by the decrees in his favor, defendants, together with John and Fred Hunzicker, became the equitable and beneficial owners of an undivided half interest in the lands in suit; the bare legal title thereto having vested at the death of John W. Tully in his heirs, if he left any, and if not, in the state of Oregon.

By the will of Jacob Hunzicker, the defendants and John Hunzicker and Fred Hunzicker was each devised an undivided one-sixteenth interest in the lands in suit. John Hunzicker is not a party to this suit, and he was not a party in his individual right to the suit against the unknown heirs of John W. Tully.

A decree will be entered, declaring plaintiffs to be the owners of an undivided nine-

sixteenths interest in and to the land in suit, and quieting their title thereto, as against the defendants Alissa Koplin, Emil Hunzicker, Helena Hunzicker, Edward W. Hunzicker, Otto M. Hunzicker, and Wilhelm P. Hunzicker, and declaring defendants to be the owners of an undivided six-sixteenths interest in and to said lands, and quieting their title thereto, as against plaintiffs. And it is so ordered.

Defendants shall recover their costs upon this appeal from plaintiffs.

Modified.

BURNETT, C. J., and MCBRIDE and RAND, JJ., concur.

(63 Mont. 363)

EDER v. BAREOLOS. (No. 4731.)

(Supreme Court of Montana. May 15, 1922.)

1. Appeal and error \S 957(1)—Judgment \S 139—Setting aside of default judgment rests within discretion of trial court.

Whether a default decree should be set aside under Rev. Codes 1921, \S 9187, providing that the court may upon just terms relieve a party or his legal representative from a judgment through mistake, inadvertence, surprise, or excusable neglect, where applied for within reasonable time, and not to exceed six months, is within the trial court's sound discretion, and the Supreme Court will not substitute its discretion for that of the district court.

2. Judgment \S 162(1)—Plaintiff may not controvert defendant's showing on motion to set aside default judgment.

In order to justify the district court in granting a motion to set aside a default and vacate a judgment under Rev. Codes 1921, \S 9187, the defendant must show that he proceeded with diligence, his excusable neglect, and that the judgment if permitted to stand will affect him injuriously, that he has a defense on the merits; but plaintiff cannot controvert such a showing by contrary evidence.

3. Judgment \S 143(12)—Trial court held justified in setting aside default and permitting trial on merits on ground of excusable neglect.

Where a defendant lived 30 miles from the county seat, and promptly employed an attorney, and 10 days thereafter met with an accident, causing him to be confined to his bed until after the default judgment was rendered, and the neglect and failure to appear was entirely that of his attorney, who was excusable inasmuch as he went twice during office hours to plaintiff's attorney's office to serve a demurrer, and on both occasions found the office locked, and then overlooked the matter because engaged in a murder trial which took all his time, held that defendant's neglect was excusable.

4. Appeal and error \Rightarrow 1011(1) — District court's decision on conflicting testimony cannot be considered.

Where conflicts in testimony are determined by the decision of the district court, they cannot be considered by the Supreme Court.

Commissioners' Opinion.

Appeal from District Court, Stillwater County; Albert P. Stark, Judge.

Action by Carl Eder against James Bareolos, for actual and exemplary damages for trespass by defendant's hogs, in which a default judgment was entered in favor of plaintiff, and defendant's motion to set aside the default and vacate the judgment was granted on condition, and plaintiff appeals from the order granting the motion. Order affirmed.

B. E. Berg, of Columbus, for appellant.

Geo. A. Westover and M. L. Parcells, both of Columbus, for respondent.

POMEROY, C. C. This action was brought to recover \$1,000 actual and \$500 exemplary damages for injury alleged to have been suffered by plaintiff on account of a trespass by defendant's hogs. The summons was served personally September 25, 1919. The default of the defendant was entered October 18th. On October 25th a trial was had and verdict returned for the plaintiff for the full amount of his claim. Judgment was entered in accordance with the verdict October 28th. On the same day the defendant moved to set aside the default and vacate the judgment. On January 16, 1920, the motion was denied. On March 20th a second motion to set aside the default and vacate the judgment was made upon leave granted by the court. The motion was heard upon affidavits and oral testimony, and was on May 27, 1920, granted. The motion was granted on condition that the defendant pay the plaintiff his costs to the amount of \$21.50 and an attorney fee of \$100. The appeal is by the plaintiff from the order granting the motion.

[1] Section 9187, R. C. M. 1921, provides:

"The court * * * may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

In the case of *Donlan v. Thompson Falls C. & M. Co.*, 42 Mont. 257, 112 Pac. 445, this court said:

"Whether it should have been set aside was a matter within the sound legal discretion of the court below, and with its determination we may not interfere, unless there was a manifest abuse of such discretion."

In the case of *Beadle v. Harrison*, 58 Mont. 606, 194 Pac. 134:

"A stronger showing of an abuse of discretion should be made to warrant a reversal where the trial court has opened a default than where it has refused to do so, for the courts almost universally favor a trial on the merits, and where there has been a reasonable excuse for the default offered with reasonable diligence, such a trial should be had."

In *Swilling v. Cottonwood Land Co.*, 44 Mont. 339, 119 Pac. 1102:

"It is beside the question that any member of this court, if sitting in the trial court, would probably have exercised the discretion in favor of the appellant. It is not the province of this court to substitute its discretion for that of the district court."

[2] In order to justify the district court in granting the motion, the defendant was required to show: (a) That he proceeded with diligence; (b) his excusable neglect; (c) that the judgment, if permitted to stand, will affect him injuriously, and that he has a defense to the plaintiff's cause of action upon the merits. *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739. It is not contended in this case that the defendant's application was not timely, nor that the judgment, if permitted to stand, will not affect him injuriously. That the defendant has a meritorious defense to plaintiff's cause of action is amply shown by his answer and by his very full and complete affidavit of merits. On the hearing the plaintiff undertook to controvert the showing by contrary evidence. This he is not permitted to do. *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303.

[3, 4] No neglect can be charged personally to the defendant. He lives 30 miles from Columbus, the county seat. On October 3d he employed Mr. George A. Westover, the oldest attorney in point of time practicing in Stillwater county, to appear for him in the suit, left with him the copy of the summons and complaint, and gave him the facts concerning his defense. On October 13th he met with an accident, was seriously injured, and confined to his bed at his home until October 31st. The neglect was entirely that of his attorney, Mr. Westover. The showing as an excuse for the neglect was:

That on October 7th Mr. Westover prepared a demurrer, and twice during office hours on that day went to the office of the attorney for the plaintiff to serve it, and on each occasion found the office locked; that (quoting from his affidavit), "affiant was one of the attorneys for the defendant in the case of the State of Montana v. Elijah Bess, who was charged with murder in the first degree; that on the day following the visit of affiant to the office of said B. E. Berg, for the purpose of serving said demurrer, affiant entered upon the work of examining witnesses and procuring affidavits for use in connection with the preparation and

trial of a motion for change of venue in said murder case, which motion was heard on Saturday, the 11th day of October, A. D. 1919; that from the morning of the said 8th day of October, A. D. 1919, and up to and until the conclusion of the trial of the said case of the State of Montana v. Elijah Bess at 2:30 A. M., on the morning of October 18, 1919, affiant was constantly engaged in the work pertaining to and trial of said murder case; that there was no intention on the part of this affiant to neglect the interests of his client, James Bareolos, defendant in the above-entitled action, and that, immediately after learning of the entry of said default, which knowledge first came to affiant on the 24th day of October, A. D. 1919, while the jury were deliberating on the verdict and before the verdict was returned in said case, affiant informed the judge of this court and B. E. Berg, attorney for plaintiff herein, that he had been retained by and represented the defendant in said action, and desired to present a defense therein or words to that effect; that affiant immediately prepared motion to set aside the default entered in said action without his knowledge, on the 18th day of October, A. D. 1919, supported by affidavit and served the same upon B. E. Berg, attorney for plaintiff herein, on the 27th day of October, A. D. 1919, prior to entry of judgment in said action and also communicated the fact of the entry of said judgment to the defendant herein, James Bareolos, by special messenger at the earliest opportunity."

Mr. Westover testified at the hearing of the motion:

"From the morning of the 13th of October, which was Monday, I was engaged in the trial of that case until 2:30 o'clock on the morning of the 18th, and during the day of the 12th of October I was engaged the entire day, which was Sunday, in the preparation for trial of the action. I believe that the 18th day of October was the same day the default was entered. Due to the fact of the importance of the murder case in which I was professionally engaged, and due to the further fact of the employment of Mr. C. B. Nolan of Walsh, Nolan & Scallon, of Helena, and Mr. H. J. Miller of the firm Miller, O'Connor & Miller, of Livingston, as well as the county attorney of Stillwater county in the prosecution of the case, my mind was intensely absorbed in the trial of the action. And I will say frankly that I considered no other matters that I recall during that period of time, other than that one case. I did not make service of the pleading, and appearance in the Eder v. Berelos Case, due to the fact that my mind was entirely absorbed in the other case between the 7th day of October and the 18th day of October, 1919, and I inadvertently overlooked the filing and the service."

That the murder case upon which defendant's attorney was engaged was one of unusual moment is evidenced by the fact that distinguished counsel from Helena and Liv-

ngston were employed to assist the county attorney. While Mr. Westover was not the chief counsel for the defense, the fact that neither of his associates was a resident of Stillwater county placed a heavy responsibility upon him. There were some conflicts in the testimony, but these were determined by the decision of the district court, and cannot be considered by this court. *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592. The trial court properly exercised its discretion in setting aside the default and permitting a trial of the case on the merits. The zeal of counsel in the murder case is to be commended. His neglect under the circumstances was clearly excusable.

Fifty-two decisions of this court, construing the provisions of the Code involved in this case, have been examined, and it is worthy of note that in only six of these have the decisions of the district courts in setting aside defaults been reversed, because of the insufficiency of the showing of excusable neglect. They are: *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *Chambers v. City of Butte*, 18 Mont. 90, 40 Pac. 71; *Scilley v. Babcock*, 39 Mont. 536, 104 Pac. 677; *Pearce v. Butte Electric Ry. Co.*, 40 Mont. 321, 106 Pac. 563; *Lovell v. Willis*, 46 Mont. 581, 129 Pac. 1052, 43 L. R. A. (N. S.) 930, Ann. Cas. 1914B, 587; and *Robinson v. Peterson*, 206 Pac. 1092, just decided. None of those decisions is in conflict with the conclusion reached in this case.

In *Lovell v. Willis* Mr. Chief Justice Brantly, speaking for a majority of the court, said:

"If the affidavit had made a disclosure of facts showing that the character of defendant's business was such as to absorb his attention and was so pressing that the average man would, under similar circumstances, have been likely to forget his other important interests, the conclusion of the court thereon might have been justified."

Other cases in point are: *Whiteside v. Logan*, 7 Mont. 373, 17 Pac. 34; *Jensen v. Barbour*, supra; *Mantle v. Largey*, 17 Mont. 479, 43 Pac. 633; *Jones v. Jones*, 37 Mont. 155, 94 Pac. 1056; *Pengelly v. Peeler*, 39 Mont. 26, 101 Pac. 147; *Nash v. Treat*, 45 Mont. 250, 122 Pac. 745, Ann. Cas. 1913E, 751; *Farmers' Co-operative Ass'n v. Roper*, 57 Mont. 42, 188 Pac. 141; *Delaney v. Cook*, 59 Mont. 92, 195 Pac. 833.

It is recommended that the order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(68 Mont. 214)

MATSON v. HINES, Director General of Railroads. (No. 4719.)(Supreme Court of Montana. May 1, 1922.
Rehearing Denied June 5, 1922.)**1. Master and servant §203(1)—Assumption of risk by railroad employee a defense.**

Though under Rev. Code 1921, § 6607, a railroad employee is not deemed to have assumed the risk from negligence of the employer, or of any one in the service, assumption of risk is a defense, when the injuries have been caused by a hazard incident to the business; and the defense is also avoidable when the injuries have resulted from a hazard brought about by failure of the employer to provide a reasonably safe place of work, and reasonably safe appliances, provided the employee is aware of the condition of increased hazard, or it is so obvious that an ordinarily prudent person would have observed and appreciated it.

2. Master and servant §217(1)—Risk of known danger assumed.

Where the employee knows and appreciates danger brought about by defective appliances or unsafe condition of the place of his work, he assumes the risk.

3. Master and servant §222(2)—Section hand, lifting rail, held to have assumed risk of strain.

An experienced section hand, knowing that six or eight men were necessary to carry a rail with reasonable safety, held to have assumed the risk of strain when he attempted to move it with four men, though he acted in compliance with the order of his foreman.

4. Master and servant §217(28)—Risk assumed by employee lifting heavy object.

An employee, who undertakes to lift or assists in lifting a heavy object, knowing its weight and condition, assumes the risk of the injury due to the task being too great for his strength.

Cooper, J., dissenting.

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

Action by Axel Matson against Walker D. Hines, as Director General of Railroads. From a judgment for plaintiff, and an order overruling defendant's motion for new trial, defendant appeals. Order and judgment reversed, with directions.

Walker & Walker, of Butte, and Gunn, Rasch & Hall, of Helena, for appellant.

Nolan & Donovan and George Bourquin, all of Butte, for respondent.

AYERS, District Judge, sitting in place of Mr. Justice REYNOLDS, disqualified, delivered the opinion of the court.

Plaintiff brought this action to recover damages for personal injuries suffered by him during his employment as a section hand for the Northern Pacific Railway Company.

The injury pleaded was a relaxation of the left inguinal ring, left side and back, and left lower part of the abdomen. The negligence charged is that defendant failed to furnish a sufficient number of servants to assist plaintiff in lifting and carrying a railroad rail weighing approximately 750 pounds. The answer denied the negligence and affirmatively pleaded the assumption of risk by plaintiff. A reply denied the assumption of risk, and upon these issues the trial was had. At the close of plaintiff's case, defendant moved for a nonsuit, specifying as one of the grounds therefor that plaintiff's evidence showed that he assumed the risk of the injury claimed to have been received by him. This motion was overruled, and, after defendant had introduced his testimony, the jury returned a verdict for plaintiff, upon which judgment was entered. An order was made overruling defendant's motion for a new trial, and this appeal is from that order and the judgment.

[1] As a matter of law, in this state, an employee of a railroad company operating a railroad is deemed not to have assumed the risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer. Section 6607, Revised Codes 1921. However, the defense of assumption of risk may be interposed as a bar in an action for personal injuries of an employee, when such injuries have been caused by hazard which is incident to the particular business. When they have resulted from a hazard brought about by a failure of the employer to exercise the degree of care required of him by law to perform his primary duty to provide a reasonably safe place of work and reasonably safe appliances for the work, the defense is also available, provided the employee is aware of the condition of increased hazard thus brought about, or it is so obvious that an ordinarily prudent person, under the same circumstances, would have observed and appreciated it. McCabe v. Montana Central Ry. Co., 30 Mont. 323, 76 Pac. 701; Coulter v. Union Laundry Co., 34 Mont. 590, 87 Pac. 973; Leary v. Anaconda C. Min. Co., 36 Mont. 157, 92 Pac. 477; Monson v. La France Copper Co., 43 Mont. 65, 114 Pac. 778; Fotheringill v. Washoe Copper Co., 43 Mont. 485, 117 Pac. 86; Molt v. Northern Pac. Ry. Co., 44 Mont. 471, 120 Pac. 809; Sorenson v. Northern Pac. Ry. Co., 53 Mont. 268, 163 Pac. 560.

[2] When an employee knows and appreciates the danger brought about by defective appliances or an unsafe condition of the place of his work, he assumes the risk. In this connection he is bound to use his senses, and cannot allege ignorance of a hazard which is obvious to any one of ordinary intelligence and understanding, and though he

does not appreciate the extent of the hazard, or does not know precisely the injury he may incur, the risk is his; yet, if the hazard requires knowledge or judgment not possessed by men of ordinary observation, the servant does not, as a matter of law, assume the risk. Assumption of risk implies knowledge, or the means of knowledge, and appreciation of the danger. Cases *supra*; *Alexander v. Great Northern Ry. Co.*, 51 Mont. 565, 154 Pac. 914, L. R. A. 1918E, 852; *Morelli v. Twoby Bros. Co.*, 54 Mont. 366, 170 Pac. 757.

[3, 4] Plaintiff introduced no other evidence than his own upon the facts concerning the happening of the injury. He testified that he was 28 years old and had been engaged in manual labor 13 or 14 years; that he had been working on railroads about 2 or 3 years; that he had before assisted in carrying rails weighing from 750 to 800 pounds, and knew that six or eight men were used in such work, and that such number were necessary to carry the thing (rail) with reasonable safety to the men doing the lifting; that at the time of the injury there were only himself and three other men lifting and carrying the rail by means of two pairs of tongs; that he had been employed by the Northern Pacific Railway Company since January 31, 1919, to the date of the injury February 17 following, during all of which time he had been handling rails and doing the same class of labor that he was engaged in at the time of the accident. This testimony discloses that plaintiff was of mature years, experienced in the work he was performing, and knew that six or eight men were necessary to move the rail with reasonable safety. If he knew that six or eight men were necessary to move the rail with reasonable safety, then it must follow that he knew it was not reasonably safe to move it with four men. Hence he must be held to have appreciated the danger when he attempted to move it with the latter number.

Plaintiff contends that, because he was acting in compliance with orders from his foreman, he did not assume the risk incident to the work he was ordered to perform. An examination of the cases cited in support of this position discloses different facts than here considered. There the servants had no independent knowledge of the danger, nor was it obvious, glaring, or imminent. The servants, acting under orders, relied upon the superior knowledge of their masters, and in such instances it was held that the servant had the right to rely upon his master's judgment, assuming that the order could be obeyed safely, or it would not have been given. Quite the contrary in the instant case, for here we have the servant admitting his knowledge of the danger.

In cases of the character of this one, which may be classed as "strain cases," the

injury occurring by overtaxing one's strength, the rule is that the lifting of a heavy object involves no peril that is not obvious to any person of common understanding. The employee is the best judge of his own lifting capacity, and the risk is upon him if he overtaxes it. An employee, who undertakes to lift, or assist in lifting, a heavy object, knowing its weight and condition, assumes the risk of the injury due to the task being too great for his strength, and, in case injury results, he is not entitled to recover damages from his employer. *Sorenson v. Northern Pac. Ry. Co.*, *supra*; *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Southern Kansas Ry. Co. v. Moore*, 49 Kan. 616, 31 Pac. 138; *White v. Owosso Sugar Co.*, 149 Mich. 473, 112 N. W. 1125; *Haviland v. Kansas City, etc., R. Co.*, 172 Mo. 106, 72 S. W. 515; *Stenvog v. Minn. Transfer Ry. Co.*, 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362, 17 Ann. Cas. 240; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53; *Haywood v. Galveston, etc., R. Co.*, 38 Tex. Civ. App. 101, 85 S. W. 433; *White on Personal Injuries on Railroads*, § 339. The exception to this rule occurs when the servant is of immature years, or is inexperienced in the particular work at which he is injured. *Sorenson v. Northern Pac. Ry. Co.*, *supra*; *Sherman v. Texas, etc., R. Co.*, 99 Tex. 571, 91 S. W. 563.

We appreciate that, if the employee should stop to make tests and experiments to determine for himself whether he could safely obey the orders of his foreman, it would be impossible to accomplish any kind of enterprise, where a considerable number of men are employed on the same work, and that it is his duty to obey orders from superiors, unless he has independent knowledge, or it is obvious, that obedience will expose him to unusual danger. Here we have the plaintiff, an employee coming under the rule in "strain cases," and in addition thereto possessing independent knowledge of the danger. That he assumed the risk is the only conclusion to be drawn from his own testimony. Defendant's motion for nonsuit should have been granted.

The order and judgment appealed from are reversed, and the district court is directed to enter judgment upon defendant's motion for nonsuit.

Reversed.

HOLLOWAY and GALEN, JJ., concur.

COOPER, J. I dissent. The primary duty of the employee is obedience to the orders of the master. He is on a wholly different footing from the foreman, who is charged by the employer with the duty of directing the employees, even as to the manner in which the particular act shall be done. It is bound to

furnish and maintain suitable appliances for the work which it requires the employees to perform. This includes instrumentalities, as well as mechanical devices. *White on Personal Injuries*, § 262; *Wallace v. Tremont Ry. Co.*, 140 La. 873, 74 South. 179, L. R. A. 1917D, 959; 3 *Labatt on Master and Servant*, § 1107; *Illinois Central Ry. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32; *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849. Whether the employer has furnished sufficient help is ordinarily a question for the jury. 4 *Labatt on Master and Servant*, § 1309; *Chicago, etc., Ry. Co. v. Cronin* (Okla. Sup.) 178 Pac. 921; *Pittsburgh, etc., Ry. Co. v. Edwards* (Ind. Sup.) 129 N. E. 310; *Patterson's Railway Accident Law*, § 297. The true rule is: The employee never assumes risks growing out of the master's negligence, unless he knows of the failure of duty and consequent dangers, or the failure of and the danger therefrom are so obvious that an ordinarily prudent man in his situation would have observed the one and appreciated the other. *Carter Coal Co. v. Howard*, 169 Ky. 87, 183 S. W. 244; *Chesapeake, etc., Ry. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933; *Id.*, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016; *Illinois Central Ry. Co. v. Langan*, *supra*; *Thompson on Negligence*, § 4878.

It required, as a general rule, from six to eight men to handle the rail with safety. On this occasion, there were present and participating in the lifting and carrying of the rail the plaintiff and three other men, including the foreman, who, standing in place of the master and directing the operations, apprehended no danger on account of the diminished force. Under these circumstances, he, for the company, assumed all the risk, and not the plaintiff. It was, at least, a situation where the probability of danger was such that prudent men might entertain different views. Section 6607 of the Revised Codes of 1921 (chapter 29, Laws of 1911), reads as follows:

"An employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer."

The common-law rule in force before the act became effectual is correctly stated in the opinions of this court cited in the majority opinion. This act, however, relieves the employee of that burden, except in cases where the operation involves danger so glaring that no prudent person would take the chances. In *Young v. Lusk*, *supra*, it was held that, even in an action under the federal Employers' Liability Act, the employer could not rely upon the defense of assumption of risk in case he himself had been negligent.

(71 Colo. 437)

LARSEN et al. v. WHITFORD et al.
(No. 10107.)

(Supreme Court of Colorado. June 5, 1922.)

1. Brokers \S 97—Broker who made loan and had disposition of money held not agent of lender.

A broker negotiated a loan to plaintiff from defendant. Defendant paid the money to the broker, with the understanding that it was to be disbursed for improvements on the mortgaged land on the orders of plaintiff. The broker had not theretofore acted as agent for either party. *Held*, that the broker must, *prima facie*, be regarded as the agent of the plaintiff, so that plaintiff could not restrain foreclosure of the mortgage for the full amount on the ground that the broker embezzled a part of the money.

2. Brokers \S 8(1)—In suit to enjoin sale under trust deed, held, that burden was on borrower to show broker was lender's agent.

In suit by a borrower to enjoin sale under a trust deed given to a lender to secure a loan, on the ground that the broker, who had been authorized to disburse the proceeds in constructing improvements on the land, had embezzled part of the money, the burden was on the borrower to show that the broker was the lender's agent.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by Emma D. Larsen and another against Edith F. Whitford and Edwin M. Sabin, as Public Trustee in and for the City and County of Denver. From a judgment for defendants, plaintiffs bring error. Affirmed.

H. A. Calvert, of Denver, for plaintiffs in error.

Henry E. May, of Denver, for defendants in error.

BURKE, J. Plaintiffs in error, having borrowed money of defendant in error Edith L. Whitford, and secured its payment by a trust deed, brought this action to enjoin sale thereunder, and to review a judgment entered against them on their evidence they prosecute this writ.

[1, 2] The loan in question was made through one Conaway. Plaintiffs alleged that Conaway was the agent of Whitford, and the burden was upon them to so prove. If they failed therein, as the trial court found, this judgment must be affirmed; otherwise it must be reversed.

Mrs. Whitford gave her check to Conaway for \$5,000, the full amount of the loan. Out of this he was to discharge a prior incumbrance of \$2,000, and pay the remainder for certain improvements as they were made. He discharged the incumbrance, and paid \$1,700 on the improvements. The balance he embezzled. Plaintiffs, contending that this balance covered by their trust deed had nev-

or been received by them, declined to make further interest payments, for which default Whitford, taking the contrary view, began foreclosure. Counsel for plaintiffs contends that the arrangement by which Conaway was to make the payments above mentioned constituted him the agent of Whitford under the rule laid down in *Travelers' Ins. Co. v. Jones*, 16 Colo. 515, 27 Pac. 807. In addition to such evidence, that alleged agency is further supported by conversations from which it appears that Conaway was an old acquaintance of Judge Whitford, Mrs. Whitford's husband, who expressed confidence in him, and surprise at his failure to pay, and apparent dishonesty, and indicated at one time a willingness to make good the embezzlement out of his own funds. One of these conversations, in which Judge Whitford indicated that plaintiffs ought not to bear the loss, took place in Mrs. Whitford's presence, and when she might have heard it, although there is no evidence that she did so, or that she personally ever assumed any responsibility therefor, or ever admitted that Conaway was her agent. Called by plaintiffs as an adverse witness for cross-examination under the statute, she testified that neither Conaway nor her husband were ever authorized to act for her.

It further appears that plaintiffs, desirous of making such a loan, saw Conaway's advertisement in a Denver paper, and called upon him; that he knew Mrs. Whitford had this amount of money to loan, although he then had none of it in his possession; and there is no evidence that he was then vested with any authority concerning it. Plaintiffs did not know whose money they were getting until the papers were made out, and they did not meet either of the Whitfords for some time thereafter. Plaintiffs executed the note and trust deed, and authorized Conaway to make disposition of the loan as above mentioned. They paid a commission to Conaway, who advised them that one-half of it was to go to Judge Whitford. Mrs. Whitford's check to Conaway was dated the following day. The arrangement for Conaway to pay for the improvements was that such payments should be made on plaintiff's order, and the \$1,700 was so paid out. There is no evidence that these orders were to be presented to, or approved in any way by, either of the Whitfords. All of which constitutes very strong evidence that Conaway was plaintiffs' agent.

Travelers' Ins. Co. v. Jones, supra, is correct as far as it goes, and unquestionably states the law; but its facts are not the facts of the case before us. There was in that case a prior relation of principal and agent, collection of interest by the agent, and no payment of commission by the borrower.

On the entire record before us we cannot say that the trial court was wrong in holding that Conaway was plaintiffs' agent. It is

certainly true that plaintiffs at least did not sustain the burden imposed upon them, i. e., to establish prima facie that Conaway was Whitford's agent. Failing in this, they were not entitled to injunctive relief.

The judgment is affirmed.

TELLER, Acting C. J., and ALLEN, and DENISON, JJ., concur.

WHITFORD, J., not participating.

(71 Colo. 442)

PEOPLE ex rel. FISHER v. LUXFORD,
County Judge. (No. 10153.)

(Supreme Court of Colorado. June 5, 1922.)

Clerks of courts §§1, 6, 8—Clerk of county court and deputies are not state officers, and hence not under civil service.

A clerk of a county court and his deputies are not state officers, but officers of the court, and hence are not within the civil service amendment to the state Constitution.

Teller and Denison, JJ., dissenting.

En Banc.

Error to District Court, City and County of Denver.

Mandamus by the People of the State of Colorado, on the relation of Nellie M. Fisher, against George A. Luxford, as Judge of the County Court of the City and County of Denver, to compel relator's reinstatement as bookkeeper and deputy clerk in the office of the clerk of such court. From a judgment denying relief, relator brings error. Affirmed.

Ira C. Rothgerber, Walter M. Appel, and Wm. E. Hutton, all of Denver, for plaintiff in error.

William H. Dickson and Francis J. Knauss, both of Denver, for defendant in error.

ALLEN, J. This is a suit in mandamus. The relator seeks reinstatement to the position of bookkeeper and deputy clerk in the office of the clerk of the county court of the city and county of Denver. She occupied that position at the time the civil service amendment to the state Constitution went into effect, and afterwards was removed from the position by the respondent, the county judge, who proceeded in this matter without reference to any Civil Service Law or regulation. The relator claims the position in question is within the civil service amendment. It is admitted that the position is one of those wherein the incumbent is "an officer of the court." The same designation has been applied by this court to a bailiff in *People v. Morley*, 67 Colo. 331, 184 Pac. 386, and we there said:

"Court bailiffs are 'officers of the court' not 'state officers' and are not within the terms of said constitutional amendment."

This decision was followed in *People v. Hersey*, 69 Colo. 492, 196 Pac. 180, 14 A. L. R. 631, where a jury commissioner was likewise designated as an officer of the court. From these two cases, which are decisive of the instant case, it necessarily follows that a clerk of a court and his deputies are not state officers, and are not under civil service.

The judgment denying relator relief was correct, and is affirmed.

SCOTT, C. J., not participating.

BURKE and WHITFORD, JJ., concur.

TELLER, J. (dissenting). The majority opinion holds that the relator is not within the classified civil service because she is not a state officer. I cannot agree with that conclusion.

In no case in which the civil service amendment to the Constitution has been construed has that question been involved. Statements to that effect have not been necessary to the judgments rendered, and are merely dicta, not binding upon us. The decisions in question were based upon the fact that state officers, not specifically excepted, are within the classified service, but none of them held, nor was there any ground for holding, that *only* state officers are within that service.

Among the officers excepted from the service are "judges of courts of record and one stenographer of each judge, *one clerk for each court of record*." The natural and obvious meaning of this is that all clerks of a court of record except one are within the classified service. If such is not the intent of the law, this provision is wholly without meaning. If clerks of courts are not within the classified service, there is no possible reason for excepting one clerk from such service.

We have no right to ignore the plain intent of the law, and the judgment should therefore be reversed.

I am authorized to state that Mr. Justice DENISON concurs in the views above expressed.

DENISON, J. (dissenting). I cannot agree with the majority opinion either in its argument or conclusion. The relator is within the classified service.

In *People v. Higgins*, 67 Colo. 441, 184 Pac. 365, we held that a water commissioner was within the classified service on the ground that he, being a peace officer, was engaged "in the administration of justice," and therefore was a state officer, following *People v. Curley*, 5 Colo. 412, where it was held that a police judge of the city of Lead-

ville was a state officer. If a police judge and a water commissioner are state officers because engaged in the administration of justice, how can it be said that a deputy clerk of a court of record is not? The civil service amendment recognizes this, and excepts from the classified service "one clerk for each court of record." There is no reason in this exception, unless it was intended to include in the classified service an assistant or deputy clerk.

The claim is made that this last point is of no force because neither the clerk nor his deputy is within the classified civil service of the state, and therefore cannot be excepted from it, but that claim is groundless since they are within that service because engaged in the administration of justice, as held in *People v. Higgins*.

I am authorized to say that Mr. Justice TELLER concurs in this dissent.

(71 Colo. 449)

WILEY v. PEOPLE. (No. 10344.)

(Supreme Court of Colorado. June 5, 1922.)

1. Criminal law §1120(3), 1170½(5)—Prejudice from denial of right to cross-examine witness held not shown.

Alleged error of the court in denying accused the right to cross-examine a witness for the state because accused had made such witness his own witness by recalling her for examination will not be considered, where accused had cross-examined the witness at length before the recall, and there was no showing as to what accused expected to adduce by further cross-examination.

2. Criminal law §945(1)—Newly discovered evidence must be such as to make probable the rendering of a different verdict.

Before a new trial upon the ground of newly discovered evidence will be granted, the evidence proposed to be adduced must be sufficiently important to make it appear that a different verdict will be rendered upon a new trial.

3. Criminal law §958(4)—Application for new trial must be supported by affidavits of newly discovered witnesses.

An application for a new trial, because of newly discovered evidence, must be supported by affidavits of the witnesses stating the facts to which they will testify, or, in the absence of the affidavits, a showing that it was impossible or impracticable to procure them.

4. Criminal law §1156(3) — New trial for newly discovered evidence is within discretion of court.

The award of a new trial on the ground of newly discovered evidence is within the discretion of the trial court, and its action will not be disturbed in absence of a showing of abuse.

Error to District Court, Pueblo County; James A. Park, Judge.

Fred Wiley was convicted of rape, and brings error. Affirmed.

Joseph Dye, of Pueblo (Benjamin F. Koperlik, of Pueblo, of counsel), for plaintiff in error.

Victor E. Keyes, Atty. Gen., and Charles R. Conlee, Asst. Atty. Gen., for the People.

TELLER, J. [1, 2] Plaintiff in error was convicted of the crime of rape, and brings error. His counsel contend that the court erred in holding that the prosecuting witness, who had been recalled by the defendant, was his witness, and not subject to cross-examination. This witness had been cross-examined at length by defendant's counsel before being recalled, and there is no showing made as to what was expected to be adduced on further cross-examination, and nothing to show that the defendant was prejudiced by the court's ruling. There are some other assignments of error on the admission and the rejection of evidence, but we find no reason to question the correctness of the court's ruling in those matters. The principal error relied upon is the refusal of the court to grant a new trial upon defendant's claim of newly discovered evidence. The motion is supported only by the affidavit of the defendant, and merely avers that two witnesses have knowledge of facts, reciting them, which, if testified to, would be favorable to the defense. The rule is that the evidence proposed to be adduced must be sufficiently important to make it probable that a different verdict will be returned on a new trial. *C. S. & I. Ry. Co. v. Fogelson*, 42 Colo. 341, 94 Pac. 356; 29 Cyc. 901.

[3] If the witnesses mentioned in the defendant's affidavit testified to what it is averred they would testify, it does not appear that the evidence would be so far conclusive as to render it probable that a different verdict would be rendered. The application is further insufficient, in that it is not supported by affidavits of the newly discovered witnesses. It has been held that, in this jurisdiction, such an application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify. *Cronin v. Hoage* (Colo.) 205 Pac. 271; *Ward v. Atkinson*, 22 Colo. App. 134, 123 Pac. 120.

If such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same. 29 Cyc. 908.

[4] In any event the disposal of such a motion is in the discretion of the trial court, and that discretion does not seem to have been abused.

There being no error found in the record, the supersedeas is denied, and the judgment affirmed.

ALLEN, BURKE, DENISON, and WHITFORD, JJ., concur.

(71 Colo. 424)

INDUSTRIAL COMMISSION OF COLORADO et al. v. PUEBLO AUTO CO. et al.
(No. 10036.)

(Supreme Court of Colorado. June 5, 1922.)

1. Evidence §5(2)—Danger of assault on highway for robbery recognized as a risk of traveling.

The danger of assault upon a highway for the purpose of robbery is generally recognized, and the danger is more imminent in recent years, since the possession of an automobile affords ready means of escape.

2. Master and servant §373—Injury by robbery compensable as "arising out of employment."

A salesman for an auto company killed by robbers while driving into the country for the purpose of selling an automobile was within the protection of Workmen's Compensation Act, and the death compensable as arising out of his employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Denison and Burke, JJ., dissenting.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Proceeding by Annetta N. Parks, for herself and others, against the Pueblo Auto Company, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurer, before the Industrial Commission for an award. From judgment vacating the award, the Industrial Commission and claimants bring error. Reversed, with directions.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for plaintiff in error Industrial Commission.

Devine, Preston & Storer, of Pueblo, for other plaintiffs in error.

Fred W. Varney, of Denver, and Charles W. O'Donnell, of Washington, D. C., for defendants in error.

Charles B. Hughes, L. E. Langdon, and John T. Barbrick, all of Pueblo, amici curiae.

TELLER, J. This case is before us on error to a judgment of the district court vacating the findings and award of the Industrial Commission. The award was in favor of the claimant, Annetta M. Parks, the widow, and one of the dependents of Elton C. Parks, deceased.

On April 11, 1919, Parks was in the employ of the Pueblo Auto Company as a salesman. On said day Parks went in an automobile into the country for the purpose of selling an automobile. On the trip he effected a sale to one Hunter, who started in the car with Parks on his return to Pueblo.

On the road they invited two brothers, named Bosco, to ride with them. A little later, while on the road, one of the Boscos shot and killed Parks. It appears that the killing was for the purpose of obtaining the automobile in which the parties were riding.

It is conceded that Parks was killed while in the course of his employment, but the district court held that the killing did not arise out of his employment. The correctness of that decision is to be determined on this review. We have been favored with exhaustive arguments upon this point. The cases seem to hold that the test is whether or not there is a causal connection between the injury and the employment; that is, are they so connected that the injury naturally resulted from the employment.

The arguments of counsel on both sides turn upon the question whether the assault upon Parks was a hazard special to his employment. Many cases are cited in which injury suffered from robbery of bank messengers and paymasters has been held to be compensable under these compensation acts. While it has been stated that these laws cover only dangers which might have been anticipated, yet the cases generally hold that if, after the injury, it can be seen that the injury was incurred because of the employment, it need not be such as to have been anticipated. We think that it is the better rule.

The award of the commission can be sustained only on the ground that Parks lost his life while he was in the course of his employment and as the result of an attempt upon the part of the Boscos to obtain possession of the employer's automobile.

[1] The danger of assault upon a highway for the purpose of robbery is generally recognized, and said danger is more imminent in recent years, since the possession of an automobile affords ready means of escape.

This court has held that an accident suffered by an employé while riding in an automobile to reach the place of his employment is compensable, and the only question is whether or not the danger of assault for the purpose of robbery is as generally recognized as is the danger from collision, or other accidental injuries to automobiles and their occupants. If not as evident, is the danger so evident as to make it fairly a risk of traveling on the highway?

That such travel is subject to the danger of assault for the purpose of robbery is not

to be denied in view of the frequent reports of such assaults.

[2] Many of the cases cited are extremely liberal in applying these compensation laws to injuries of this general class. Some of them have gone so far as practically to eliminate the question whether or not the injury grew out of the employment, making it sufficient that it was suffered in the course of the employment. We do not feel at liberty to go that far and practically to amend the law, and we are not required to do so in this case. There is ample authority for holding that an injury inflicted in an attempt to rob an employé, while in the course of his employment, is compensable as arising out of such employment.

The case of *Mechanics' Furniture Co. v. Industrial Board*, 281 Ill. 530, 117 N. E. 986, involved a claim for the death of a watchman who was killed on his employer's property. There was no evidence as to the purpose of the killing. The Industrial Board found from the circumstances of the case that the man had been killed in defense of his employer's property, and as a result of an attempt to rob.

The court held that the inferences drawn by the Board were justified, and that the killing was in the course of and grew out of the deceased's employment.

In *Spang v. Broadway Brewing & Malting Co.*, 182 App. Div. 443, 169 N. Y. Supp. 574, it is held that an employé of a brewing company, who was killed while on a collecting trip, the killing resulting from an attempt to rob, was killed in the course of his employment, and that the killing grew out of his employment. The court said:

"The fact that the death of Spang was intentionally caused does not defeat the claim. He was killed as an incident of his employment, because he had in his possession money belonging to his employer, which it was the purpose of his slayer to feloniously appropriate. An injury caused deliberately and willfully by a third party may be an 'accidental injury,' within the meaning of the act from the viewpoint of the employer and the employé"—citing a number of cases.

That case would seem to be in point here.

It being established that Parks was killed in order that his assailant might obtain his employer's automobile in which Parks was riding on his master's business, we are of the opinion that the Commission was justified in awarding compensation to the claimant.

The judgment is accordingly reversed, with directions to enter judgment affirming the award made by the commission.

ALLEN and WHITFORD, JJ., concur.
DENISON and BURKE, JJ., dissent.
SCOTT, C. J., not participating.

(57 Cal. App. 546)

CHING WING v. SOUTHERN PAC. CO. et al.
(Civ. 3885.)

(District Court of Appeal, Second District, Division 1, California. May 2, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Railroads @350(7)—Question of primary negligence in not keeping lookout for pedestrian held for jury.

In an action for death of pedestrian struck by a train while lying on track at a crossing after having been stunned by an automobile, in which it was claimed that the employees of the railroad were negligent in not keeping a proper lookout, evidence held to warrant submission of the question of primary negligence, as against the contention that the only issue in the case was the question of the liability of the railroad under the last clear chance doctrine.

2. Railroads @349(5) — Burden of proving contributory negligence on defendant.

In action for death of pedestrian struck by train while lying on track at a crossing after having been stunned by an automobile, the burden of proving contributory negligence was on the defendants.

3. Negligence @83—"Last clear chance" doctrine stated.

The "last clear chance" doctrine necessarily presupposes a condition where the injured party has, by his own negligence, placed himself in a position of danger, and where the party causing his injuries, in addition to whatever primary act of negligence may be chargeable against him, after perceiving the dangerous situation of the injured party, acts with further negligence and injury results.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

4. Railroads @338 — Last clear chance doctrine held inapplicable.

In an action for death of a pedestrian struck by train at a crossing after an automobile threw him to the track, held, that last clear chance doctrine was inapplicable.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Ching Wing, as the administrator of the estate of Wong On King, against the Southern Pacific Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Harry M. Irwin and Waldo M. York, both of Los Angeles, for respondent.

JAMES, J. Plaintiff, having alleged in his complaint that defendants, by acts of negligence, caused the death of his intestate Wong On King, was awarded damages in the sum of \$7,500 by a jury. Judgment fol-

lowed accordingly, and defendants have appealed.

On June 30, 1916, Wong On King was crossing Alameda street in the city of Los Angeles when an automobile collided with him, causing him to fall across the track of the defendant Southern Pacific Company. He was apparently stunned by the fall and, while lying on the track, his legs were crushed by the wheels of a locomotive tender. This injury caused his death. The locomotive of which the tender was a part was owned by defendant company. Defendant Jordan was the engineer in charge of the locomotive and was being assisted at the time by the defendant Thorne as fireman. It is the contention of the appellants that the court erred in the giving of a certain instruction, and in modifying another which was offered on the part of the defendant. As to the errors complained of affecting the instructions as given and modified, appellants insist that under the evidence the case should have been submitted to the jury upon one theory only; that theory being that a situation was presented which might make applicable the doctrine of "last clear chance." It does not appear to be contended that, assuming that the evidence disclosed a case which might authorize a recovery because of the primary negligence of the defendants, the instructions as given were erroneous. The court refused to instruct the jury that the rule of recovery could be under the "last clear chance" doctrine only, but gave an appropriate instruction setting forth that, if the jury found that the deceased, while traveling across the street, was exercising reasonable care and prudence, and that while so doing the locomotive of defendant company was, through the negligence of the operators thereof, propelled upon him, causing his death, plaintiff should recover. In other instructions given the "last chance" rule was correctly and adequately explained and it was left for the jury to determine whether the facts warranted its application in the case.

[1] A brief statement of the evidence, given a light most favorable to the plaintiff, will show that there was no error in the giving of the instruction first referred to. At about 1:30 o'clock of the day in question Wong On King was at the southeast corner of Marchessault and Alameda streets. He was proceeding to cross to the opposite side of the street. Marchessault street enters Alameda street from the east. Upon Alameda street are laid double tracks of the defendant corporation. A freight train of the defendant had proceeded northward along the easterly track and had cleared the street intersection when Wong On King started to cross Alameda street. Emerging from Marchessault street an automobile proceeded to

cross Alameda street at the right of and near to Wong On King. As the latter reached the easterly track of the railway, the automobile made a sudden turn to the left and collided with Wong On King, knocking him to the street, where he lay with his legs across the easterly rail and his body between the two rails of the track. The automobile proceeded to the left and south for some yards or rods on Alameda street, where it came to a stop. The locomotive was following the freight train on the easterly or north-bound track. This locomotive was backing northward, the tender being in front. It was traveling at approximately six miles per hour, and, according to the engineer's testimony, maintained a distance of 360 to 400 feet from the rear of the receding freight train. Alameda street was straight for at least a number of blocks south from the point of the accident. At the time of the happening of the latter there was considerable traffic of vehicles along its paved surface. It did not appear in evidence that any of this traffic came between the engine and the fallen Chinaman from the moment that the automobile threw the man to the street up to the time that the wheels of the tender ran over his limbs. An eyewitness stated that when Wong On King started to cross the street the witness saw the engine approaching from the south at a point at about Jeannette street, which was shown to be 345 feet away from Marchessault. As the engine approached the fallen man, several persons attempted to attract the attention of the operatives on the locomotive, and finally the call of a truckman did reach the ear of the fireman, who in turn signaled the engineer and the engine was brought to a standstill—not, however, until some of the wheels of the tender had passed over the limbs of the Chinaman. The body of the tender of the locomotive was 14 feet high, 8 feet wide, and 37 feet and 7 inches long. The sides of the engine cab were not so wide as the tender, but the engineer and fireman, by projecting their heads in the customary manner through the windows of the cab, could bring their eyes a few inches outside the lines of the tender—as the fireman stated, "maybe one or two inches." They could not see over the top of the tender. At the time in question the fireman and engineer were in their accustomed places, the fireman being on the right side of the cab as the engine proceeded backward, and the engineer on the left. The fireman stated that, looking up the track in the direction they were going, he could see the east rail thereof from a point about 25 feet ahead of the tender; that he could not see the west rail nearer than a point between 150 and 200 feet away. The engineer testified similarly,

but stated that from his side he had a clear view of the westerly track except for a distance of about 35 feet immediately ahead of the tender, but that he could not see any part of the easterly track nearer than a point 150 feet away. Both of the operatives were charged by instructions from their employer to keep a sharp lookout ahead, and it does not appear that attention to any other necessary duties prevented them from so doing at the time in question. The fireman stated that he observed the automobile in question cross the tracks when it was 120 feet away from the tender of the locomotive. He did not explain why in such circumstances he failed to observe the prostrate Chinaman lying upon the easterly rail after the automobile crossed. By the testimony of some of the plaintiff's witnesses, the jury might well have inferred that the locomotive was farther than 120 feet away from the corner of Marchessault and Alameda streets when the automobile struck Wong On King.

[2-4] It is not disputed by appellants as a correct rule of law that, if the Chinaman was in no wise negligent in crossing the street at that time and place, the negligence of any third person, having no privity with him in the act, could not be used to establish the defense of contributory negligence. The burden was upon the defendants to show that Wong On King was guilty of some act of contributory negligence. The evidence failed to disclose any such negligence. The evidence did show a case where the jury was altogether justified in concluding that the operatives on the locomotive did not use reasonable care in observing the track ahead of them. Where the rule of "last clear chance" applies, it necessarily presupposes a condition where the party injured has, by his own negligence, placed himself in a situation of danger, and where the party causing his injuries, in addition to whatever primary act of negligence may be chargeable against him, and after perceiving the dangerous situation of the first party, acts with further negligence and injury results. The evidence does not seem to disclose a case where the doctrine of last chance was applicable at all; either the operatives of the locomotive were negligent and responsible, or the accident was the inevitable result of circumstances for which no such responsibility would exist. The giving of the instruction complained of, therefore, did not constitute error. For like reasons the trial judge did not err in modifying as he did the instruction offered by the appellants.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 432)

Ex parte PAPPAS. (Cr. 616.)(District Court of Appeal, Third District,
California. April 24, 1922.)**1. Indictment and information \S 117—Charge construed to be of conducting business at unlicensed place.**

Complaint for violation of Yolo county ordinance No. 72, held to charge, not conducting place of business for selling liquor without procuring the necessary license, but conducting it at a place other than one of the ten which under the ordinance could be licensed.

2. Intoxicating liquors \S 13, 132—Consistent state legislation not repealed by Eighteenth Amendment and Volstead Act.

The Eighteenth Amendment and the Volstead Act, while superseding the license features of state and county enactments, do not repeal the features thereof not inconsistent with them.

3. Intoxicating liquors \S 13, 132—County ordinances held not wholly regulatory as regards effect thereon of Eighteenth Amendment and Volstead Act.

Yolo county ordinance No. 72 held not to be wholly regulatory, and so necessarily wiped out in toto by the Eighteenth Amendment and the Volstead Act, but to be in part prohibitory; it making all but certain parts of the county dry at all times and the remaining parts dry except on the concurrence of three things.

4. Intoxicating liquors \S 13—No assumption that county ordinance would not have been enacted could the Eighteenth Amendment, making inoperative license features, have been foreseen.

It cannot be assumed that Yolo county ordinance No. 72, making dry most of the county and the remainder dry except on the concurrence of three things, would not have been enacted could it have been foreseen that its license provisions would be rendered inoperative by the Eighteenth Amendment; so the entire ordinance cannot be held void on that ground.

Original habeas corpus proceeding by Teddy Pappas for a writ to be directed to the sheriff of Yolo County. Writ discharged, and petitioner remanded.

A. O. Huston and Harry L. Huston, both of Woodland, and S. W. Cross, of Sacramento, for petitioner.

O. C. McDonald, Dist. Atty., of Woodland, for respondent.

PREWETT, Justice pro tem. [1] Teddy Pappas was convicted in a justice's court of the crime of violating ordinance No. 72 of the county of Yolo. He will be referred to in this opinion as the petitioner.

The operative portions of the complaint against him read as follows:

"Did then and there willfully and unlawfully keep, conduct and establish a place where alcoholic liquors were sold, served and distributed and were kept for the purpose of sale and distribution, *and the place not being then and there a licensed place of business* as provided in ordinance No. 72 of said county of Yolo. * * *" (The italics are ours.)

The chief point urged in behalf of petitioner is that he is charged with conducting a place of business where alcoholic liquors are sold without first procuring the necessary license. Much of the argument and many of the authorities on the part of petitioner are directed to this point; but it is sufficient to say that he is not charged in the complaint with conducting the place of business in question without procuring the necessary license so to do. He is charged merely with conducting it in a place *other than* a licensed place.

To appreciate fully the import of the charge as laid in the complaint it is necessary to examine in detail the provisions of the ordinance with the violation of which petitioner stands charged. Chief of these is section 3, which reads as follows:

"Sec. 3. From and after the first day of October 1911, it shall be unlawful for any person, corporation, firm, company, association or club, within the limits of the county of Yolo, to keep, conduct or establish, as principal, agent, employee or otherwise any place where alcoholic liquors are sold, served or distributed or are kept for the purpose of sale or distribution, except at the ten licensed places mentioned and described in section one hereof. * * *"

Section 1, thus referred to, describes the ten excepted places. For convenience, we have divided into paragraphs the provision thus excepting them. It reads as follows:

"* * * (1) Except at a fixed place of business described in this ordinance,
"(2) And in the license authorizing the same,
"(3) Duly issued to the person conducting the said business."

We employ the usual terms "wet" and "dry."

The ordinance further provides that all places in the county other than the said ten excepted places are "dry" territory, and makes it a misdemeanor to sell alcoholic liquors or to conduct a place for its sale within them. Section 2a provides that a license may issue to carry on business at the ten excepted places. And a place remains "dry" until such license is issued. Otherwise stated, a place remains prohibition territory until a license is actually issued to the person who conducts a business thereat. In addition, of course, the place must be one of the ten described in the ordi-

nance. All three of the conditions set out as paragraphs 1, 2, and 3 must concur in order to render it "wet" territory. And even then it is "wet" only in a limited degree. It is "wet" only as to the person who conducts a place of business thereat, and who has a license which authorizes the business, and this license must be issued to him.

It is thus seen that the pleader merely negatives the fact that the place stated in the complaint is one of the ten excepted places. There is no intimation in the complaint that the petitioner is charged with the offense of carrying on the business without first procuring the necessary license. The language criticized describes the territory, rather than the act of the offender.

[2] The petitioner insists that he could not lawfully be charged with the offense of failure to procure the license required by the ordinance, since it is conceded that the license provisions are all superseded by the Eighteenth Amendment and the Volstead Act, and he cites many authorities to sustain this point. But since he is not charged with such failure, it would be unprofitable to examine these authorities at length. It is further conceded that this national legislation does not operate a repeal of county and state enactments that are not inconsistent therewith. If authorities were needed in support of this concession, reference may be had to *In re Volpi* (Cal. App.) 199 Pac. 1090, and *People v. Capelli* (Cal. App.) 203 Pac. 837. Our conclusion that the petitioner is not charged with conducting a business without first procuring the necessary license nor with failure to procure a license eliminates many questions pressed upon our attention by his counsel.

[3] The petitioner makes the further point that the ordinance in question is regulatory rather than prohibitory, and it is argued therefrom that all regulatory provisions are necessarily wiped out by the Eighteenth Amendment and the Volstead Act.

We are assured that this court, in the case of *Golden v. Justice's Court*, 23 Cal. App. 802, 140 Pac. 60, while considering this identical ordinance, held it to be regulatory. It is quite true that the court in that case uses this expression: "The purpose of said ordinance is the regulation of the business of selling intoxicating liquors," etc.

But the court had no occasion to distinguish between regulatory and prohibitory provisions, and the remark of the court was not addressed to such distinction. The court, in that case, in no manner negatives the fact that all the county, save the ten excepted places, is "dry" territory. It is express authority to the contrary.

It would constitute a gross misreading of the opinion to hold that the court meant that all portions of the ordinance are regulatory. Counsel in their briefs assure us

that only about 1 per cent. of the county is "wet" territory within the purview of the ordinance, although all save 2 or 3 of the 40 or 50 paragraphs in the ordinance deal with the regulation of the liquor traffic therein.

[4] We are asked to declare the entire ordinance void for another reason. We are asked to assume that the board would not have enacted the ordinance if it could have foreseen that all the license provisions would be rendered inoperative by the Eighteenth Amendment. But this view does not appear to be sound. A law or ordinance may be composed of such interrelated parts that an unforeseen failure of one part may justify the assumption that, in its mutilated form, it would not have been enacted. But we find no such case here. The board of supervisors divided the county into two parts—about 99 per cent. "dry" and the remaining 1 per cent. provisionally "wet." The two divisions are distinct, and they are in no wise interdependent. Prohibition is neither greater nor less in the "dry" territory by reason of the provision for license in the ten excepted places. Conversely, the right to licenses in the license territory is in no way dependent upon the fact that other portions of the county are "dry". So far as appears from the ordinance itself, the board prohibited the sale of liquors in certain parts of the county, because, with reference to those parts, it so desired. If it really desired that such sales should be prohibited in these parts, we can indulge no inference that such desire was in any way dependent upon the further desire that licenses might be issued in ten designated places. And the failure of its intent with references to these ten places in no way argues that its intent with reference to the larger portion of the county has failed.

It is necessary to recall, in this connection, that the entire county was "dry" the moment the ordinance was adopted, and that it so remained until the three excepted conditions ripened into realities. The ordinance appears to have been very carefully drawn so as to exclude any inference that the ordinance itself created any part of the county into "wet" territory. It was all "dry" at all times until the concurrence of the three specified conditions converted it into "wet" territory. This meant that it was prohibition territory, and not merely that it was territory within which it was made unlawful to sell liquors without a license. Indeed, we do not discover any provision in the ordinance which makes it unlawful to commence or carry on business or to sell liquors without a license. It is this that clearly distinguishes this case from the Louisiana case cited by counsel. *State v. Green*, 148 La. 376, 88 South. 919.

In that case the statute expressly prohibited the selling of liquors without a license. It was wholly a regulatory statute, and the court properly held that there could be no inference that the Legislature intended to provide a penalty except for the failure to procure the proper license. In the case at bar we are only incidentally concerned with the effect of the Eighteenth Amendment and the Volstead Act (41 Stat. 305) in the ten excepted places. In support of the claim that the will of the board of supervisors has failed as to these ten excepted places, we are referred to *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115. But that case is not in point. In that case the state had attempted unlawfully to discriminate between coasters and other ships coming into her ports, permitting the former to enter without being subject to pilot's fees. The court held that the purpose of the Legislature had failed, and that the whole act was void. It seems to have held in effect that it could not be ascertained whether the Legislature (in view of the unconstitutionality of its effort) would have provided that all should come in free or that all should pay the proper fees.

Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568, is practically identical with the case before us. In that case the statute provided for general prohibition, except as local option, through a vote of the municipalities, might authorize a sale under license. In the Yolo ordinance, it is provided that the whole county is "dry" until the board, under section 2c, exercises its option to order the issue of a license. This limitation applies only to the ten described places. The Supreme Court of Massachusetts in commenting on this condition says:

"As a matter of statutory construction, the prohibition is general; the license is exceptional. The latter is dependent upon the efficacy of the valid local vote and the genuine license. This being the purpose and plan of the statute, its prohibitory features are not so dependent upon those respecting license as to be swept away when those as to license are stricken down by the Eighteenth Amendment."

In the light of the foregoing quotation, it may be said that the board of supervisors ordained that the entire county should be "dry" save and except as it, from time to time might at its option grant licenses in certain excepted places.

The ordinance as to the portion of the county involved in this proceeding is held to be valid. The writ is discharged, and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 488)

Ex parte PAPPAS. (Cr. 617.)

(District Court of Appeal, Third District, California. April 24, 1922.)

1. Indictment and information \S 117—Complaint construed to be not for selling without a license, but for selling in dry territory.

The averment in the complaint for violation of Yolo County Ordinance No. 72, \S 1, "the defendant not then and there having a license," held intended to aid the description of the place of sale as "dry" territory, and not as a charge of selling without a license; the complaint clearly averring the sale of liquor at a place other than those designated for licenses.

2. Indictment and information \S 117—Construction of complaint contrary to pleader's evident intent, and rendering the whole meaningless, to be avoided.

Construction of part of a complaint which would not only defeat the evident purpose of the pleader, but render the whole complaint meaningless, is to be avoided.

3. Habeas corpus \S 30(2)—Mere defects in complaint cannot be reached by it.

Mere defects of obscurity or ambiguity in a complaint cannot be reached by habeas corpus, as it cannot serve the purposes of a writ of error.

Original habeas corpus proceeding on behalf of Gust Pappas for a writ to be directed to the Sheriff of Yolo County. Writ discharged, and petitioner remanded.

A. C. Huston and Harry L. Huston, both of Woodland, and S. W. Cross, of Sacramento, for petitioner.

C. C. McDonald, Dist. Atty., of Woodland, for respondent.

PREWETT, Justice pro tem. This proceeding is identical with case No. 616 (Ex parte Teddy Pappas [Cal. App.] 207 Pac. 483) this day decided, save that in this the complaint charges a violation of section 1 of the ordinance in question, while Teddy Pappas was charged with a violation of section 3 thereof. Gust Pappas did not in person initiate this proceeding, but it is found convenient to refer to him as the petitioner. Every point involved herein, except that relating to the mere form of the charge, has been decided in said case No. 616 adversely to his contention.

Section 1 of the ordinance, under which the charge is laid, reads as follows:

"Sec. 1. From and after the first day of October 1911, it shall be unlawful for any person, firm, corporation, association or club, as principal, agent, employee or otherwise, within the limits of Yolo county, to sell, furnish, distribute, deliver or give away any alcoholic liquors in any quantity, except at a fixed place of business designated in this ordinance and in the license authorizing the same duly issued to the person conducting the said business, in the

manner hereinafter described." (The italics are ours.)

The complaint against the petitioner, the material portions of which we quote, does not contain the subdivisions into paragraphs. These are here designated by numbers for convenience in reference. Said material portions read as follows:

"Did then and there willfully and unlawfully sell, furnish, distribute, deliver and give away alcoholic liquors within the limits of said Yolo county and

"(1) The said place where the defendant sold, furnished, distributed, delivered and gave away said alcoholic liquors then and there not being a fixed place of business designated in ordinance No. 72 of Yolo county; and

"(2) The said place where the said defendant sold, distributed, delivered and gave away said alcoholic liquors not being then and there a licensed place of business for selling, furnishing, distributing, delivering and giving away said alcoholic liquors as provided in said ordinance No. 72 of Yolo county; and

"(3) Said defendant not then and there having a license to sell, furnish, distribute, deliver or give away alcoholic liquors as provided in said ordinance No. 72."

[1] Petitioner insists that he is charged in the third paragraph of the complaint with selling liquors without having theretofore procured a license so to do. It is conceded that he could not, since the passage of the Volstead Act, procure such a license, and he argues therefrom that he is charged with an impossible crime. He would have us read the complaint as though it contained only the following allegation:

"The defendant sold liquors within the limits of Yolo county not then and there having a license so to do."

For the sake of brevity, we will use the popular terms "wet" and "dry." It becomes necessary to examine the several conditions specified in the ordinance which constitute prerequisites to the right to sell liquors in the ten excepted places. The ordinance divides the county into two classes of territory: (1) The ten excepted places within which liquors could under certain circumstances be sold; (2) the entire remaining portion of the county, stated to be more than nine-tenths of the county. This remaining portion was, under the ordinance and yet is, "dry."

But these ten excepted places are not unconditionally "wet"; and this fact explains the necessity for the several allegations designated in the complaint as paragraphs 1, 2, and 3. Under the terms of the ordinance the "dry" territory comprises all the county that is not "wet." The "wet" territory is not always "wet." It is in the one class or the other according as the conditions specified in the complaint as said paragraphs 1, 2, and 3 do or do not exist. A place may be "wet" territory to-day and prohibition territory tomorrow. In order to constitute "wet" terri-

tory the three following conditions must concur: (1) A fixed place of business designated in the ordinance; (2) and also designated in the license authorizing it; (3) and the license must have been issued to the person conducting the business.

A complaint attempting to describe "dry" territory might be sufficient if it pleaded the nonexistence of any one of said three conditions, since all three must concur. A complaint alleging that the place was one for which no license had been issued to the person conducting a business thereat would have described "dry" territory—the allegation describing not the person, but the place. No less does it charge a crime because it sets out the absence of all three of the necessary conditions, all of which must concur to constitute "wet" territory. The complaint does not charge the petitioner with carrying on a business at all; hence the impossibility of charging him with carrying it on without first procuring the necessary license. The ordinance does not provide for a license to sell or give away liquors in general, but only for a license to sell or give them away at one of ten specifically described places. A party could not have procured a license to sell or give away liquors at one of the ten excepted places save and except that he was the person who was carrying on the business thereat.

But the matter may be viewed from another angle. Conceding that a close reading of the allegation "the defendant not then and there having a license" would, if standing alone, warrant the claim of petitioner that he is charged with a failure to procure the proper license, still the entire complaint must be examined, and it must be interpreted in the light of all of its allegations. It is clearly averred that the petitioner sold liquors in Yolo county at a place not designated as one of the ten excepted places. This, of necessity, describes the place as "dry" territory. No more nor less does it describe it as "dry" territory, because it further avers that the place was not a licensed place of business; and no more nor less does it so describe because it further avers that the petitioner did not then and there have a license. It seems to follow, therefore, that the pleader cannot have intended to charge the petitioner with failure to procure a license, since such failure, because it is shown that the place was not a fixed place of business, is not inhibited in the ordinance. Even in the pre-Volstead days, it would not have charged the crime of failure to procure a proper license. It does not do so now.

[2] It is therefore not only possible, but inevitable, that we read the averment "the defendant not then and there having a license" as being intended to aid the description of the place as "dry" territory. The construction contended for by the petitioner would not only defeat the evident object of

the pleader, but would render the whole complaint meaningless. Such constructions are to be avoided. In *re Mitchell*, 120 Cal. 384, 52 Pac. 799; *Golden v. Justice's Court*, 23 Cal. App. 778, 140 Pac. 49.

[3] At most, the allegation of which the petitioner complains is a mere obscurity or ambiguity, and it is well settled that the writ of habeas corpus cannot be made to serve the purposes of a writ of error. Mere defects in a complaint cannot thus be reached. *Ex parte Williams*, 121 Cal. 328, 53 Pac. 706; In *re Avdalas*, 10 Cal. App. 507, 102 Pac. 674.

The writ is discharged and the petitioner remanded.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 492)

BRISCOE v. GUARANTY MORTGAGE CO.
et al. (Civ. 4209.)

(District Court of Appeal, First District, Division 1. California. April 28, 1922.)

1. Venue ⇨41—One nonresident defendant cannot change venue without showing non-residence of all defendants.

Under Code Civ. Proc. § 395, a nonresident defendant in a personal action in which there are several defendants cannot have the place of trial changed to the county of his residence without showing that none of the other defendants are residents of the county in which the action was brought.

2. Venue ⇨22(3)—Holder of note is necessary party to suit to cancel it for fraud.

In a suit to rescind a purchase of corporate stock for fraud, and to cancel a note given in payment for the stock, brought against the payee of the note and the subsequent holder, the holder of the note is a necessary party, so that the venue cannot be changed to the county of the corporation's residence without a showing that the holder is a nonresident of the county where the action was brought.

3. Cancellation of Instruments ⇨37(6)—Complaint need not allege subsequent holder of note was party to fraud.

In a suit to cancel a negotiable instrument for fraud, brought against the payee and the subsequent holder, the complaint was not defective as respects the subsequent holder in that it did not allege that he was a party to the payee's fraud, in view of Civ. Code, § 3136, as added by St. 1917, p. 1541, as to defective title; and section 3140 providing that, when the title of any person who negotiated the instrument was defective, the burden is on the holder to prove he was an innocent holder.

Appeal from Superior Court, Fresno County; D. M. Cashin, Judge.

Action by J. J. Briscoe against the Guaranty Mortgage Company and another. From an order denying the motion of the named defendant for a change of venue, that defendant appeals. Affirmed.

Leo J. McEnerney, of San Francisco, for appellant.

George Cosgrave, of Fresno, for respondent.

KNIGHT, Justice pro tem. This is an appeal by defendant Guaranty Mortgage Company, a corporation, from an order denying its motion for a change of place of trial from Fresno county to the city and county of San Francisco. The motion was based upon the grounds that the city and county of San Francisco at the time of the commencement of the action was the residence of the defendant Guaranty Mortgage Company, and that the causes of action sued upon accrued in said city and county of San Francisco.

The action is one to rescind an agreement to purchase corporate stock upon the ground of fraud, and upon the ground that the agreement to purchase said stock was procured in violation of the so-called "Corporate Securities Act" (St. 1917, p. 673) of the state of California, and to cancel two promissory notes, one for the principal sum of \$6,500, and the other for the principal sum of \$3,500, given by plaintiff in payment of the purchase price of said stock. It is alleged in the complaint that the note for the sum of \$3,500 was assigned by said defendant Guaranty Mortgage Company to the defendant B. J. Sheagren, and that the latter was at the time of the commencement of the action the owner and holder thereof. The prayer of the complaint is that the agreement for the purchase of said stock be canceled, that defendant Sheagren be required to deliver up said note for \$3,500, and that the defendant Guaranty Mortgage Company be required to deliver up said note for \$6,500, and that both of said notes be thereupon canceled, and that plaintiff have such other and further relief as to the court may seem meet and agreeable to equity.

[1] The defendant Sheagren did not join in the action for the change of place of trial, and there was no proof offered on the hearing of said motion to show that he was not a resident of Fresno county. Under such circumstances the motion was properly denied. The rule applicable here is stated in *Donohoe v. Wooster*, 163 Cal. 114, 124 Pac. 730, as follows:

"Where there are several defendants in a personal action, a nonresident defendant, moving alone, is not entitled to have the place of trial changed to the county of his residence in the absence of a showing that none of the other defendants are residents of the county in which the action was brought. (Code Civ. Proc. § 395; *Hearne v. De Young*, 111 Cal. 371 [43 Pac. 1106]; *Quint v. Dimond*, 135 Cal. 572 [67 Pac. 1034]; *County of Modoc v. Madden*, 136 Cal. 134 [68 Pac. 491]; *Sullivan v. Lusk*, 7 Cal. App. 186 [94 Pac. 91].)"

[2] Appellant endeavors to escape the effect of the rule above stated by claiming

that the defendant Sheagren is not a necessary party to the action, and that the complaint fails to state a cause of action against him, in that it contains no allegation that Sheagren was a party to the alleged fraud or had notice or knowledge thereof.

This contention cannot be sustained. It is alleged in the complaint that Sheagren is the holder of one of said promissory notes which plaintiff by this action seeks to have canceled, which of itself is sufficient ground for making him a party defendant. It would be impossible to obtain a valid judgment for the cancellation of said note without making him a party defendant, and, in order to state a cause of action against him, it was not necessary to allege that he was a party to the fraud or had knowledge thereof.

[§] Section 3136 of the Civil Code, as added by St. 1917, p. 1541, provides that the title of a person who negotiates an instrument is defective when he obtains the instrument under such circumstances as amount to fraud, and section 3140 of the same Code provides that—

"When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

Inasmuch as it is alleged in the complaint that the title of the defendant Guaranty Mortgage Company, who negotiated the instrument, was defective on account of the alleged fraud, the burden therefore rests with the defendant Sheagren, as assignee, to show, and for that purpose to affirmatively allege as a defense, that he is a holder in due course. The case of *Rhode v. Dock-Hop*, 184 Cal. 367, 194 Pac. 11, 129 A. L. R. 437, relied upon by appellant, is not in point here, for the reason that there the action was one to recover unpaid balances due on the subscription for corporate stock, and did not involve a negotiable instrument. The rule declared by section 3140 of the Civil Code applies peculiarly to negotiable instruments.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

(57 Cal. App. 601)

HOPKINS v. PALO VERDE MUT. WATER CO. (Cv. 3901.)

(District Court of Appeal, Second District, Division 1, California. May 4, 1922.)

Waters and water courses §263—Evidence held to show landowner not entitled to damages for failure of water company to furnish water.

In an action against a water company for damages for failure to furnish water, evidence

held to warrant finding that plaintiff was not denied water, and that failure to receive it was occasioned by her own fault in not properly applying therefor.

Appeal from Superior Court, Riverside County; George H. Cabaniss, Judge.

Action by Volene Tegner Hopkins against the Palo Verde Mutual Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

D. B. Chapin and Paul Blackwood, both of Los Angeles, for appellant.

I. W. Stewart, of Oxnard, and Arvin B. Shaw, Jr., of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover damages for the alleged refusal of the defendant to furnish water with which to irrigate certain arid land owned by her. Judgment was in favor of the defendant. Plaintiff has appealed.

Prior to December, 1918, plaintiff became possessed of considerable acreage of land in Riverside county, which was contiguous to the canal of the defendant corporation. The latter was a mutual water company, and plaintiff, desiring to become a member thereof in order to obtain water, arranged for the purchase of 145 shares of defendant's stock. The price of this stock exceeded the sum of \$5,000. Plaintiff, at the time of the purchase, paid no money on account, but gave her notes which were payable with interest and gave a mortgage on her land to secure the payment thereof. She also, under the requirement of the company, deposited the stock with the latter as collateral. By January, 1919, she owed the defendant the sum of \$550.66, that being the amount of three overdue semiannual installments of interest on the water stock account. At that time her land was incumbered with three liens: First, a trust deed securing the payment of \$7,500; second, a mortgage securing the purchase price of the water stock; and, third, a trust deed securing an apparent loan of \$15,000 made in favor of a Riverside bank. At the end of the year 1918 the Riverside bank was pressing the plaintiff for payment of the amount due it. She had defaulted in the matter of the payment of at least one assessment regularly levied for maintenance purposes by the defendant water company prior to that time. This assessment the bank had paid in order to protect its security. Plaintiff anticipated a probable foreclosure by the bank and in December, 1918, removed a pumping plant from the land and placed it on adjoining property. At the time she did this she told persons with whom she had conversations that she wanted to save the pumping plant and not allow the bank to sell it with the land. She admitted at the trial that the reason given for removing the plant was as stated,

but also stated that it was removed because it needed a new foundation. So far as appears, the new foundation was never built, and it did appear in evidence that neither the pump, nor any of its accessories, was ever replaced in its original location. She testified that some time in February a suit was brought on her behalf enjoining the bank from proceeding with foreclosure or sale of the property and that she was advised by her attorney that that suit would secure to her possession of the land for at least another year. Meanwhile there were no crops planted or growing upon the land except 20 acres of alfalfa; none other were grown or planted at any time prior to the commencement of this action or the trial thereof.

On January 21, 1919, the auditor of the defendant sent to the plaintiff a letter calling plaintiff's attention to the fact that interest money was overdue on the water stock account and stating:

"As your account is over six months in arrears, the board of directors have instructed us to shut off the water and make no more deliveries until this interest account is settled. This action will not be taken if payment is received by us on or before the 27th of January."

It was the claim of the plaintiff that because of this action of the company she was deprived of the use of her land; that her alfalfa crop failed for want of water; all to her damage in a sum in excess of \$11,000, for the recovery of which she brought this suit during the latter part of April, 1919. She testified that upon several occasions, prior to the first of April, she called at the office of the defendant and inquired whether she could have water, and was informed that it would not be delivered to her because of the nonpayment of interest. About April 1st she appeared before the board of directors' meeting at the office of the company and made request that water be furnished her. Several of the directors testified that she was told at that time that her crops would not be allowed to suffer. There was testimony that she said at that time that she wanted water for her alfalfa but that she might not want it for two or three weeks; that she went away apparently satisfied. Under established valid regulations of the defendant company, stockholders desiring water were required to file written application therefor, stating the time when they desired the water delivered. The defendant then had the option (under its rules) to furnish the water on the precise day stated or one day in advance thereof, or one day after. The plaintiff had at numerous times prior to the year 1919 received water which was always delivered to her after the filing of the written order, and she was very familiar with the requirement that the request should

be so expressed in writing, and upon blanks provided for that purpose.

The main contention of appellant is that notification given her on January 21, 1919, that water would not be furnished until the overdue interest amounts had been paid, was never revoked, and that there was a continued refusal on the part of the defendant to supply her with water up to the time she brought this action. She contends that the refusal was unjustified and argues that her right to have water furnished her under her stock ownership could not be made conditional upon payment of interest due on account of the purchase price of the stock. The trial court found in effect that the defendant did withdraw the notification of January 21st at the directors' meeting of about April 1st, when the plaintiff appeared at the meeting. The court further found that the land of plaintiff was adapted to the growing of cotton and that at the time of the meeting of the board of directors there remained a period of 75 days before the end of the cotton planting season, which was an adequate period of time within which plaintiff might have prepared her land, irrigated it, and planted the crop. Without deciding the question, it may be assumed that the defendant did not have the right to deprive a stockholder of water because only of default made in the matter of the payment of interest on the purchase price of water stock. Even allowing that assumption, the findings of the trial judge are plainly sustainable upon the evidence. First, there was a great deal of testimony to the point that the plaintiff was clearly informed by the president and others of the directors about April 1, 1919, that she could have whatever water was necessary to meet her needs. She knew well the requirement that she should present a written order for the water, but she made no such order. She chose, rather, shortly after the date last referred to, to bring this action for damages. There was testimony, as has been hereinbefore stated, that she announced at the time she met the directors that her alfalfa did not need the water then. One witness testified that she there said: "My alfalfa is all right yet, but I don't know how long it will be so." This testimony negatives any idea that the loss of or damage to the alfalfa crop, which was the only crop grown up to that time in that year, was due to any failure of the defendant to furnish water from January 21st to the April date. It was shown that the crop to which the land was best adapted for that year was cotton, and plaintiff's testimony as to the rental value of the land was generally based upon its assumed use for the purpose of growing that crop. No preparation had been made to receive water in 1919, although plaintiff testified that she had made "plans" for the ditching of the ground. All the circumstances

indicated very strongly, however, that, because of threatened foreclosure proceedings, plaintiff had not anticipated going to the expense of producing any crop other than the alfalfa already planted, during the year 1919.

This suit bears strongly the color of a speculative attempt to reap damages where none could justly be claimed. It seems unnecessary to review authorities cited in the briefs of either counsel. The main question is one of fact, as to the determination of which the decision of the trial court, made upon substantial evidence, is unassailable.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 458)

PROWD v. GORE et al. (Civ. 3805.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1922.)

1. Citizens ⇐2—"Citizens of the United States" means person born in, or naturalized under laws of, the United States.

A citizen of the United States is a person of any race or color born within the limits of, or who has been naturalized under the laws of, the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. Citizens ⇐2—"Citizen of the state" means a citizen of the United States domiciled in the state.

By "citizen of the state" is meant a citizen of the United States whose domicile is in such state.

3. Citizens ⇐2—"Citizen" not convertible with "resident," but often used synonymously.

The word "citizen," while not convertible with the word "resident," is often used synonymously with it, without any implication of political privileges.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resident.]

4. Civil rights ⇐2, 6—Constitutional law ⇐210—"Citizen" entitled to privileges in theaters includes residents not citizens, in view of equal protection clause.

The term "citizen," as employed in Civ. Code, § 51, declaring "all citizens within the state entitled to the full and equal privileges of theaters," and section 52 thereof, making "whoever denies to any citizen privileges enumerated in section 51," etc., liable in damages for not less than \$100, is not restricted to citizens of the United States or of any of the states, but includes unnaturalized residents of foreign birth, white or black, as otherwise these sections would deny equal protection of the laws, guaranteed by Const. U. S. Amend. 14.

5. Civil rights ⇐6—Theater proprietor liable for wrongful exclusion by manager of theater.

Whether Civ. Code, § 52, rendering liable in an action for damages any one who excludes a person from a theater because of race or color, is penal or not, a person so excluded by the manager of a theater can recover thereunder against the theater proprietor, who neither ordered nor knew of this or a like exclusion, as, by section 2338, and also by general law, a principal is liable for the wrongful acts committed by his agent in the transaction of the business of the agency.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by John Emery Prowd against A. L. Gore and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellants.

E. Burton Ceruti, of Los Angeles, for respondent.

SHAW, J. Action to recover damages. It appears from the findings herein that defendants A. L. and M. Gore were, on March 7, 1921, the owners and proprietors of the Burbank Theater in Los Angeles, of which defendant Wolfe, as their employee, was manager; that on said date plaintiff, who is a member of the negro race and who was at said time a citizen of the United States and a resident of California, over the age of 21 years, purchased a ticket which entitled him to a seat on the lower floor of said theater; that, although upon presentation of his ticket, plaintiff was admitted to the theater, the defendants, their agents, and employees, solely on account of his race and color and for no other reason, refused to give plaintiff a seat on the lower floor of the theater, to which, as the purchaser of said ticket, he was entitled; that by reason of such discrimination on account of his race and color he was humiliated and damaged in the sum of \$100.55. Judgment followed in accordance with these findings, from which defendants have appealed.

The ground relied upon by appellants for a reversal of the judgment is the insufficiency of the evidence to justify the finding that plaintiff was a citizen of the United States and of the state of California, or that defendants Gore, by direction or otherwise, participated in the act of their employees in discriminating against plaintiff.

The action is based upon the provisions of sections 51 and 52 of the Civil Code, the first of which sections provides that "all citizens within the jurisdiction of this state are entitled to the full and equal * * * privileges of * * * theaters * * * subject only to the conditions and limitations established by law, and applicable alike to all citizens"; and the second provides that

"whoever denies to any citizen, except for reasons applicable alike to every race or color, the full * * * advantages, facilities, and privileges enumerated in section fifty-one of this Code, * * * or whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to * * * his treatment in, any * * * theater, * * * for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose." The only evidence touching the question of citizenship was that of plaintiff, to the effect that he was at the time in question a resident of Los Angeles, living at 1382 East Fifteenth street. The contention of appellants is that this evidence fell short of showing that plaintiff was a citizen of the state of California, in the absence of which, they insist, plaintiff could not maintain the action. In support of their contention they cite numerous cases involving diversified citizenship as a condition of the right to invoke the jurisdiction of the federal courts.

[1-4] In our opinion, these cases are not applicable to the question here presented. Neither race nor color is involved in the term "citizen." When used alone and without words of qualification, the term may have different meanings, depending upon the context in which it is found. As said in *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536, "the word must * * * be taken in the sense which best harmonizes with the subject-matter in reference to which it is used." When we speak of a citizen of the United States we mean one who is born within the limits of or who has been naturalized by the laws of the United States; and when we speak of a citizen of a state we mean a citizen of the United States whose domicile is in such state. While the word is not convertible with "resident," nevertheless it is often used synonymously with such term without any implication of political privileges. As employed in sections 51 and 52 of the Civil Code, the term "citizen" is not used in a restricted sense—that is, a citizen of a state or citizen of the United States—but in the broad and unrestricted sense, implying that one is a resident of the state and as such entitled to invoke the jurisdiction of its courts to protect a right guaranteed to all, without reference to race or color, who reside within its jurisdiction. To hold otherwise would render the statute obnoxious to the Fourteenth Amendment of the federal Constitution, under which a state may not "deny to any person within its jurisdiction

the equal protection of the laws." In our opinion, it was not the intent of the Legislature to restrict the operation of the statute to those only who were subjects of the United States government, and exclude therefrom unnaturalized residents of foreign birth, whether white or black. The evidence shows that plaintiff was a resident of the state, which fact entitled him to maintain the action. Whether or not he was a citizen of the United States, with all the rights implied by such term, is immaterial.

[5] It appears that neither defendant A. L. nor M. Gore was cognizant of the act of their employees in discriminating against plaintiff by refusing to permit him a seat on the lower floor of the house. Neither had they given any instruction to their employees to exclude or discriminate against patrons of the negro race; and hence appellants insist that the judgment as to defendants Gore should be reversed. This contention is based upon the claim that the statute is penal in character, and that defendants Gore cannot be held liable for a wrong committed by their employees. Conceding the statute to be penal, we are nevertheless of the opinion that defendants are liable for the acts of their manager, defendant Wolfe, in discriminating against plaintiff. Section 2838, Civil Code, declares:

"Unless acquired by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the * * * wrongful acts committed by such agent in and as a part of the transaction of such business."

In *Otis Elevator Co. v. First National Bank*, 163 Cal. 39, 124 Pac. 707, 41 L. R. A. (N. S.) 529, it is said:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business."

Moreover, the provision does not purport to be a penal statute. No criminal offense is created thereby, and no provision is made for criminal prosecution nor the recovery by the state of any fine or the imposition of a penalty for a public wrong. It merely fixes a minimum measure of damages for a private tort, to be recovered by an aggrieved party for his own benefit. *Gruetter v. Cumberland Tel. & Tel. Co.* (C. C.) 181 Fed. 248.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 798)

SMITH v. GORE et al. (Civ. 3806.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1922.)

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Ira Smith against A. L. Gore and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellants.

E. Burton Ceruti, of Los Angeles, for respondent.

PER CURIAM. This action is based upon facts identical with those involved in the case of John Emery Prowd, Plaintiff, v. A. L. Gore, M. Gore, and F. L. Wolfe, Defendants, Civil No. 3805, 207 Pac. 490, an opinion in which is by this court filed herewith. Upon the authority of what is there said, the judgment herein is affirmed.

(57 Cal. App. 558)

PEOPLE v. FOLEY. (Cr. 1008.)

(District Court of Appeal, First District, Division 2, California. May 3, 1922.)

1. Robbery \Leftrightarrow 24(3)—Evidence held to sustain conviction.

In prosecution for robbery, evidence held to identify defendant as one of the perpetrators of the crime.

2. Criminal law \Leftrightarrow 822(13)—Instruction held not to mislead jury to believe that more than a reasonable doubt was necessary for acquittal.

In prosecution for robbery, instruction, stating that "all evidence tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where the crime was committed and actually committed it," held not to mislead jury to believe that more than a reasonable doubt as to the presence of the defendant at the time and place of the robbery was necessary for his acquittal, in view of other portion of the instruction stating that the defendant was to be given the benefit of every reasonable doubt.

3. Criminal law \Leftrightarrow 824(13)—Failure to instruct that defendant's failure to testify raised no presumption against him held not error in absence of request therefor.

In prosecution for robbery, failure to instruct jury that defendant's failure to testify raised no presumption against him held not error, in absence of a request therefor, even though the defendant personally conducted a portion of his defense.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Thomas Foley was convicted of robbery, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of robbery. The offense alleged in the indictment was the robbery of the Bank of Alameda County, located at Alvarado, Cal. Two prior convictions for felonies were also charged against the defendant, to which he pleaded guilty.

The president, cashier, and another employee of the bank testified that on October 13, 1920, at about 11 o'clock in the morning, four men arrived at the bank in an automobile. While one of them remained outside on guard, the other three entered the bank and, after shooting the president through the shoulder, secured about \$23,000 in money and escaped in the automobile after having locked the employees of the bank in a vault.

Appellant calls to our attention the fact that some of the witnesses for the prosecution were not absolutely positive in their identification of the defendant as one of the perpetrators of the crime. It is true that two of the witnesses were reluctant to positively identify the defendant. One of these witnesses, however, stated that the defendant "resembled the man that was there"; that his "features, and all, resembled the man that was there." Another witness, while not positive in his identification, stated that he recognized the defendant by some peculiarity on his cheek bone and hair, and by his hands, which were unusually small. Owing to the fact that the men who robbed the bank donned masks upon entering the building, it was difficult for the witnesses, who had not observed them until they were masked, to be absolutely positive in identifying the defendant because such identification, necessarily, depended upon a recognition of such physical peculiarities as were unhidden by the mask. But the effect of any reluctance upon the part of these witnesses to state beyond all possibility of doubt that the defendant was one of the men who entered the bank upon the occasion in question is entirely overcome by the positive identification of defendant by the witness Matoza. Matoza was a customer of the bank and arrived there while the robbery was going on. He heard the shots fired, and one of the men on guard forced him to enter the bank. He was later locked in the vault with the employees of the bank. He testified positively that he saw the defendant at the bank; that defendant was the first of the three men to enter the bank. He stated that he identified defendant by his face and his eyes, having seen defendant enter the bank before he was masked. The bank cashier also positively identified the defendant.

He saw the defendant go around to the directors' room and meet there the president of the bank. At that time defendant was adjusting his mask. Two shots were fired. This witness also saw the defendant gather up the money. Upon cross-examination this witness swore, positively, that defendant was one of the men who robbed the bank. He stated that he could not be mistaken; that he had a picture in his mind of the entire incident which he would never forget.

[1] Taken as a whole, the record contains abundant evidence in the testimony of the eyewitnesses to the robbery, to identify the defendant as one of its perpetrators. Added to this there is the unequivocal testimony of the witness Kirk. He testified that on the afternoon of October 13, 1920, he was injured while at his work and was obliged to return to his home in Alameda. There he found the defendant in company with Jack Beebe, a man whom Kirk had previously known and who has been convicted of participation in this bank robbery. The witness was sent with a note to the so-called "Howard Street Shack" in San Francisco, to be delivered to "Spanny" Valente. Kirk delivered the note and Valente returned with him to his home in Alameda, where the defendant and Beebe awaited them. Kirk then saw the defendant and his companions sorting and counting a large amount of money, some of it loose and some of it in packages. The defendant remained secluded at the home of this witness for two nights, and during that time the witness heard defendant talking with his companions about the details of the bank robbery.

Indeed, the evidence connecting the defendant with the crime is so convincing and so abundant in the record that it would seem idle to discuss this point at all were it not that the attorney for the appellant urges upon our attention the fact that the defendant at the trial insisted upon conducting, personally, much of his defense, although he had an attorney who was present in court and who attempted to conduct his case for him. In reply to the suggestion that the defendant was handicapped by his lack of legal learning, it is only necessary to observe that the part which defendant took in examining the witnesses was taken upon his own insistence in open court. It is also pertinent to observe that although the defendant was without training in legal procedure, he, nevertheless, showed great acuteness in questioning the witnesses, and it is apparent that his participation in the defense of his case in no way weakened or jeopardized his cause.

[2] Objection is made to a portion of an instruction that—

"All evidence tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where

the crime was committed, and actually committed it."

It is argued that this instruction would lead the jury to believe that something more than a reasonable doubt as to the presence of the defendant at the time and place of the robbery was necessary for his acquittal; that the jury might understand that a preponderance of evidence in favor of the defendant was necessary to justify a verdict of "not guilty." It is difficult for us to see how such a construction could be placed upon this language, and especially so in view of the fact that the trial court, in the same instruction, went on to say that in this conflict of evidence the defendant was to be given the benefit of every reasonable doubt.

[3] It is also urged that the trial court erred in not giving the jury an instruction to the effect that the failure of the defendant to testify in his own behalf raised no presumption against him. Defendant would have been entitled to such an instruction had he requested it, but the record does not disclose that he did so. It was said in the case of *People v. Flynn*, 73 Cal. 511, 15 Pac. 102:

"The defendant did not take the stand as a witness in his own behalf, and the court did not instruct the jury in reference to his failure to do so. It is claimed that 'it was the duty of the court to charge the jury that no presumption of guilt followed from his failure to testify in his own behalf, and that they could not consider his failure to testify in arriving at a verdict.' It does not appear from the bill of exceptions that any such instruction was asked. If counsel for defendant desired such an instruction to be given, they should have asked it at the proper time; and as they failed to do that they cannot now be heard to complain. (*People v. Haun*, 44 Cal. 100; *People v. Ah Wee*, 48 Cal. 239; *People v. Marks*, 72 Cal. 46.)"

Appellant contends that he should not be held to this well-settled rule because he, personally, conducted a portion of his defense. This contention is without merit upon the record before us. As we have stated, defendant was provided with counsel. In the course of the trial, he twice insisted upon taking the conduct of the case into his own hands, but demanded, for at least a part of the time, that his counsel remain beside him in the courtroom and advise with him. The court and counsel acceded to defendant's demands and great latitude was allowed him in the conduct of his case. After he had, personally, examined some of the witnesses, he again turned the case over to his counsel, but toward the end of the trial he demanded that he be allowed to "take the lead" himself and stated that he desired his counsel to withdraw. The court then excused counsel from acting any further, stating that this was done upon the request of the defendant. It appears, therefore, that the defendant had the benefit of legal advice during almost the en-

tire course of the trial, and that when he was left without legal assistance, it was because of his own demand and insistence. Under such circumstances, this fact should not militate against the well-settled rule of law above referred to. Most especially is this true in view of the entire record, which leaves no doubt of the justness of this verdict.

There are no other matters requiring discussion.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

(57 Cal. App. 533)

Ex parte JARVIS. (Cr. 1058.)

(District Court of Appeal, First District, Division 2, California. May 2, 1922.)

1. Contempt §14—Findings of fact held sufficient to sustain charge of contempt of court by tampering with jury.

Findings that defendant had filed a complaint against a person charging him with burglary, and that at the trial, after the jury had heard testimony and before the case had been submitted to the jury, during a recess of court, defendant approached two jurors and stated to them that, if he had known the identity of the person charged with burglary, he would not have sworn to the complaint in the case, and that he said to the jurors, "You fellows should acquit that fellow," were sufficient to sustain a charge of contempt of court.

2. Contempt §54(4) — Affidavit of juror sought to be influenced held sufficient to give court jurisdiction in proceeding for contempt.

In a proceeding for contempt of court in trying to influence jurors, an affidavit of a juror showing that defendant was the complaining witness in a prosecution for burglary pending before the court, and that on the same day he gave his testimony in the case he stated to the affiant and another juror, "You fellows should acquit that fellow," although it contained no express averment that defendant knew that the person addressed was a juror in the case, nor that defendant intended to influence the decision of the juror, was sufficient to confer jurisdiction on the court.

In the matter of Robert Jarvis in habeas corpus. Application for writ of habeas corpus prayed to be directed to the sheriff of Alameda county to secure the release of petitioner. Writ denied.

Gilman & Harnden, of Oakland, for petitioner.

Ezra W. Decoto, Dist. Atty., and T. P. Wittschen and Chas. W. Snook, Deputy Dist. Attys., all of Oakland, for respondents.

LANGDON, P. J. This matter comes before us on a petition for a writ of habeas

corpus. The petition states that the petitioner is unlawfully imprisoned, detained, confined, and restrained of his liberty by Frank Barnett, sheriff of the county of Alameda, state of California, at the county jail in the city of Oakland, county of Alameda, state of California, by virtue of an order of the superior court of the state of California in and for the county of Alameda adjudging petitioner in contempt of court for a violation of an order of said court and in interfering with the processes of said court. Petitioner alleges that the order committing said Robert Jarvis is in excess of the jurisdiction of said superior court; that the said affidavit or complaint upon which the original proceeding is based is insufficient in that said affidavit fails to allege that the said Robert Jarvis had any knowledge that said Katrina Wassman was a jury woman in the case then before said court at said time, and further that said Robert Jarvis had any knowledge of any orders issued to said jurymen in said matter, or intended to violate any orders or proceedings of said court; that said affidavit wholly fails to state that said Robert Jarvis intended or did influence the decision of said jury woman or said jury in any manner whatsoever or at all; further, that the evidence introduced upon the hearing of said contempt proceedings wholly fails to substantiate the charge set forth in said affidavit in whole or in part.

The affidavit in the contempt proceedings was made by Katrina Wassman, who was serving as a juror in a case then pending before the superior court of Alameda county, and, omitting the title and prayer of the affidavit, it is as follows:

"Mrs. Katrina Wassman, being duly sworn, deposes and says:

"That she is a citizen of the United States and of the state of California over the age of 21 years.

"That on the 14th day of February, 1922, Robert Jarvis swore to a complaint against one Peter Martioli in the police court of the city of Oakland charging said Martioli with the commission of felony, to wit, burglary; that on the 24th day of February, 1922, said Peter Martioli was duly and regularly held to answer on said charge of burglary to the above-entitled court by the Honorable Mortimer Smith, judge or said police court; that said action was thereafter immediately transferred to the above-entitled court and assigned to department No. 5 thereof; that ever since said time said action has been and is now pending in said court and said department, and is entitled 'People of the State of California v. Peter Martioli, No. 8196.'

"That on the 30th day of March, 1922, in the above-entitled court a jury was duly impaneled and sworn to try said cause, and that affiant and Marie Dorfel were two of said jurors so impaneled and sworn; that said cause proceeded to trial on said 30th day of March,

1922; and that during said trial on said date said Robert Jarvis was called as a witness for the people and gave testimony in said cause.

"That thereafter on said date, to wit, during the regular noon recess at about 12:10 p. m., and before said cause was submitted to the jury for their verdict, and before said jury was discharged, the said Robert Jarvis approached affiant on the steps of the courthouse in said county of Alameda, state of California, as affiant was leaving said building; that the said Robert Jarvis at said time and place made remarks to affiant, the exact purport and meaning of which affiant cannot state.

"That the said Robert Jarvis thereupon followed said affiant across from the west side of Broadway, Oakland, Cal., to the east side of Broadway, Oakland, Cal., where affiant seated herself in the automobile of a fellow jury woman, to wit, Mrs. Marie Dorffel, said Marie Dorffel having been duly sworn, examined, and accepted as a juror in the said case of the People of the State of California v. Peter Martioli; that while affiant was seated in said automobile as aforesaid Robert Jarvis stood by the side of said automobile and stated to affiant that if he had known the identity of the defendant he would never have sworn to the complaint in this case, and, addressing himself to said affiant and said Marie Dorffel, the said Robert Jarvis said, 'You fellows should acquit that fellow.'"

[1] Upon this affidavit this matter came on regularly to be heard before the superior court, and after many witnesses, together with the petitioner, were examined in open court, and after hearing the arguments of counsel, the court made findings of fact and an order of commitment as follows:

"The above-entitled matter coming on regularly to be heard the 11th day of April, A. D. 1922, and being heard on said 11th day of April, A. D. 1922, and upon the 12th and 17th days of April, A. D. 1922, after continuances regularly had upon an order to show cause heretofore and on the 3d day of April, A. D. 1922, made and issued by this court requiring the above-named Robert Jarvis to appear before said court, department No. 5 thereof, on said 11th day of April, A. D. 1922, then and there to show cause why he should not be punished for contempt of court as alleged and set forth in a certain affidavit made and filed in the above-entitled action in said court by one Katrina Wassman on said 3d day of April, A. D. 1922, and said Robert Jarvis being personally present in court, and the above-entitled court having called said matter for hearing and trial, and witnesses having appeared and having been sworn, and having testified in support of said question of contempt alleged in said affidavit of Katrina Wassman and for and on behalf of said Robert Jarvis, and the said evidence and the whole thereof and the law pertaining to said matter having been duly and fully considered by the above-entitled court, and it appearing to the said court and the court now finding as follows, to wit:

"That on the 14th day of February, 1922, Robert Jarvis swore to a complaint against one Peter Martioli in the police court of the city of Oakland charging said Martioli with

the commission of felony, to wit, burglary; that on the 24th day of February, 1922, said Peter Martioli was duly and regularly held to answer on said charge of burglary to the above-entitled court by the Honorable Mortimer Smith, judge of said police court; that said action was thereafter immediately transferred to the above-entitled court and assigned to department No. 5 thereof; that ever since said time said action has been and is now pending in said court and said department, and is entitled 'People of the State of California v. Peter Martioli, No. 8196.'

"That on the 30th day of March, 1922, in the above-entitled court, a jury was duly impaneled and sworn to try said cause, and that Katrina Wassman and Marie Dorffel were two of said jurors so impaneled and sworn; that said cause proceeded to trial on said 30th day of March, 1922.

"That during said trial on said date, and while said Katrina Wassman and said Marie Dorffel were sitting as jurors in said cause, said Robert Jarvis was called as a witness for the people of the state of California, and gave testimony in said cause; that said Robert Jarvis knew that said Katrina Wassman and said Marie Dorffel were jurors in the said cause of the People of the State of California v. Peter Martioli; that upon the completion of his said testimony said Robert Jarvis remained within the courtroom where the trial of the said cause was being conducted.

"That thereafter on said date, to wit, at about 12:10 o'clock p. m., the court took a recess until 2 o'clock p. m.; that immediately previous to taking said recess the jury so impaneled to try said cause was instructed and admonished by the court that it was their duty not to converse among themselves or with any one else on any subject connected with the trial, nor to form or express any opinion thereon until the cause was finally submitted to them, whereupon said jury was excused until the hour of 2 o'clock p. m. of said day; that said Robert Jarvis at the time of said admonition was personally present in the courtroom.

"That thereafter on said date, to wit, during the regular noon recess at about 12:10 p. m., and before said cause was submitted to the jury for their verdict and before said jury was discharged, the said Robert Jarvis was approached by Katrina Wassman, said juror, on the steps of the courthouse in said county of Alameda, state of California, as said Katrina Wassman was leaving said building; that the said Robert Jarvis at said time and place made certain remarks to Katrina Wassman, said juror concerning the trial of said cause of People of the State of California v. Peter Martioli, Defendant.

"That said Robert Jarvis thereupon followed said Katrina Wassman, said juror, across from the west side of Broadway, Oakland, Cal., to the east side of Broadway, Oakland, Cal., where said Katrina Wassman seated herself in the automobile of a fellow jury woman, to wit, Mrs. Marie Dorffel, said Marie Dorffel having been duly sworn, examined, and accepted as a juror in the said case of the People of the State of California v. Peter Martioli; that while said Katrina Wassman, said juror, was seated in said automobile as aforesaid, Robert Jarvis stood by the side of said automobile and stated

to said Katrina Wassman that if he had known the identity of the defendant he would never have sworn to the complaint in said case, and, addressing himself to the said Katrina Wassman, said juror, and said Marie Dorffel, the said Robert Jarvis said, 'If I had known that Martioli was the man, I wouldn't have had him arrested,' and further said, 'You fellows should acquit that fellow':

"Now, therefore, it is ordered, adjudged, and decreed that said Robert Jarvis be, and he is hereby, declared to be guilty of contempt of this court in the following particulars, to wit, in that the said Robert Jarvis, the said witness, then and there on the 30th day of March, 1922, in the manner aforesaid, unlawfully and willfully interfered with the proceedings of this court in the trial of the cause hereinabove named, and disobeyed the order of this court in the manner aforesaid, in that the said Robert Jarvis, said witness, did corruptly attempt to influence said Katrina Wassman, said juror, in respect to her verdict in and decision of said cause and proceeding pending before her by means of oral communications had with her except in the regular course of proceedings by means of persuasion and entreaty as hereinabove set forth; and now, whereas said Robert Jarvis has been duly adjudged guilty of contempt as hereinabove set forth:

"It is therefore ordered, adjudged, and decreed that the said defendant, Robert Jarvis, pay a fine of \$200, and that, if he fail to pay said fine, he be imprisoned in the county jail of the said county of Alameda until the fine be satisfied in the proportion of one day's imprisonment for every \$2 of said fine."

[2] We think that the facts found by the court are amply sufficient to sustain the charge of contempt of court, and the only question in the case is as to the sufficiency of the affidavit to give the court jurisdiction. While it is true there is no express averment in the affidavit that petitioner knew that Mrs. Wassman was a juror in the case before the court, nor an express averment that petitioner intended to influence the decision of said juror, we think upon the face of the affidavit the knowledge of petitioner that Mrs. Wassman was a juror and the intention of petitioner to influence her decision in the matter then pending before the jury sufficiently appear. The affidavit shows that petitioner was the complaining witness in the case pending before the court; that on the same day that he gave his testimony in the case he followed the juror Wassman from the courthouse across Broadway street where she was seated in an automobile and stated to said juror: "You fellows should acquit that fellow." As was said in *Ex parte Creely*, 8 Cal. App. 713, 719, 97 Pac. 766, 768:

"It was not necessary for the affidavit on which the proceedings were based to state any more than the facts, and they appear to be fully stated. The fact that the petitioner called out to the jury in a distinct tone of voice, 'Don't convict my friend Ruef,' appears to be

all the fact that could be stated. No one but petitioner could look into his mind and tell the intent, object, and purpose of the remark. The remark itself from its very language tends to establish that petitioner knew Ruef was on trial; that the jury to whom the remark was made had charge of the case, and the power to either convict or acquit. Petitioner saw the jury and the deputy sheriffs in charge of them—four in number—and knew that Ruef was being tried. He must be presumed to have intended the ordinary consequences of his own deliberate act."

So in the instant matter the language set forth in the affidavit, "You fellows should acquit that fellow," can convey no other meaning than that the person to whom it was addressed was a juror in the case, and the language clearly shows an intention to influence the decision of the juror. The cases cited by petitioner do not overrule *Ex parte Creely*, supra, and, under the authority of that case, the affidavit was sufficient to confer jurisdiction upon the court, and the findings of the court show a clear case of contempt.

The writ is discharged, and the prisoner remanded to the custody of the sheriff of Alameda county.

We concur: STURTEVANT, J.; NOURSE,

(57 Cal. App. 551)

Ex parte COLE. (Cr. 872.)

(District Court of Appeal, Second District, Division 2, California. May 2, 1922.)

Criminal law §1208(5), 1218—Police court of Los Angeles held to have jurisdiction of vagrancy prosecution and sentence to city jail.

Los Angeles being a city of the first and one-half class, St. 1913, pp. 469, 476, §§ 2 and 15, and not Pen. Code, § 647, apply to a prosecution for vagrancy, and the police court of such city did not exceed its jurisdiction in sentencing one, convicted of vagrancy, to imprisonment for 180 days, to be confined in the city jail and not in the county jail.

Application by George D. Cole for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles to secure his release after conviction of vagrancy. Writ discharged, and petitioner remanded.

C. Franklin Baxter, of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, and J. Friedlander, Deputy City Prosecutor, both of Los Angeles, for the People.

CRAIG, J. The petitioner was prosecuted in the police court of the city of Los Angeles. He was charged with vagrancy under section

647 of the Penal Code of California, subdivision 5 thereof, and was convicted and sentenced to be confined in the city jail of Los Angeles for a period of 180 days. We are asked to hold that the police court exceeded its jurisdiction in pronouncing this sentence and particularly in that the petitioner was sentenced to the city jail, whereas it is contended that the law directs such imprisonment to be in the county jail. As authority for this claim it is said that article 10 of the charter of Los Angeles established a police court, and that section 647, Penal Code, is controlling as to the penalty for the offense of which petitioner was convicted. The provision of the charter above mentioned was held to be void by the Supreme Court in *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620. The same case also decided that although the present charter of the city of Los Angeles provides for the establishment of a police court, the city has not taken advantage of its authority in that regard, and that therefore the scope of legislative control remains as provided in section 1 of article 6 of the Constitution, in which the Legislature is given power to create police or other inferior courts in any incorporated city or town.

Sections 2 and 15 of chapter 267 of the Statutes of 1913 apply here, and not section 647 of the Penal Code. These sections expressly authorize the judgment pronounced against the petitioner. Los Angeles is a city of the first and one-half class and the provisions last mentioned confer jurisdiction on the police court of a city of that class over misdemeanors, punishable by fine or imprisonment or both, committed in the city where such police court is held and provide further that upon conviction of such an offense the person "shall upon the order of the judge before whom such conviction is had, be imprisoned in the city jail," etc.

The writ is discharged, and the petitioner remanded.

We concur: **FINLAYSON, P. J.; WORKS, J.**

(57 Cal. App. 529)

FASSIO v. E. L. GOLDSTEIN CO.
(Civ. 4122.)

(District Court of Appeal, First District, Division 2, California. May 1, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Work and labor §10—Owner who retained building on discovery that contractor had obtained contract by fraud liable for reasonable value not exceeding contract price.

Owner, who retained building after construction thereof, on discovery that the contractor had obtained the contract by fraud, was liable merely for the reasonable value not exceeding contract price.

2. Contracts §94(1)—Construction contract held void for fraud.

Construction contract, let after the architect who had called for bids had induced other contractors to submit bids greatly in excess of the cost, and in excess of the bid made by the contractor when contract was awarded, and after owner had been misled as to the amount of steel required in the construction of the building, held void for fraud.

3. Witnesses §268(13) — Cross-examination as to issue not raised by pleadings held reversible error.

In contractor's action against owner for balance of contract price in which it was proved that the contract was void for fraud, and in which the issue of the reasonable value was not raised by the pleadings, cross-examination of contractor's superintendent as to contractor's profit on the building held ground for reversal.

Appeal from Superior Court, City and County of San Francisco; **E. P. Shortall, Judge.**

Action by Vincenzo Fassio, doing business under the firm name of the Mission Concrete Company, against the E. L. Goldstein Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Sloss, Ackerman & Bradley, of San Francisco, for appellant.

G. R. Perkins, of San Francisco, for respondent.

STURTEVANT, J. [1] The plaintiff sued and relied on an express contract; the defendant pleaded an equitable defense sounding in fraud and mistake. If the defense was sustained by the evidence, then, under the pleadings as they were framed, there could be no recovery because, if there was actually fraud or mistake in drawing the contract the whole contract was vitiated. Conceding that the defendant received and now retains the building, its liability, if any, would rest upon the basis of the reasonable value thereof not exceeding the contract price. However, the pleadings did not put in issue the reasonable value of the building.

[2] We turn then to a consideration of the undisputed facts proved by the defendant in support of its equitable defense. The defendant had employed Mr. Stewart as its architect. What the relations were which existed between Mr. Stewart and the plaintiff does not fully appear, but that such relations were somewhat intimate will appear as we proceed. Having prepared plans and specifications for the defendant, Mr. Stewart called for bids for the general construction work. He also called for bids to do the steel work. Bids for the general construction work were called for from five or six different contractors, including the plain-

tiff. The plaintiff put in its bid for \$30,500. Acting upon the request of Mr. Stewart, R. J. H. Forbes put in a bid. Before doing so he applied to the plaintiff to give him a figure which he should submit. In the same way L. J. Diebel put in a bid for \$33,620. Barrett & Hill, acting upon their own initiative, put in a bid for \$37,487. Before any of those bids were received, Gunn, Carle & Co. put in a bid of \$10,989 on the steel, estimating the amount of steel at 104 tons; whereas, the steel necessary for the building amounted to 104,000 pounds or 52 tons. That, in putting in said bid, Gunn, Carle & Co. was acting as the agent of the plaintiff appears from undisputed facts. In the first place, the bid of Gunn, Carle & Co. was, at first, accepted. But, notwithstanding that fact, Mr. Stewart obtained authority from the defendant to do so and awarded the steel contract to this plaintiff. Well knowing these facts, such act, on the part of Mr. Stewart, was approved in advance by Gunn, Carle & Co. That company, without objection, so abandoned its rights to a contract in which it had a profit of over 100 per cent. In the second place, although the bid of Gunn, Carle & Co. was made in the month of June, 1919, and the alleged mistake was soon after discovered by that company, nevertheless as late as December 15, 1919, that company wrote the defendant that the amount of steel incorporated in the defendant's building was "in round numbers, 100 tons of reinforcing bars. This 100 tons includes about 30,000 square feet of fire mesh and several sizes of wire used in wrapping columns, etc." After Gunn, Carle & Co. had written and submitted its bid, Mr. Stewart requested Mr. Carle to ask the Pacific Coast Steel Company to file a bid. That company was engaged in the manufacture of steel, but it was not engaged in steel construction. Thereupon Mr. Carle furnished that company a figure and it bid \$12,480, which figure was 125 per cent. above the market price. Before the plaintiff bid on the general construction work, Mr. Stewart (without the knowledge of the defendant) opened the bids on steel and informed the plaintiff that Gunn, Carle & Co. had put in the lowest bid. When the plaintiff put in its bid, it also knew that the purported mistake had been made in the bid on the steel and that the plaintiff could get the steel for \$5,400. Furthermore, Mr. Stewart did, at about the same time, promise the plaintiff

that it could have the steel contract if it got the construction contract. None of the conniving above set forth was known to the defendant until it had made all of the payments excepting the payment which is sued for in this action. Under the facts as stated, it manifestly appears that all that Mr. Carle did was done as the agent of the plaintiff; that all that the Pacific Coast Steel Company did and all that Mr. Forbes did was done as the aids and assistants of Mr. Carle; and that at least part of the acts of Mr. Stewart were done in the interest of the plaintiff instead of in the interest of the defendant. Under these circumstances, the contract sued upon was saturated with the fraud imposed by the plaintiff on the defendant and no verdict based on the contract should have been returned.

[3] When the case stood in this form the plaintiff asked of Mr. Smith, who had formerly been the superintendent for the plaintiff:

"Do you know what the profit was on the Goldstein job? Mr. Ackerman: I object as incompetent, irrelevant, and immaterial, and in no way binding upon the defendant in this case. The Court: What is that? Mr. Perkins: I asked what the profit to the Mission Concrete Company was on this job, assuming that was to be \$41,489 the contract price. The Court: I think that is proper cross-examination. A. We made in the neighborhood of about fifty-one or fifty-two hundred dollars on that job, as near as Mr. Fassio and I could check it up from our bills payable."

The result of the ruling of the trial court was that the jury were allowed to believe that, if the plaintiff in the foregoing conniving made only a reasonable profit, then and in that event the defendant should pay accordingly. However, as the issue of reasonable value was never tendered by the pleadings the case stands thus: The plaintiff was allowed to submit its testimony regarding reasonable value and the defendant was never given an opportunity to produce witnesses on the same subject.

For the foregoing reasons we think that the judgment should be reversed, that the parties should be allowed to amend their pleadings, and that a new trial should be had on the amended pleadings. It is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

(57 Cal. App. 473)

PEOPLE v. HURST. (Cr. 856.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1922.)

1. Criminal law § 878(1)—Conviction both of arson and burning of insured property with intent to defraud insurer proper.

Under Pen. Code, § 954, providing that an information may charge two or more different offenses connected together in their commission, a conviction for arson and the burning of insured property and contents with intent to defraud insurer was proper.

2. Arson § 37(1)—Evidence held sufficient to sustain conviction.

Evidence considered, and held sufficient to sustain conviction for arson and burning of insured property and contents with intent to defraud insurer.

3. Criminal law § 656(2)—Direction by court to answer questions evaded by accused on cross-examination not error.

Where accused as a witness repeatedly evaded questions asked by district attorney on cross-examination, it was not error for the court to direct him to answer the questions.

4. Criminal law § 419, 420(5)—Exclusion of hearsay evidence not error.

Where a witness whose testimony accused desired was ill, and he sought by another witness to prove statements made by her, it was not error to exclude such proposed testimony as hearsay.

5. Witnesses § 277(6)—Proper to question accused as to purported written confession not introduced in evidence.

Where a written confession, purported to have been made by accused, was ruled out on the ground that it was not signed, it was proper for the district attorney to question accused as to statements therein purported to have been made by him.

6. Criminal law § 448(1), 1170(1)—Evidence that business of accused, charged with arson, was profitable properly excluded as a conclusion, and any error therein was harmless.

Where, in a prosecution for arson and burning of insured property and its contents, with intent to defraud insurer, accused sought to prove that the business of accused was operating on a paying basis for the purpose of showing absence of motive, held, that the evidence was properly excluded as the conclusion of the witness, and in any event the exclusion thereof was harmless.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Leo W. Hurst was convicted of arson in the first degree and the burning of insured property with intent to defraud the insurer, and he appeals. Affirmed.

Mart Coles and Cooper, Collings & Shreve, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. By the first count of an information filed by the district attorney, defendant was charged with the crime of arson. By the second count thereof he was charged with the offense defined in section 548, Penal Code, to wit, the burning of insured property, alleged to be a dwelling house and contents, consisting of furniture therein, with intent to defraud the insurer.

No objection by motion or demurrer was interposed to the information by defendant, who, upon trial, was convicted of arson in the first degree, followed by a judgment thereon of imprisonment for the term prescribed by law, which, as specified in section 455, Penal Code, is not less than two years. He was likewise convicted as charged in the second count, and adjudged to suffer imprisonment for the term prescribed by law, which, as specified in section 548, Penal Code, is not less than one year; it being provided that such last-mentioned judgment should run concurrently with the judgment pronounced upon defendant's conviction of the crime of arson.

[1] On appeal from these judgments defendant, without objection urged in the court below, insists, for some reason not appearing in his brief, that it was error to convict him upon both charges. In the absence of any reason assigned therefor, we are unable to perceive any ground upon which the objection could be based. Section 954, Penal Code, provides that—

"The * * * information may charge two or more different offenses connected together in their commission, * * * or two or more different offenses of the same class of crimes or offenses, under separate counts."

The offenses are different, and connected together in their commission; one being for arson, and the other for burning insured property, its contents, with intent to defraud. By the one act, since the property was insured, and the burning accompanied with the intent to defraud, two crimes were committed.

[2] That the evidence was clearly sufficient to show defendant's guilt admits of no doubt whatsoever. He occupied the house as a tenant of another, and at the time of the fire he held a policy of insurance upon the furniture in the sum of \$2,000 for his own benefit. With an associate, likewise charged with the commission of the crime, and who pleaded guilty to the second count, defendant participated in the burning of the house, the purpose thereof, as clearly appears from the evidence, being to obtain the insurance money, with which he and his associates were to go to Mexico. The fact that, in accordance with their agreement, the fire was ignited by King, who obtained the kerosene therefor, renders defendant none the less guilty.

[3] It is next claimed that the attitude of the court prevented defendant from having a

fair trial. This contention is based upon the fact that, when defendant upon the witness stand repeatedly evaded questions asked him by the district attorney on cross-examination, the court as often directed him to answer the questions. There was no error in the action of the court in this regard; indeed, it could not have done otherwise without loss of dignity and ceasing to function.

[4] Upon the ground that a Mrs. Hammond, whose testimony defendant desired, was ill, defendant sought by another witness to prove statements made by her to the effect that she was with defendant at about the time the fire occurred. Clearly such proposed testimony would have been hearsay.

[5] It appears that the people offered in evidence a written confession purporting to have been made by defendant, which, upon objection, was ruled out upon the ground that it was not signed by defendant. Whereupon defendant was questioned as to whether he had not made certain statements contained in the typewritten document, some of which he admitted having made, and others of which he denied. The confession was not, as claimed by appellant, introduced in evidence, and we perceive no impropriety in the court permitting the district attorney to question defendant with reference to statements made by him as to his participation in the burning of the building.

[6] A witness called by defendant was asked, "Did you have any interest in that business?" to which question the court sustained an objection upon the ground that it was immaterial. Defendant's attorney then stated, "I want to show the absence of motive;" whereupon the court asked defendant's attorney, "What do you propose to prove by this witness?" to which he replied, "I propose to prove that the business was operating on a business basis and that the business was paying;" in answer to which the court stated, "That would be a conclusion of the witness," and sustained an objection thereto. In so ruling we think the court was correct. While defendant was entitled, as he claims, to introduce evidence showing an absence of motive, which, if established, is a fact for the consideration of the jury in weighing the evidence against him, since without motive therefor it is improbable that one will commit a criminal offense, nevertheless no question was asked of the witness tending to bring out any facts from which the jury could determine whether or not the business was profitable and, clearly, had the witness answered that it was a paying business, it would have been merely a conclusion. However this may be, and conceding the ruling to have been erroneous and that the answer to the question would have been favorable as tending to show want of motive, nevertheless, since an examination of the entire record

leaves no doubt as to defendant's act in burning the building, which was insured for his benefit in the sum of \$2,000, he could not have been prejudiced by the alleged error.

Upon the record presented there can be no possible question as to defendant's guilt, and there were no errors in the rulings of the court prejudicial to his substantial rights.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 512)

JACKSON v. LEONARDT & PECK.
(Civ. 3799.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1922. Hearing Denied by Supreme Court June 28, 1922.)

1. Municipal corporations \S 809(2)—Contractor having permit to operate concrete mixer in street must exercise care.

A contractor holding a regular permit from the city authorities to use a concrete mixer in the street in connection with the construction of a building was not a trespasser upon the street, but, nevertheless, owed the duty to place the machine so that it would not unnecessarily obstruct travel, or be likely to produce injury to those who, using reasonable care, might travel upon the street.

2. Municipal corporations \S 819(1)—Evidence held not to show negligence in leaving concrete mixer in street.

Evidence that the concrete mixer which defendants had a permit to use in the street was standing close to the curb, 100 feet from a street intersection, having the hopper raised in which position it would cause less obstruction than if it were lowered, when plaintiff ran her automobile into it in broad daylight, held not to show any negligence by the defendant.

3. Municipal corporations \S 809(2)—Due care does not require barricade around concrete mixer in street.

Due care does not require a contractor having a permit to operate a concrete mixer in the street to erect a barricade around the mixer, which would have added to the obstruction of the street and could not have served to give any better notice of the presence of the mixer than did the object itself.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Luella P. Jackson against Leonardt & Peck, a partnership composed of H. Leonardt and C. L. Peck, to recover damages to an automobile. Judgment for plaintiff, and defendant appeals. Reversed.

Le Roy M. Edwards, of Los Angeles, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

JAMES, J. Plaintiff, by the judgment of the trial court, was awarded damages because of the alleged negligent act of the defendant in maintaining upon the street an obstruction with which the automobile of the plaintiff collided. Defendant has appealed.

It is the contention of appellant that the plaintiff failed to establish against it any negligent act authorizing the recovery. This contention seems to be borne out by the evidence as the record shows it. At the time in question a building was being constructed at the northwest corner of Seventh and Figueroa streets in the city of Los Angeles. On Seventh street and approximately 100 feet from the corner, in the street but close to the curb line, was a concrete mixer owned by the defendant and used in mixing the cement which entered into the construction of the building. Seventh street at that point runs in an approximately easterly and westerly direction, and its intersection with Figueroa forms nearly, if not quite, a right angle. Plaintiff driving a motor coupé, and in full daylight, drove south along Figueroa and turned west on Seventh street. Seventh street was sufficiently broad to permit of free passage of vehicles without use of the space upon which the concrete mixer was placed. The width of the mixer at its base, as it extended from the curb into the street, was about 8 feet. There was a metal hopper attached to an arm of the machine, which could be let down or raised up by a cable attachment. On the day in question (being Sunday, and the machine not being in use) the hopper was in a raised position. When raised the metal part of the hopper, at a distance of about $6\frac{1}{2}$ or 7 feet from the ground, extended out about 2 feet beyond the main body of the machine and toward the center of Seventh street. When in that position the machine furnished less obstruction to traffic on the street than with the hopper lowered. As plaintiff was driving her automobile past the mixer, the right-hand front corner of the top collided with a corner of the hopper. The force of the contact partially broke the hopper loose from its attachment, and it came down and rested, when plaintiff's machine finally stopped, on the rear fender. The automobile of plaintiff was damaged considerably and several hundred dollars were expended to cover the cost of repairs.

[1, 2] Defendant was not a trespasser upon the street, as it held a regularly issued permit from the city authorities allowing it to maintain and use the mixer at that point. Its duty, of course, nevertheless, was to so place the machine that it would not unnecessarily obstruct travel, or be likely to produce injury to those who, using reasonable care, might travel upon the street. The mixer was a large contrivance standing about 8 feet high and presented its whole outline to persons

who might be approaching it. At the time of the accident, being the open day, there was no necessity for the placing of lights about it. Neither was it a thing which plaintiff, upon making the turn from Figueroa street onto Seventh, was suddenly confronted with, for in her own testimony she stated that after turning the corner of the street she traveled for a distance of about 100 feet before her automobile struck the mixer. Moreover, she testified that she did not see the mixer at all before she collided with it, which must be interpreted to mean that she did not look in the direction of it. If the machine, as was the fact, was plainly discernible in all of its projecting parts to those who traveled upon the street, and was so placed that contact with it might easily be avoided, it would follow that defendant had exercised all the care required of it in the circumstances. The negligence, if any there was, which produced the damage must be said to have been that of the driver of the automobile.

[3] Counsel for respondent argues that a barricade should have been built about the mixer. Such a barricade would merely have added to the obstruction presented by the machine and could not have served to give any better notice of the presence there of the mixer than did the object itself. The evidence does not sustain the findings made by the trial judge.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 467)

RAY v. LANKERSHIM GRAIN CO.
(Civ. 3819.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1922.)

1. Costs \S 205, 206—Memorandum of costs with affidavit attached prima facie right to insert amount in judgment.

The memorandum of costs, with an affidavit attached containing all the requisite statements as the same are specified in Code Civ. Proc. \S 1033, establishes the prima facie right to have the total amount shown by those items inserted in the judgment, and it devolves upon the party objecting to show that the items were not properly included within the cost bill.

2. Costs \S 184(1)—Party claiming witness fees as costs need not have paid the fees.

It is not essential to the right of a party, who claims witness fees as costs, that he should first have paid the fees.

Appeal from Superior Court, Los Angeles County; T. N. Harvey, Judge.

Action by Carl Ray against the Lankershim Grain Company, a fictitious name, owned and operated by H. D. Clarke. From

an order denying motion to retax costs, defendant appeals. Affirmed.

Wetherhorn, Hoyt & Jones, of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

JAMES, J. The defendant asked to have certain items, appearing in a memorandum of costs which the plaintiff filed, disallowed. The court denied the motion. Defendant has appealed from the order.

[1, 2] After notice of decision and within the time required by section 1033, Code of Civil Procedure, the plaintiff, in the court below, filed his memorandum of costs. In this memorandum, various items appeared as for fees of witnesses, who were seven in number, such fees including the per diem fixed by the statute, together with the mileage charge which is allowed to be collected. It included notary charges for taking a deposition of one Nye at Cheyenne, Wyo., amounting to \$5, and a witness fee of \$2, with a mileage charge of 10 cents for the attendance of the witness upon the taking of his deposition. The other charges were for the serving of subpoenas. Plaintiffs' attorney attached to the memorandum his affidavit, which in all respects was sufficient to establish prima facie the regularity of the charges made. This affidavit contained the statement that, to the best of his knowledge and belief, the items "in the within memorandum of costs and disbursements are true and correct and have been necessarily incurred in this cause." It was further set out in the affidavit that the witnesses actually attended at the trial and actually traveled the number of miles claimed for each, and that in the judgment of the affiant, each of the witnesses was a necessary and material one. A statement as to the correctness of the service charges was also included. In the notice of motion to have the court tax the costs, it was stated generally that the motion would be upon the ground that the charges were not correct and were not taxable against the defendant, and would be based upon an affidavit and the records and files in the case. Appellant does not claim that the witnesses were not legally required to attend upon the trial, or that they did not so attend, but makes the contention that, because they did not demand their fees when subpoenaed, they could not afterwards collect compensation. The second contention is that a party may not include in his cost bill items as for fees due witnesses, unless he has actually paid such fees. The affidavit attached to the cost bill contained all the requisite statements as the same are specified in section 1033, Code of Civil Procedure. The memorandum of costs, with such an affidavit attached, established prima facie the right of the plain-

tiff to have the total amount shown by those items inserted in the judgment. *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210; *Miller v. Highland D. Co. et al.*, 91 Cal. 103, 27 Pac. 536. It devolved upon the moving party to show that the items were not properly included within the cost bill, and this it failed to do. There was no showing that any witness had waived his costs and presumptively, each having been duly required by subpoena to attend at the trial, each would have a legal claim against the plaintiff for the amount of his fees. Plaintiff having incurred such liability was entitled to have judgment to cover it. It is not essential to the right of a party who claims witness fees as costs that he should have first paid the fees. *Linforth v. S. F. Gas & Electric Co.*, 9 Cal. App. 434, 99 Pac. 716. No showing was made that the notary charge of \$5 for the taking of the deposition of the witness Nye in Wyoming was excessive, or that the witness fee of \$2 and mileage of 10 cents, presumably paid to the witness to secure his attendance before the notary, was not proper to be collected. The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 496)

PEOPLE v. GROENIG. (Cr. 604.)

(District Court of Appeal, Third District, California. April 28, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Indictment and information \S 174—Indictment as principal sustains conviction for aiding and abetting.

Under Pen. Code, \S 31, 971, an indictment charging defendant in the usual form as principal with the crime of grand larceny is sufficient to sustain a conviction, though the evidence shows he aided and abetted the commission of the offense.

2. Criminal law \S 785(15)—Instruction as to witness testifying falsely held not to require reversal.

The giving of an instruction that, if any witness had willfully sworn falsely as to any material matter the jury should distrust his entire evidence, does not require reversal.

3. Criminal law \S 792(2)—Evidence held to authorize instruction as to aiding and abetting.

An instruction in the language of Pen. Code, \S 31, that all persons concerned in the commission of a crime, whether directly committing the act or aiding and abetting in the act, are principals, was proper where there was evidence on the charge of larceny of an automobile tending to show that defendant had employed others to steal the automobile and drive it into another state.

4. Larceny \Leftrightarrow 73—Evidence held not to warrant charge on defendant's ownership of stolen automobile.

Where defendant and the owner of an automobile had a contract whereby defendant was to receive an automobile in a trade for land, and, pending consummation of the trade, the automobile was stored in a garage from which defendant had the right to take it for demonstration purposes only, and defendant had expressly refused to accept title to the automobile on the ground it would impose the risk of loss on him, the title had never passed to defendant, under Civ. Code, § 1141, so that it was not error in a prosecution of defendant for larceny of the automobile to refuse a requested instruction based on the theory that the title to the automobile had passed to the defendant before it was stolen.

5. Criminal law \Leftrightarrow 531(3)—Evidence held to sustain finding confession was voluntary.

Where there was no evidence that any threats or promises had been made to defendant to induce him to make a confession, and it appeared that, immediately before he made the statement, the district attorney stated the charge against him, informed him he did not have to talk but that they would listen to any explanation he chose to make, the court and jury were justified in concluding that the confession was free and voluntary.

6. Criminal law \Leftrightarrow 535(2)—Evidence aside from confession held to show corpus delicti.

Evidence that the automobile defendant was charged with having stolen was in a locked garage on a certain evening, and that next morning the garage was discovered to have been broken open and the car was gone and it was later found in another state, is proof sufficient to sustain the corpus delicti of larceny of the automobile aside from defendant's confession.

7. Criminal law \Leftrightarrow 511(7)—Evidence held sufficient to corroborate testimony of accomplice.

In a prosecution for larceny of an automobile, where a witness for the state testified defendant had employed witness and another to steal the car, defendant's written confession and his testimony at the trial held sufficient to corroborate the testimony of the accomplice and sustain the conviction.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Gus Groenig was convicted of grand larceny, and he appeals from the judgment of conviction and from the order denying his motion for a new trial. Affirmed.

R. W. Dodge and H. C. Stanley, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. This appeal is from the judgment of conviction of the crime of grand larceny and the order denying defendant's motion for a new trial. He was charged

with the theft of an automobile, alleged to belong to Henry Boehm.

The defendant and his wife agreed to sell the latter's house and lot to Boehm on the terms set out in the following contract executed by the parties on the day it bears date:

"This agreement made this 12th day of Jan., 1921, between Gus Groenig and Lydia I. Groenig, wife of Gus Groenig, first party and Henry Boehm second party. First party is agreed to sell and second party is agreed to buy property on lot 7, block 11, Lodi, Barnhart tract, for the sum of \$2,000, difference in trade on automobile (Buick 7 passenger). First party furnishes deed certif. of title insurance policy to date. Deposit \$2,000 in the Farmers' & Merchants' Bank at Lodi, Cal., payable to Lydia I. Groenig on delivery of above stated papers about 17th of Jan., 1921.

"Lydia I. Groenig.

"G. Groenig.

"Heinrich Boehm."

On the same day Boehm's check was deposited with the bank, together with a letter of instructions reading as follows:

"Inclosed herewith is my check for \$2,000 on the Farmers' & Merchants' State Bank of Lacrosse, Kansas, payable to you. You are authorized to forward said check for collection and when paid you are to deliver the said sum of \$2,000 to Lydia I. Groenig and G. Groenig, upon delivery to you by them of a deed properly executed conveying to me the following premises: Lot 7, block 11, Lodi, Barnhart tract, said deed to be accompanied by a certificate of title showing premises free and clear of any and all incumbrances. Also an insurance policy assigned to me of \$2,000, covering buildings now on premises. You are also authorized to have said deed placed on record for me. * * * Heinrich Boehm."

The defendant testified that he delivered the deed, certificate of title, and assignment of the insurance policy to the bank on the 19th day of January. The manager of the bank, Mr. Mettler, denied this statement and testified that such papers were not produced by defendant until February 2d. The defendant testified that, when he delivered these papers, he asked Mettler to give him the \$2,000 deposited, but that Mettler refused, saying that "he could not turn that over to me until Mr. Boehm got back."

J. H. Boehm testified that the automobile was placed in a garage in Lodi on the day the agreement was executed, with instructions to the proprietor thereof to keep it—

"until Mr. Groenig would have time to bring down the papers of the place and until we got our license for the car and everything in shape so we could turn the things over, and * * * that if Mr. Groenig brought anybody there to demonstrate the car * * * he would have the right to demonstrate it, but to bring it back after it was demonstrated."

About January 21st defendant and one R. L. Brown took the automobile out of the garage and later returned it. On the evening of January 23d the automobile was in the garage, which was locked for the night. The next morning it was discovered that the garage had been broken into and the automobile taken. It was finally located in El Paso, Texas. Malcolm Lee testified that, during the afternoon of January 23d, he was riding in an automobile with the defendant and Brown, they two being in the front seat and Lee in the rear, and that, in a conversation between the defendant and Brown, "I heard about \$200 to take it to El Paso but I didn't get all the words that were in there"; that between 1:30 and 3 o'clock the next morning Brown, a man named Henry Bechtold, and the witness took the automobile from in front of defendant's residence and drove it away, finally reaching El Paso with it; that the witness assumed the name Earl McDonald on the trip; that the witness wrote the defendant from some town near Phoenix, Ariz.; and that in reply he received a money order from defendant for the sum of \$80. About January 25th the defendant informed Boehm that he could not wait any longer to consummate the sale of the house and lot, as he had an opportunity to sell to another person, and the parties then agreed upon a sale to Boehm for \$3,000 in cash, in lieu of the original agreement, Boehm to keep the automobile if recovered. On February 2d the transfer of the property was made on that basis.

After his arrest the defendant made a statement to the district attorney. The statement was taken down in shorthand by the court reporter, who testified to the contents thereof at the trial. After stating the substance of the agreement with Boehm, the defendant said:

"I was to clear this house, which I did, and he was to clear this car and, being a Kansas car, we were to have 10 days in which to do this. * * * He had left the car in the garage there. * * * He gave me the privilege of using it or selling it, or anything like that. * * * I met this man Brown. I asked him if he didn't know somebody that wanted to buy a Haines. * * * I told him I had another car that I had just taken in on a trade, and I described it to him. He says right away, 'I know where we can sell that.' * * * We went over to the garage and I told the garage man, I says let him have the car. * * * So I went along with him out here to Elk Grove, somewhere by Galt, the fellow wanted to buy, but he didn't. * * * Brown seemed to be kind of pressed. * * * On the way back I gave Brown \$70 or \$75. * * * I will tell you the truth and take what comes; I will be candid with you. * * * I had given Brown this money, and I says now, 'If you don't sell the car I will be loser here.' * * * I took this car back that evening to the garage. * * * I seen him somewhere, I think it was on Main street there again that day, and we

said something about this money and so on. Well, he says, there is more than one way to get around things. * * * He said if he had a car he could go out and make big money bootlegging. * * * I opposed the proposition. * * * He said he would see that I got rid of that car if we had to steal it. And there is where the trouble started, gentlemen, and there is where I should have said something else; but, of course, I didn't say anything. Well, I don't really know just how these things went on and so on, anyway they occurred. Now then, I didn't see Brown from that day on—I believe it was Friday—until Sunday when he came to my house, he says that he had hired a man, I don't know what his name is, but he had hired a fellow, and he says we are going to do the business. He says you stay at home to-night; stay with your family so you won't get into trouble and your family will be with you. This was Sunday night and Brown asked me for some money. Well, the long and short of it, gentlemen, I gave him some money. I know I was a fool, but I did it. * * * I hadn't told Brown where to take this car. That was up to him to do with as he liked. * * * I don't know whether I asked him to destroy it or sell it, or what. I had the opinion that Brown was going to sell this car. * * * My wife didn't know anything about this. * * * On Sunday afternoon I says to him: 'Now here Brown, if something goes wrong here, you know I have a family here,' and I says, 'I don't mind giving you any money, as far as money is concerned, if you need it so bad as that,' but I says, 'I don't want to get into trouble here in any way.' I says: 'If you go to work and do this and there is any trouble, you will put me into it and I with a family will have to stand for it.' He says: 'No, I won't do no such a thing. I will go to jail first.' * * * He said he would not be caught."

The defendant stated that several days after the theft he received a letter from Phoenix, Ariz., and continued his narrative, saying:

"It said something like this: 'Dear Cousin: I am coming to see you. Everything is dried up here. I haven't any money. Send me \$80.' * * * It was signed 'McDonald.' * * * I didn't know I had a cousin by that name. * * * I didn't say anything to my wife. I wish I had, maybe things would have been different, and of course, I was scared too. * * * I got a money order for \$80.00. * * * About the time I went to get this money order I decided it was Brown that had written that letter, see, and I was afraid somebody was on my track, either to get the money or do me personal harm. * * * In order to keep my good name over there I substituted another. * * * I sent that money order from Lodi. I got it at Woodbridge."

At the trial the defendant attempted to explain away the incriminating statements made to the district attorney. His explanation is far from convincing and it was for the jury to determine which story to believe.

The defendant further testified that, after the original contract had been signed:

"John and I we drove up to my house, I believe he talked with my wife a little bit * * * and he says: 'Well, what will we do with the automobile?' 'Well,' I says, 'We will leave it right here if I had a garage to put it in but I haven't got it and it can't stay outside.' * * * I suggested that we run it over there in the Central avenue garage, * * * so we got in and drove it over there. I says to this man Olenberger (the proprietor of the garage): 'I want to leave the car here for a short period of time until we get settled up on the deal; * * * I have took this car in on a trade and we got to get papers for it.' So this man Boehm took the key and gave it to him, what he done with it I don't know, he went into the office and talked with the man."

The defendant testified that, at the time of the transfer of the house and lot on February 2d, he said to Mettler, in explanation of the change of terms:

"If you remember this deal we made, John and Henry Boehm and myself, * * * this automobile had disappeared and under the conditions these papers cannot be transferred as they are under that contract."

Relative to his right to use the automobile, the defendant testified on cross-examination:

"I didn't hear Mr. Boehm say anything to this Mr. Olenberger. I asked Olenberger what the instructions were and Olenberger told me that I could use the car for demonstrating purposes and so on as per Mr. Boehm's orders."

Mr. Mettler testified that, a few days before the car was stolen, the defendant asked him whether, if the car was delivered to him and thereafter stolen, Boehm or defendant "would be loser"; that witness replied that he thought the defendant would have to stand the loss; and that the defendant then said that he would not accept it under those circumstances. Mettler's testimony as to this conversation stands wholly uncontradicted. The foregoing lengthy statement of the evidence is deemed necessary to an intelligent understanding of the points made on this appeal.

[1] The indictment was in the usual form and charged the defendant as a principal. The evidence shows that he aided and abetted in the commission of the crime. The appellant contends that the indictment is insufficient in that it fails to allege that defendant so aided and abetted. There is no merit in the contention. Pen. Code, §§ 31 and 971; *People v. Nolan*, 144 Cal. 75, 77 Pac. 774.

[2] It is claimed that the court erred in giving the following instruction: "If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence." This instruction was criticized in *People v. Delucchi*, 17 Cal. App. 96, 102, 118 Pac. 935, and *People v. Vertrees*, 169 Cal. 404, 413, 146 Pac. 890, but in neither case was the

giving thereof held prejudicial. Instructions in the identical language above quoted, or in stronger terms, have often been approved. *People v. Plyler*, 121 Cal. 160, 163, 53 Pac. 553; *People v. Fitzgerald*, 138 Cal. 39, 45, 70 Pac. 1014; *White v. Disher*, 67 Cal. 402, 7 Pac. 826; *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984; *People v. Kelly*, 146 Cal. 119, 123, 79 Pac. 846; *People v. Thomson*, 145 Cal. 717, 722, 79 Pac. 435.

[3] The court instructed the jury in the language of section 31 of the Penal Code. It is urged that such instruction was not applicable to the charge or the evidence. The evidence quoted clearly shows that the instruction was proper.

[4] Appellant complains of the court's refusal to instruct the jury that if, prior to the 23d day of January, the defendant deposited with the bank the deed admitted in evidence, the certificate of title, and an assignment of the insurance policy on the buildings, "then the title to said automobile vested absolutely in said Gus Groenig and Lydia Groenig by such delivery of said papers, and said Henry Boehm ceased thereby to be the owner of said Buick car and defendant could not be guilty of a larceny thereof"; that, if the automobile at the time of the alleged theft was the property of the defendant, the defendant could not be guilty of stealing the same; and that if, "on or about January 23, 1921, defendant had done all that was required of him to consummate the agreement with Henry Boehm, whereby said automobile was to be turned in to defendant as part payment for a house and lot to be conveyed to said Henry Boehm, then you will find the defendant not guilty." The only instruction given by the court relative to the ownership of the automobile was, in appropriate language, that, if the defendant stole the automobile at the time alleged and the same was then the personal property of Henry Boehm, the jury should convict.

The whole testimony, even that of the defendant, shows that title to the automobile never passed to him. Section 1141, Civ. Code. There is no evidence whatever that Boehm delivered it to defendant or that the latter accepted it with the intention of passing title but, to the contrary, the evidence shows that both parties understood that title had not passed. The defendant told Mettler he would not accept delivery until the transaction was completed. When it was learned that the automobile was gone, the defendant and Boehm entered into a new agreement by the terms of which Boehm paid an additional thousand dollars for the house and lot in lieu of the delivery of the automobile and neither of them contended or suggested that title to the automobile had passed prior to the theft. Neither in his lengthy statement to the district attorney nor in his testimony

given at the trial did the defendant once say that he even thought that the automobile belonged to him or that he had the right to take it. There was no evidence to which the refused instructions were applicable.

[5] The admission in evidence of the defendant's statement to the district attorney is assigned as error on the ground that it was not voluntary. The testimony shows that no threats or promises were made to induce the defendant to make the statement and that the statement was voluntary on his part. Immediately before the defendant made the statement, the district attorney said to him:

"Gus, you are brought back as you probably know, on a charge of grand larceny of an automobile, for taking an automobile belonging to a man by the name of Boehm, a preacher out here at Lodi; I had you brought up here. If you have anything to say about the matter we will listen to you. You don't have to talk; we are not going to attempt to make you talk. If you have an explanation to make we will be glad to listen to you."

From this testimony the court and jury were justified in concluding that the statement was free and voluntary.

[6] Appellant contends that, independent of the defendant's statement or confession, the corpus delicti was not established. The evidence shows that, on the evening of January 23d, the automobile was in a locked garage, that the next morning it was discovered that the garage had been broken open and that the car was gone, and it was later found in El Paso, Tex. Certainly, such proof is sufficient to show that the machine was stolen.

[7] It is lastly urged that the witness Lee was an accomplice in the commission of the crime and that there is not sufficient corroboration of his testimony. The defendant's testimony, given at the trial, and his statement made to the district attorney are, either of them, amply sufficient corroboration. The evidence establishes the defendant's guilt with unusual certainty.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 539)

CRUM v. CRUM. (Civ. 2441.)

(District Court of Appeal, Third District, California. May 2, 1922.)

1. Divorce §127(3)—Corroboration of plaintiff's testimony as to cruelty is required to prevent collusion.

The main purpose of Civ. Code, § 180, providing that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties, was to prevent collusion.

2. Divorce §127(4)—Plaintiff need not be corroborated as to every act of cruelty charged by her.

In an action for divorce on the ground of cruelty, where plaintiff alleged and testified to a large number of acts of cruelty on the part of defendant, it was not necessary that her testimony be corroborated as to every act of cruelty.

3. Divorce §127(4)—Testimony of daughter of parties held to corroborate wife's testimony as to husband's cruelty.

In an action for divorce brought by the wife on the ground of the husband's cruelty, testimony by the daughter of the parties as to some of the acts of cruelty alleged by plaintiff held sufficient corroboration of plaintiff's testimony to entitle her to a divorce, especially where the husband vigorously resisted the divorce at the trial and on appeal, so there could be no suspicion of collusion.

4. Divorce §27(3)—Cruelty is not limited to physical violence.

Extreme cruelty as a ground for divorce embraces not only physical violence, but also any conduct in one of the married parties which may produce mental anguish or suffering in the other, or which furnishes reasonable apprehension that the continuance of cohabitation under the circumstances may be attended with bodily harm committed by one upon the other.

5. Divorce §184(10)—Defendant's evidence not necessarily considered on question of sufficiency of evidence to support decree for plaintiff.

Where the single question submitted on appeal from a judgment granting divorce to plaintiff is whether the decision of the trial court is sufficiently supported by the evidence, the limit of inquiry by a reviewing court is whether there is sufficient evidential support to uphold the findings, and the appellate court is not always required to consider the evidence presented by defendant.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action for divorce by Essie B. Crum against Samuel D. Crum. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. C. Russell, of Hanford, for appellant. Clark Clement, of Lemoore, for respondent.

HART, J. The plaintiff was granted an interlocutory decree of divorce from the defendant on the ground of extreme cruelty. The decree also awarded to plaintiff the custody of the minor child of the parties, Mabel Ruth Crum, age seven years, the only issue of the marriage of said parties, and one-half of the community property, consisting principally of real estate. The personal property, of which there was a small amount, and which also belonged to the community, was awarded to the defendant.

The defendant appeals from the judgment under the alternative method upon the sole

ground that the testimony of plaintiff as to the acts of cruelty alleged to have been committed by the defendant upon her was not legally corroborated.

The parties intermarried in the state of Missouri, in the month of May, 1908, and removed to Kings county, this state, about two years later.

The complaint alleges that on numerous occasions from the year in which the parties were married until May 12, 1920, on which latter date they separated and ceased living together, the defendant "has treated plaintiff in an extremely cruel and inhuman manner," following which averment is a specification of certain acts of cruelty on plaintiff by the defendant in the years 1910, 1911, 1915, 1916 and 1919. It is alleged that on one of these occasions the defendant, in the presence of others, called plaintiff a "d—n fool," a "d—n b—ch," and cursed and threatened to inflict bodily injury upon her by saying, "God d—n you; I will bust your head," and threatened to kick plaintiff out of the house; that at another time, the defendant, becoming very angry at plaintiff, struck her a violent blow "over the head with his gun case," and that, on another occasion specifically mentioned in the complaint, the defendant, having been asked by plaintiff "a few friendly questions," became sullen and morose and refused to answer said questions; that thereupon plaintiff insisted on answers, when defendant became very angry, "grabbed her with both hands, and jammed her up against some shelves saying that he was going to kill her"; that at this time defendant, without cause, "twisted plaintiff's arm painfully, and cracked a bone in one of her fingers"; that in April, 1919, "while plaintiff and defendant were living near Lemoore, in said county, defendant, without cause, grabbed hold of plaintiff forcibly with his hands, and jammed her against the wall a number of times, and said that he was going to kill plaintiff"; that, during the four years immediately preceding the date of their separation, the defendant has practiced sexual abuse upon the plaintiff, by reason whereof she has become a nervous wreck. The complaint then charges generally numerous other acts of cruelty practiced upon plaintiff by defendant during the four years the couple resided in Lemoore, it being stated that, without cause, the defendant "constantly reviled plaintiff, and cursed her with the vilest language"; that defendant "has constantly been sullen and morose, without cause, around home; that he has constantly and habitually refused to talk to plaintiff, and has never talked to her except when compelled by necessity to do so." There are some other charges of cruelty in the complaint of a more or less specific nature, as to which no findings were made, and which, therefore, require no specific notice herein.

The complaint describes and specifies the value of the several pieces of real estate which it alleges is the community property of the parties, and asks for a division thereof between said parties. The defendant, by his answer, denies specifically each and every material allegation of the complaint, and, while not asking for a decree, alleges that the trouble between the parties has been due to the ungovernable temper of the plaintiff; that she would "fly into a rage and run all the hired men off the ranch, and would not allow any one to come on the ranch to work for defendant," and that she otherwise frequently so annoyed and harassed the defendant that he could not do the work on his farm which was required of him, etc.

The court found generally that, since the date of the marriage between the parties "the defendant has treated plaintiff in an extremely cruel and inhuman manner," and also specifically found that the several acts of cruelty particularized in the complaint, and which are therein alleged to have occurred in the years 1910, 1911, and 1915, were committed by the defendant as so alleged. It was further found that during the period of four years immediately preceding the date of the separation of the parties the defendant practiced sexual abuse upon plaintiff, "with the result that her nervous system was impaired thereby."

Reading the testimony in this case, without reference to the findings of the court, one could hardly dodge the conclusion that neither the plaintiff nor the defendant was, in the maintenance of their domestic relations, a paragon of amiability in disposition. The plaintiff herself admitted that, on one occasion, having been provoked by the insulting language with which the defendant addressed her, after she had asked him in a singularly civil way some very decent questions, emphasized her indignation thereat by hurling at him a china coffee cup with such accuracy of aim that it landed on the side of his face with sufficient force to inflict thereon a slight wound. This circumstance, however, does not mean that there is not sufficient corroboration of the plaintiff's testimony as to the general cruel treatment of her by the defendant during much of their married life. Indeed, she claimed and testified (and her testimony supporting this claim was corroborated by her adopted daughter) that she never at any time, including the occasion on which she hurled the coffee cup with such telling effect, betrayed ill-temper in controversies with her husband until she had become so overwrought through his gross and inhuman mistreatment of her that she was unable to control herself.

That the testimony of the plaintiff is sufficiently corroborated will readily appear from an examination of the evidence. There is no need for a detailed recapitulation herein of the testimony for the purpose of con-

firming this declaration. It will suffice merely to refer in a general way thereto.

The plaintiff testified that the defendant, sometimes, in the presence of persons not members of their immediate family, had, on frequent occasions, addressed to her opprobrious epithets, and cursed her, such as "God d—n you;" "you d—n b—ch," and that he had threatened to break her head, and had at different times violently struck her; that he was of a morose and sullen disposition, and very seldom would answer her with civility, sometimes not at all, when she would ask him about the business of the farm. She testified that his manner of maintaining sexual relations with her, against objection by her, was such that it resulted in the production of serious female trouble, and, consequently, in a corresponding impairment of her health.

The adopted daughter of the parties testified that she had, on two occasions, witnessed the infliction of physical violence upon the plaintiff by the defendant. One of these occasions, though, was when the plaintiff struck the defendant with the coffee cup. As to this circumstance, the little girl said that, after the cup was thrown by the plaintiff, the defendant grabbed hold of her mother and "jammed her up against the wall," and repeatedly bumped her head against the wall. She testified that the immediate cause of this particular trouble between them was that, after her mother had asked defendant some questions "in a nice way," and he had refused to answer the same, except to say to the plaintiff, "God d—n you, keep your mouth shut," the latter became very angry, and thereupon hurled the cup at defendant. The other occasion on which the witness saw the defendant use physical force on plaintiff was after the couple had retired for the night. The witness said that she heard a noise in the room occupied by the plaintiff and the defendant, and heard her mother scream, and that she (witness) then ran into the room, and saw her father in the act of choking her mother while they were in bed. The witness undertook to interfere, when the defendant ordered her from the room. The little girl further testified that "every day or so," for a long period of time prior to the date of the separation of the parties, she had heard the defendant curse the plaintiff and call her offensive names, and threaten to injure her. It is not necessary to repeat here the language which the young witness testified that she so often heard her father use towards her mother. It is sufficient to say that said language was about as vile and offensive as can well be imagined. The witness, in effect, testified that such abuses of the plaintiff by the defendant were a common occurrence.

The family physician testified that he had, in the year 1920, professionally attended the

plaintiff, and upon examination found that she was suffering from severe female trouble and a general impairment of her nervous system by reason thereof, and that the "sexual abuse" which the plaintiff stated to him that defendant had habitually practiced upon her would produce the condition which he found in the plaintiff.

It should be added that the testimony tends to show that the plaintiff was a woman of education and refinement, that for a period in her life she had taught school, and that she was to some extent accomplished along musical lines.

[1, 2] Thus the evidence has been sufficiently referred to to show that, except as to the charge that the defendant practiced sexual abuse upon the plaintiff, the latter's testimony was corroborated—that is, her testimony bearing upon the charge that the defendant otherwise cruelly treated her is corroborated. The corroboration, it may be conceded, is not of her testimony as to all the acts of cruelty charged in the complaint and to the commission of which by defendant the plaintiff testified, but the corroboration does go to the testimony of the plaintiff as to many acts and words of cruelty charged in the complaint either specifically or generally, and, since from the fact that the defendant at the trial vigorously resisted, and on this appeal likewise opposes the granting of the decree to the plaintiff, it is obvious that there was and is no collusion between them to procure a divorce, the corroboration is legally sufficient. The main purpose of section 130 of the Civil Code, providing that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties, is, as is said in *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298, to prevent collusion. It is further said in that case, quoting from the syllabus:

"Where a divorce is sought on the ground of extreme cruelty, consisting of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff, but it is sufficient corroboration if a considerable number of important and material facts are testified to by other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff."

[3] As suggested, there can be no doubt that the testimony of the adopted daughter of the parties, if believed by the trial court, as manifestly it was, strongly tended to "strengthen and confirm the statements of the plaintiff" as to many of the acts and words of cruelty practiced by the defendant upon her. The trial court was justified in finding from the testimony of the plaintiff, as corroborated by the testimony of the adopted daughter, that the defendant had carried on a systematic abuse of the plaintiff, at least by words, if not by acts, and

was further justified in finding that the cruelty thus inflicted upon the plaintiff was, when considered in view of the fact that she was a woman of education, some culture, and a corresponding degree of refinement, legally sufficient to warrant the decree.

[4] It has often been held that extreme cruelty, as specified by the law as one of the grounds upon which the married relation may be dissolved, embraces not only physical violence inflicted upon the complaining party by the other, but also any conduct in one of the married parties which may produce mental anguish or suffering in the other, or which furnishes reasonable apprehension that the continuance of the cohabitation under such circumstances might be attended with bodily harm committed by one upon the other. See *Morris v. Morris*, 14 Cal. 76, 73 Am. Dec. 615, and *Kapp v. District Court*, etc., 31 Nev. 454, 103 Pac. 235, 238. But the court in this case was also apparently justified in finding that some of the alleged acts of cruelty, consisting of the infliction of physical violence upon the plaintiff by the defendant, were sufficiently established by the proofs.

[5] We have not considered herein the testimony presented by the defendant. This we are not always required to do where the single question submitted on appeal is whether the decision of the trial court is sufficiently supported by the evidence. In such case the limit of inquiry by a reviewing court is whether there is sufficient evidentiary support to uphold the findings, and, if it be found, as we have found to be true in this case, that the decision derives such support from the evidence produced by the plaintiff, then further inquiry to that end is entirely supererogatory.

We conclude that the judgment appealed from cannot justly be disturbed, and it is therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(57 Cal. App. 566)

CITY NAT. BANK IN LONG BEACH v. LEMCO MFG. CO. et al. (Civ. 3895.)

(District Court of Appeal, Second District, Division 1. California. May 8, 1922.)

Guaranty §5—Guarantor of void note not liable.

One who has guaranteed payment of a note cannot be held liable when the note itself has not been executed by its purported maker and is void for want of consideration under Civ. Code, §§ 2787, 2809.

Appeal from Superior Court, Los Angeles County; Chas. S. Crall, Judge.

Action by the City National Bank in Long Beach against the Lemco Manufacturing Com-

pany, Jess H. Clark, and others. From an adverse judgment, the last-named defendant appeals. Reversed.

H. G. Ames, of Anaheim, and Delmas & Brown, of Los Angeles, for appellant.

CONREY, P. J. There is no brief or appearance herein on behalf of respondent. The case is stated, and the point relied upon by appellant is presented as follows:

"The plaintiff sued as payee of a note purporting to be executed by the defendant Lemco Manufacturing Company, and guaranteed as regards payment by the defendant Clark. These defendants pleaded that the note had been signed in the name of the company without its authority, and that it was void for want of consideration. The court found the plea true; and thereupon rendered judgment in favor of the company, but against Clark for the full amount of the note. From that part of the ensuing judgment which runs against him Clark appeals. There is presented, then, for decision the single question: Can one who has guaranteed payment of a note be held liable, when the note itself has not been executed by its purported maker, and is void for want of consideration? This question admits, we think, of but one answer. The obligation of the guarantor being accessory to that of the principal obligor, it would seem to be as self-evident in law that if there is no principal there can be no accessory, as in physics it is self-evident that there can be no shadow where there is no substance. *Brandt on Suretyship and Guaranty* (3d Ed.) §§ 4, 19, 163, and notes."

The contention of appellant appears to be correct, and is supported by authority in this state. Civ. Code, §§ 2787, 2809; *Glassell v. Coleman*, 94 Cal. 260, 266, 29 Pac. 508; *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361.

The judgment against appellant is reversed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 411)

Ex parte MAZURAN. (Cr. 1055.)

(District Court of Appeal, First District, Division 2, California. April 24, 1922.)

1. Criminal law §228—Jurisdiction of the police court not divested by reason of postponement.

A departure from Pen. Code, § 861, providing that a postponement of the preliminary examination cannot be for "more than six days in all," by granting postponement beyond that period does not divest the police court of jurisdiction.

2. Habeas corpus §3—Remedy for improper postponement must be asserted at time of illegal confinement.

The remedy under Pen. Code, § 861, for illegal confinement by reason of erroneous postponements lies at the time of such postponements, and not by habeas corpus after hearing

and upon commitment to answer to the superior court.

Original application for writ of habeas corpus by M. J. Mazuran, on behalf of Christopher Miramontes, directed to the sheriff of the city and county of San Francisco. Writ denied.

A. J. Hennessy, of San Francisco, for petitioner Mazuran.

Matthew Brady, Dist. Atty., and Richard E. Fitzgerald, Deputy Dist. Atty., both of San Francisco, for respondent.

LANGDON, P. J. This matter comes before us on a petition for a writ of habeas corpus. Petitioner is confined in the county jail in the city and county of San Francisco by virtue of a warrant of commitment of the police court of said city and county holding said defendant to answer before the superior court on a charge of burglary.

It is contended by appellant: First, that the police court lost jurisdiction of the case by the various postponements made in violation of section 861 of the Penal Code; and, second, that the defendant was committed without reasonable or probable cause. There is no merit in either of these contentions.

[1, 2] A postponement of the preliminary examination beyond six days, whether erroneous or not, does not divest the court of jurisdiction. As was said in *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538:

"If the postponement worked appellants any legal wrong, such wrong consisted in their temporary illegal confinement by the officer who had them in custody, for which, if not lawful, there would have been a remedy at the time."

Furthermore, the record shows at least one continuance was given at the request of the defendant.

After a careful examination of the record before us, we are satisfied that the evidence is amply sufficient to warrant holding defendant to answer to the charge of burglary before the superior court.

The writ is discharged, and the prisoner remanded to the custody of the sheriff.

We concur: NOURSE, J.; STURTEVANT, J.

(57 Cal. App. 518)

BLOCK v. CITIZENS' TRUST & SAVINGS BANK. (Civ. 3668.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1922. Rehearing Denied May 24, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Vendor and purchaser §130(1)—Contract to give good and sufficient deed requires conveyance of good title.

A contract by a vendor of land to give a good and sufficient deed, when standing alone,

refers not merely to the form of the instrument, but also requires that the vendor shall transfer a marketable title which shall be free from all reasonable doubt and clear of all incumbrances or material defects.

2. Vendor and purchaser §133—Contract to give deed and certificate of title free from incumbrances by vendor does not require conveyance of clear title.

Where the contract required the vendor to execute a good and sufficient deed conveying the land, and to deliver a certificate showing title free from all incumbrances made, done, or suffered by appellant, the clause relating to the deed to be furnished must be construed with the clause relating to the certificate of title, the purpose of which was to enable the purchaser to ascertain whether the deed conveyed what he was to receive, so that the contract requires a conveyance of title free only from incumbrances made, done, or suffered by the vendor.

3. Vendor and purchaser §133—Pendency of condemnation proceedings is an incumbrance, but not one made, done, or "suffered" by vendor.

The pendency of proceedings to condemn a portion of the land covered by the contract of sale constitutes an incumbrance on the property, but not an incumbrance made, done, or suffered by the vendor; the word "suffered" in that connection implying responsible control, not something caused without the act of the party and beyond his power to prevent, and therefore the pendency of such proceedings does not warrant rescission of a contract to convey the property free from incumbrances made, done, or suffered by the vendor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suffer.]

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by G. F. Block against the Citizens' Trust & Savings Bank, to recover the purchase price of certain real property. Judgment for plaintiff, and defendant appeals. Reversed.

Hunsaker, Britt & Cosgrove, of Los Angeles, for appellant.

Randall, Bartlett & White and Walter J. Little, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in favor of plaintiff in an action to recover the purchase price of a certain parcel of land that defendant had agreed to convey to plaintiff, the latter claiming the title to be defective. The true construction of defendant's contract of sale is the only question involved.

The findings disclose a situation substantially as follows: On September 11, 1913, plaintiff and defendant entered into a written contract whereby defendant agreed to sell and plaintiff agreed to buy a lot of land

in Los Angeles county for the sum of \$600, payable in certain monthly installments. The agreement contains a clause as follows:

"The first party [defendant] upon receiving payment of the full amount, * * * agrees to execute and deliver unto the party of the second part [plaintiff] a good and sufficient deed of grant conveying said land, and to deliver a good and sufficient certificate of title issued by the Title Insurance & Trust Co., showing title to said property vested in the party of the first part [defendant], free from all incumbrances, made, done, or suffered by said first party."

Plaintiff, who seems to have been put in possession immediately upon the execution of his contract to purchase, made all the payments required of him under the terms of his contract, including taxes; and on May 10, 1919, he made his final payment, which at that time was five months overdue.

On April 29, 1919, which was shortly prior to plaintiff's final payment, the Los Angeles County Flood Control District, a political subdivision of this state, commenced in the superior court for Los Angeles county an action of eminent domain to acquire by condemnation an easement in and over certain lands, including an easement in and over the westerly 60 feet of the land which defendant had agreed to convey to plaintiff. Such easement was sought by the flood control district for the purpose of providing and maintaining a fixed and definite channel for certain waters by erecting embankments and walls on the right of way sought to be condemned. The plaintiff here, the vendee, was not a party to that action. His vendor, this defendant, was, however, made a party defendant to the condemnation suit, though its time to answer therein had not expired when this action was tried. On the day when the condemnation suit was commenced, April 29, 1919, a lis pendens was recorded in the office of the county recorder, giving due notice of the pendency of that action. At the date of the trial of the present action the condemnation suit had not been set for trial. Pursuant to the power conferred by section 14 of article 1 of the Constitution, as amended on November 5, 1918, an order was made in the condemnation suit on May 14, 1919, authorizing the flood control district to take immediate possession and use of the right of way described in the eminent domain proceedings. Though the flood control district has not as yet taken actual possession of the right of way which it is seeking to obtain over the westerly 60 feet of the land in question here, it has taken constructive possession thereof.

Some time between the 19th and 25th of May, 1919, defendant tendered to plaintiff a deed, duly signed and acknowledged, and sufficient as to form, purporting to convey to plaintiff the property in question. At the same time defendant tendered to plaintiff a certificate of title, issued and executed by the Title Insurance & Trust Company of Los

Angeles on May 19, 1919, certifying that the title to the whole parcel of land is vested in defendant free from all incumbrances except "an action commenced April 29, 1919, and now pending in the superior court, entitled, Los Angeles County Flood Control District v. Stephen A. Armstrong, Citizens' Trust & Savings Bank, a Corporation, et al., brought to condemn the west 60 feet of said lot for the construction and maintenance of a channel for the flood waters of the Los Angeles, San Gabriel, and other rivers." The certificate of title further stated that "notice of the pendency of the said action was recorded April 29, 1919, in Book 76, p. 19, of notices of actions"; and also that "on May 15, 1919, an order was entered authorizing plaintiff [the flood control district] to take immediate possession and use of the right of way as described in the complaint [in the condemnation action], the money deposits required by law as security having been made pursuant to the order of the court."

Though defendant has continued ready and able to make his tender good, plaintiff refuses to accept the offered deed and certificate of title because of the pendency of the condemnation proceedings, the recording of the lis pendens, and the making of the order authorizing the flood control district to take possession of the right of way sought to be condemned.

Whether respondent, the vendee, is entitled to rescind his contract to purchase and recover the purchase money which he paid to appellant, the vendor, depends upon the construction that should be placed upon appellant's covenant "to execute and deliver unto the party of the second part [respondent] a good and sufficient deed of grant conveying said land, and to deliver a good and sufficient certificate of title * * * showing title to said property vested in the party of the first part [appellant], free from all incumbrances made, done, or suffered by said first party."

There are cases which lend color to the view that, where condemnation proceedings are commenced after the making of a contract of sale, but before the time for its completion by a conveyance, the institution of such proceedings will not affect the vendee's duty to complete the purchase. The reason given by the courts which adhere to this view is that the purchaser is regarded in equity as the owner from the time of the making of the contract, and, as such equitable owner, is entitled to the damages which may be awarded in the condemnation proceedings, and the exercise of the right of eminent domain confers upon the plaintiff in the condemnation suit an independent and not a derivative title. 27 R. C. L. p. 500; Nixon v. Marr, 190 Fed. 913, 111 O. C. A. 503, 36 L. R. A. (N. S.) 1067; Clarke v. Long Island Realty Co., 126 App. Div. 282, 110 N. Y. Supp. 697. See, also, Stevenson v. Loehr,

57 Ill. 509, 11 Am. Rep. 86. Other cases take the view that, if the vendor has agreed to convey a good title, free and clear of all incumbrances, the condemnation proceeding, if pending when the time arrives for the execution of a conveyance to the vendee, constitutes an incumbrance or defect in the vendor's title justifying the purchaser in refusing to complete the purchase and giving him the right to recover the purchase price. 27 R. C. L. p. 500; *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; *Cavenaugh v. McLaughlin*, 38 Minn. 83, 35 N. W. 576; *Johnston v. Callery*, 173 Pa. 129, 33 Atl. 1036; *Miller v. Phillips & Co.*, 44 Wash. 226, 87 Pac. 264. The cases on both sides of the question are reviewed in the majority and dissenting opinions in *Nixon v. Marr*, *supra*. We do not find it necessary to determine which of those two conflicting views is supported by the better reasoning. We shall assume, for all the purposes of this decision, that the correct doctrine is that last stated; that is, we shall assume that, where the vendor has obligated himself to convey a good title, free and clear of all incumbrances, the pendency of condemnation proceedings at the time when the vendee becomes entitled to his deed will entitle the latter to reject the title and sue for the recovery of any purchase money that may have been paid by him to his vendor.

As we construe the language of appellant's covenant, there was no agreement to give respondent a good title, free and clear of all incumbrances. Appellant covenanted to do two things: (1) To execute "a good and sufficient deed of grant conveying said land"; and (2) to deliver a certificate of title showing title to the property vested in appellant as the vendor, free from all incumbrances "made, done, or suffered" by appellant. Though there are two parts to appellant's covenant, each part calling for the performance of a separate and distinct act, the subject-matters of the two are so correlated that the two clauses should be read together, and the intention of the parties respecting the meaning of each division of the covenant be ascertained by a consideration of the covenant as a whole, each clause throwing an illuminating light upon the other and disclosing the exact limits of the covenant and the true meaning of appellant's promise to execute "a good and sufficient deed." The whole question is one of intention, to be ascertained by a consideration of all the language used by the parties.

[1] If, instead of covenanting to execute a good and sufficient deed, and to give a certificate of title showing title in itself free and clear of all incumbrances "made, done, or suffered" by it, appellant had simply covenanted to execute "a good and sufficient deed," making no mention of any certificate of title, we would have had no trouble

in construing appellant's covenant as meaning that the parties intended that a good and sufficient title should be conveyed as well as that a deed good and sufficient in form should be executed; for the doctrine recognized by the later authorities is that, as a general rule, a covenant simply calling for a good and sufficient deed goes not merely to the form of the instrument, but also requires that the vendor shall transfer a good title, i. e., a marketable title, such as shall be free from all reasonable doubt and clear of all incumbrances or material defects. 27 R. C. L. p. 486; 11 Am. Dec. 34 et seq., note to *Porter v. Noyes*; 39 Cyc. 1446; *Haynes v. White*, 55 Cal. 38.

[2] Or if, instead of covenanting to execute "a good and sufficient deed," appellant had expressly covenanted to execute a good and sufficient deed, and to convey a good title, its express promise to convey a good title doubtless would have been construed as calling for such title, even though the covenant also contained a provision that appellant, as vendor, would furnish a certificate showing title vested in itself free only from incumbrances "made, done, or suffered" by it. But appellant did not expressly covenant to give a good title. It covenanted to execute a good and sufficient deed, and to furnish a certificate of title that was not required to show the title free of all incumbrances, but only of such incumbrances as might be "made, done, or suffered" by appellant. And, though a covenant to execute "a good and sufficient deed" is usually construed as calling for the conveyance of a good title, nevertheless the context may show a contrary intention, as we think it does in the present case. When appellant's undertaking to give a "good and sufficient deed" is read in the light of the contextual undertaking to furnish respondent with a certificate showing title in appellant free from incumbrances made, done, or suffered by the latter, it is clear that in this case the parties intended, by their use of the words "good and sufficient deed," no more than a grant conveying to respondent a title free from such incumbrances as might have been made, done, or suffered by appellant; that is, free from such incumbrances as the certificate of title was required to show. This is so because the very object of a certificate of title is to enable the vendee to pass upon the validity of the title for which he is bargaining. It is to enable him to know if he can get what he has purchased, and whether his vendor has and can convey all he has undertaken to sell. *Mead v. Fox*, 6 Cush. (Mass.) 199, 201. Though this Massachusetts Case presents the reverse of the situation that we have here, it is quite in point with respect to the construction which should be placed on appellant's covenant. It has been held in Massachusetts from an early date, as it formerly

was in this state (*Brown v. Covillaud*, 6 Cal. 566, 573, *Green v. Covillaud*, 10 Cal. 317, 322, 70 Am. Dec. 725) that a covenant for "a good and sufficient deed" relates to the form and execution of the deed, and not to the title (*Aiken v. Sanford*, 5 Mass. 494). But in *Mead v. Fox*, supra, it was held that, because the parties stipulated that the vendee should have "ten days to examine the title," it manifestly was their intention that the vendors should convey a good and clear title, the court saying:

"By the terms of the sale, ten days were allowed purchasers to examine the title. Purchasers could have no other object in examining the title, than to see if the plaintiffs could make a good title; and there could be no object whatever in ascertaining whether or not the plaintiffs could make a good title, unless they were bound to make such title, and the purchaser was entitled to have a good and clear title made to him, in order to bind him to the performance of his contract of purchase. The purchaser was allowed time to examine the title, to see if he could get what he had purchased, and whether the plaintiffs actually had and could convey what they had undertaken to sell."

By a parity of reasoning, it should be held that in the present case the purpose of the certificate of title was to enable the purchaser to see if he could get what he had purchased and whether his vendor had and could convey what he had agreed to sell, and that, therefore, the parties contemplated the conveyance of such title as was to be shown by the certificate of title, namely, a title free only of incumbrances made, done, or suffered by appellant.

[3] That the pendency of a condemnation action is an "incumbrance," but that it is not one which is "made, done, or suffered" by the vendor, seems obvious. If any authority be needed for the proposition that the pendency of condemnation proceedings constitutes an incumbrance, it may be found in the reasoning pursued by Circuit Judge Sanborn in his dissenting opinion in *Nixon v. Marr*, supra. It is not, however, an incumbrance that is "made" or "done" by the vendor; nor is it one that is "suffered" by him. An incumbrance upon property suffered by the vendor means one within his power or duty to avoid. "Suffer," in this connection, implies responsible control; and it cannot be held to apply to a thing not caused by the act of the party nor within his power to prevent. *Crist v. Fife*, 41 Cal. App. 511, 183 Pac. 197; *Smith v. Elgerman*, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281.

For the foregoing reasons we conclude: (1) That appellant undertook, not to execute a deed conveying the title free and clear of any and every incumbrance, but to execute a deed conveying the title free of all incumbrances "made, done, or suffered" by appellant; (2) that neither the pendency of the condemnation suit nor the order authorizing

the plaintiff therein to take possession of the easement which it was seeking to condemn was an incumbrance "made, done, or suffered" by appellant; and (3) that, as a consequence, the deed which appellant tendered to respondent would convey to the latter all the title that appellant, as vendor, had agreed to convey. It follows, therefore, that, upon the facts found by the court below, the judgment should have been in appellant's favor.

The judgment is reversed, and the lower court is instructed to enter a judgment on the findings adjudging that plaintiff take nothing by his action and that defendant recover its costs.

WORKS, J., concurs.

CRAIG, J. I dissent. As is stated in the opinion of the majority of the court, the appellant, the vendor in the contract, covenanted to do two things: First, to execute "a good and sufficient deed of grant conveying said land"; second, to "deliver a good and sufficient certificate of title . . . showing title to said property vested in the party of the first part free from all incumbrances made, done, or suffered by said first party." The dispute between the parties upon this appeal centers upon the construction of the provisions above quoted. The appellant concedes that, if he had simply agreed to deliver a good and sufficient deed without mentioning the character of the title to be conveyed, a stipulation would exist by implication that the deed must carry with it a good and sufficient title. *Haynes v. White*, 55 Cal. 38. 39 Cyc. 1448, is authority for this proposition. But it is argued that the provision, "and to deliver a good and sufficient certificate of title showing title to said property vested in the party of the first part free from all incumbrances made, done, or suffered by said first party," is a qualification of the phrase just preceding it, to wit, "agrees to execute and deliver to the party of the second part, a good and sufficient deed of grant conveying said land." However, the plain meaning of the entire provision under consideration, governed by rules of grammatical construction, is that the vendor was to do two distinct and independent acts. The purpose of the provision for a certificate of title is not merely to describe the kind of title required. Such a stipulation was unnecessary. It had been definitely defined by the agreement to execute "a good and sufficient deed of grant conveying said land." The intention of the parties concerning a requirement for a certificate of title is rather to be ascertained by a consideration of the following well-recognized legal principles.

The rule in the purchase of land is caveat emptor. In the absence of an agreement by the vendor to furnish an abstract or certifi-

case of title it is incumbent upon the purchaser to provide the same, and to satisfy himself as to the condition of the title. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. The object of an abstract is to benefit the purchaser and to enable him or his counsel to pass more readily upon the sufficiency of the title. *Kane v. Rippey et al.*, 22 Or. 296, 23 Pac. 180; *Taylor v. Williams*, 2 Colo. App. 559, 31 Pac. 504. In the case last cited it was further held that a provision for the delivery by the vendor "of warranty deed conveying clear title with abstract" was not complied with by proof that the title was in fact complete and perfect. The court held that the contract was to furnish a certain abstract, and not merely good title. *Smith v. Taylor*, 82 Cal. 538, 23 Pac. 217, is another case of the same character. The contract called for an abstract of title which would show good title. The vendor furnished an abstract of title which showed defects. Upon the trial he claimed the right to show that the claims of persons appearing in the abstract which constituted the apparent defects were groundless. The court held that, under the contract there in question, proof of the actual condition of the title was inadmissible to show compliance with the stipulation that the abstract should show good title. In *Kane v. Rippey*, supra, the contract provided that the vendor should convey "in fee simple, clear of all incumbrances, by a good and sufficient warranty deed and abstract of title." The court held that by this stipulation the vendor agreed to convey a good title free from all incumbrances whatsoever, and to furnish an abstract of such title, and that the abstract which was furnished was admissible in evidence, not, however, for the purpose of proving title, but to show the condition of the abstract itself. From these cases it is apparent that the covenants for good title and for abstract of title are not interdependent.

As to whether or not any abstract of title shall be required is purely a matter of contract between the parties. Where the vendor agrees to the purchase "with abstract showing good title," this refers to record title only. However, the contract sued upon in *Moot v. Business Men's Ass'n*, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666, provided for a search as to the actual title and not as to the record title of the property in question. It is obvious that the nature and scope of the certificate of title is purely a matter of agreement. In the instant case the parties expressly stipulated that the vendor should not only execute and deliver to the vendee "a good and sufficient deed of grant conveying said land," but also deliver to the vendee "a good and sufficient certificate of title issued by the Ti-

tle Insurance & Trust Company showing title to said property vested in the party of the first part free from all incumbrances made, done, or suffered by said first party." The purpose of the latter requirement for a certificate of title was to relieve the vendee from the necessity of investigating the public records of the county concerning the existence of any incumbrances "made, done, or suffered by the vendor." As to all other incumbrances, however, the vendee impliedly agreed to make his own investigation, and the rule caveat emptor applies. In our endeavor to discover the intention of the parties another fact worthy of consideration, and one which can hardly be in doubt, is that the vendee would not have signed a contract to this purchase lot, being an ordinary residence lot 50 by 130 feet, with the expectation and understanding that the vendor might only convey to him a lot 50 by 70 feet. If this is true, unless the language of the contract necessarily requires such a construction, a court of equity should not interpret it in such a manner as to force the vendee to accept a piece of property which he obviously had no intention of buying. I conclude that the provision of the contract concerning the furnishing of a certificate of title does not relieve the vendor from the obligation to supply "a good and sufficient deed of grant conveying said land," which means that the vendor must have good and sufficient title, one complete and perfect for alienation; that although the provision concerning the certificate of title may have been complied with by the vendor, the stipulation to execute and deliver a good and sufficient deed of grant conveying the land required the vendor to possess and tender a good and sufficient title. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, and *Whittier v. Gormley*, 3 Cal. App. 489, 86 Pac. 726. The pendency of the condemnation proceeding, the lis pendens, and the order of the court giving the flood control district possession of the strip being condemned are clearly such defects of title as to violate the agreement in that respect. If authority is needed for this proposition, *Prentice v. Erskine*, 164 Cal. 446, and *Koshland v. Spring*, 116 Cal. 689, 48 Pac. 58, supply it. Appellant attempts to distinguish these cases from the one at bar upon the ground that the defects in the title existed at the time of the execution of each of the contracts. The vendor having contracted to deliver a good title, no reason is suggested, nor do we perceive any to exist, relieving the vendor from a violation of his covenant because of the fact that such violation is due to an occurrence taking place subsequent to the time that the contract was executed.

(57 Cal. App. 667)

Ex parte AJURIA et al. (Cr. 636.)

(District Court of Appeal, Third District, California. May 13, 1922.)

1. Municipal corporations — 636—Jurisdiction over person can be acquired by consent of defendant.

Where the court had jurisdiction over the subject-matter of a prosecution for violation of a city ordinance, it could acquire jurisdiction of the person of defendant by his consent, or by his failure to object to such jurisdiction in time.

2. Arrest — 63(3)—Officers can arrest without warrant for possession of liquors in their presence.

The unlawful possession of alcoholic liquors is a continuing public offense, so that a peace officer may arrest without a warrant a person having possession of such liquor in the immediate presence of the officer.

3. Criminal law — 394—Evidence obtained by unlawful seizure is admissible.

Even though a search of defendants' premises without a warrant was unlawful, the evidence of possession of liquors so unlawfully obtained was admissible against defendants.

4. Arrest — 63(3)—Officers may make arrest for offense in their presence, though unlawfully on the premises.

The fact that officers were unlawfully on the premises of defendant does not divest them of their statutory authority to arrest for an offense committed in their presence while they were there.

Application by Lucio Ajuria and another for writ of habeas corpus, prayed to be directed to the sheriff of Yuba county to secure their release from custody, after conviction of a violation of an ordinance of the city of Marysville prohibiting the possession of intoxicating liquors. Writ denied.

W. E. Davis, of Marysville, for petitioners.

FINCH, P. J. The petitioners were convicted of the violation of an ordinance of the city of Marysville and sentenced to pay fines and to be imprisoned in the county jail. They herein seek their discharge upon a writ of habeas corpus. The petition does not set out the terms of the ordinance or state the offense of which the petitioners were convicted, other than that it was a misdemeanor. It may be inferred from the facts alleged, however, that they were found guilty of having wine in their possession contrary to the terms of the ordinance.

[1] It is alleged that the police officers unlawfully and without a search warrant entered in the nighttime and searched the defendants' premises, and discovered there a barrel containing several gallons of wine;

that thereupon, without a warrant and without a complaint having been filed charging the defendants with the commission of any offense, the officers arrested them and took them to the police station; that three days later a complaint was filed charging the defendants with the misdemeanor of which they were later convicted; that no warrant of arrest was ever issued out of the police court or served upon the defendants, and that by reason of the failure to so issue and serve a warrant the police court did not acquire jurisdiction of the persons of defendants; and that thereafter the defendants were tried and convicted. In his points and authorities, counsel for petitioners states that on their arrest they were released on bail; but the petition does not so allege. It does not appear that petitioners made any objection to the jurisdiction of the police court at any stage of the proceedings. There can be no contention that the court did not have jurisdiction of the offense charged. Jurisdiction of the offense cannot be acquired by consent, but "everywhere jurisdiction of the person of the defendant may be acquired by consent of the accused or by waiver of objections. If he fail to make his objection in time, he will be deemed to have waived it. He cannot, for instance, raise such a question for the first time in the appellate court." 8 R. C. L. 96; 16 C. J. 174.

[2, 3] It is contended that the officers were not authorized to make the arrest without a warrant. A peace officer may make an arrest without a warrant for a public offense committed in his presence. The unlawful possession of alcoholic liquors is a continuing offense. The defendants were in possession of the wine in the immediate presence of the officers. It is not perceived why the officers were not as fully authorized to make the arrest without a warrant as they would have been had they seen the defendants on a street corner with the wine in their possession. *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574. The search of the premises without a warrant was unlawful, but the evidence so unlawfully obtained was admissible against the defendants. *People v. Mayen* (Cal. Sup.) 205 Pac. 435.

[4] For like reasons the fact that the officers may have been unlawfully on the premises could not divest them of their statutory authority to arrest for an offense committed in their presence while there. Petitioners rely on *People v. Howard*, 13 Misc. Rep. 763, 35 N. Y. Supp. 233, and *People v. James*, 11 App. Div. 609, 43 N. Y. Supp. 315, in support of their contention that a conviction cannot be upheld where the arrest was made, without a warrant, for a misdemeanor not committed in the presence of the arresting officer. In the first case, decided by the

Court of Special Sessions of Albany county, the objection to the court's jurisdiction was made and sustained on the arraignment of the defendant. In the other case, no information was filed and no warrant of arrest issued. In the case of *People v. Park* (Erie County Court) 92 Misc. Rep. 369, 156 N. Y. Supp. 816, where the defendant was arrested, without a warrant, for a misdemeanor not committed in the presence of the arresting officer, the court reviewed the cases cited by petitioners and many others and affirmed the judgment, holding that the court acquired jurisdiction of the defendant when she was brought before it charged with the offense, regardless of the illegality of the arrest. It may be further stated that in that case objection to the court's jurisdiction was made at the time of the trial. See, also, *People v. Pratt*, 78 Cal. 345, 20 Pac. 731, and *Ex parte Clark*, 85 Cal. 203, 24 Pac. 726.

The petition for the writ is denied.

We concur: BURNETT, J.; HART, J.

(189 Cal. 799)

Ex parte AJURIA et al. (Cr. 2472.)

(Supreme Court of California. May 22, 1922.)

1. Habeas corpus \S 85(1)—Complaint charging offense not brought before Supreme Court is presumed to have been sufficient.

Where the complaint on which applicants for writ of habeas corpus were tried and convicted is not presented to the court to which application is made, it is presumed that it sufficiently charged the offense.

2. Intoxicating liquors \S 17—City ordinance making unlawful possession of intoxicating liquors is valid.

A city ordinance declaring it unlawful for any person to have in his possession any intoxicating liquors is valid.

3. Criminal law \S 562—Conviction for possession of liquors is not void because liquors were seized without warrant.

A conviction of possession of intoxicating liquors contrary to a city ordinance is not void, because the liquor was found on defendant's premises without a warrant to search such premises having previously been obtained.

Application by Lucio Ajuria and another for a writ of habeas corpus, prayed to be directed to the sheriff of Yuba county to secure the release of petitioners from custody, after conviction of violation of an ordinance of the city of Marysville prohibiting the possession of intoxicating liquor. Writ denied.

See, also, 207 Pac. 515.

W. E. Davies, of Marysville, for petitioners.

PER CURIAM. The petitioners are imprisoned after conviction upon a charge of violating an ordinance of the city of Marysville declaring it unlawful for any person to have in his possession any intoxicating liquors.

[1, 2] The complaint on which they were convicted is not presented to us, and we must therefore presume that it sufficiently charges the offense. We have heretofore had similar attacks made upon local ordinances of this character, and our decisions therein are against the petitioners on all the points presented in this case with relation to the validity of this ordinance. See *In re Polizzotto* (Cal. Sup.) 205 Pac. 676; *People v. Collins* (Cal. App.) 202 Pac. 344; *People v. Capelli* (Cal. App.) 203 Pac. 837; *Ex parte Kinney* (Cal. App.) 200 Pac. 967, and *Ex parte Volpi* (Cal. App.) 199 Pac. 1090.

[3] The claim that the judgment is void because the intoxicating liquor was found on the premises without previously having obtained a search warrant for the discovery thereof is answered by the decision in *People v. Mayen* (Cal. Sup.) 205 Pac. 435. On the authority of these cases the petition is denied.

SHAW, C. J., and WILBUR, SHURTLIFF, LAWLOB, SLOANE, and LENNON, JJ., concur.

(189 Cal. 100)

RAMSAY v. RODGERS et al. (S. F. 10220.)

(Supreme Court of California. June 8, 1922.)

1. Appeal and error \S 631—Motion to dismiss appeal denied, where clerk's typewritten copy of judgment roll had been filed.

Where appellant had filed the clerk's typewritten copy of the judgment roll, a motion to dismiss the appeal was denied, since, under Code Civ. Proc. §§ 950, 953, a clerk's certificate is ordinarily a sufficient authentication, and, as printing of the record is not necessary under section 953c, where prepared under section 953a, as amended in 1915, and the latter section, in providing that a transcript of the proceedings made by the official reporter and authenticated by the trial judge becomes a portion of the judgment roll, requires only the proceeding at the trial to be so authenticated and prepared.

2. Appeal and error \S 672 — Judgment roll held sufficient record for review.

The judgment roll alone is a sufficient record for the review of all rulings which appear thereon and of the sufficiency of the pleadings and findings to support the judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by T. H. Ramsay against Elizabeth A. Rodgers and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion denied.

John E. Bennett, of San Francisco, for appellants.

Creed, Jones & Dall, of San Francisco, for respondent.

SHAW, C. J. The respondent moves to dismiss the appeal on the ground that no transcript, prepared and authenticated as required by law, has been filed within the time allowed by the rules of this court.

[1] Prior to the filing of the notice of motion to dismiss the appeal, the appellants had procured from the clerk of the superior court and had filed in this court a transcript of the papers included in the judgment roll, duly certified by the clerk of said superior court. We are of the opinion that, under the rules of court and the law as they now exist, this is a sufficient compliance with the law and with our rules. Section 950 of the Code of Civil Procedure provides that, on appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, the judgment roll, and any bill of exceptions upon which he relies. Section 953 provides that the copies provided for in section 950 must be certified to be correct by the clerk or the attorneys. A certificate of the clerk is therefore a sufficient authentication. Our rules require the printing of the judgment roll, except when it is prepared under section 953a. Section 953a, as amended in 1915, provides that any person desiring to appeal from any judgment may, in lieu of a bill of exceptions "or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment," procure a transcript of the proceedings had at the trial, to be made up by the official reporter, and to be settled and authenticated by the judge of the superior court, and that, when so settled and allowed, such transcript shall "become a portion of the judgment roll." The portions of the section first quoted authorizes a record under the provisions of section 953a for the purpose of presenting an appeal from the judgment.

[2] The judgment roll alone is a sufficient record for the review of all rulings which appear thereon and of the sufficiency of the pleadings and findings to support the judgment. Section 953c provides that, on appeals from judgments, if the appellant avails himself of the provisions of section 953a, the clerk, within 10 days after the preparation

of the record, must transmit it to the court to which the appeal is taken, and that no transcript thereof need be printed. It will be observed that section 953a does not require the judge of the superior court to settle and certify the judgment roll, nor does it require the official reporter to make a typewritten record thereof, in pursuance of the notice to be given thereunder. His transcript includes only the testimony offered or taken, evidence offered or received, and the rulings and other proceedings on the trial, but does not include the pleadings, finding, or judgment. The preparation and certification of those documents are not provided for, but are to be prepared in accordance with section 950 and certified in accordance with section 953. Section 953c, however, provides that, on appeals from judgments and other appealable orders, when the record is prepared under section 953a, it must be filed and need not be printed.

In the present case the appellants proceeded under section 953a, but failed to procure a reporter's transcript, and succeeded only in getting the clerk's transcript of the judgment roll. Formerly, under section 953a before it was amended so as to include the passage first above quoted, it had been decided that a judgment roll alone could not, under our rule, be presented in typewriting. *Harbold v. Slocum*, 168 Cal. 364, 143 Pac. 609; *Lapique v. Plummer*, 33 Cal. App. 317, 165 Pac. 56. We think that, by fair intendment, the Code as it now stands allows the filing of a typewritten transcript of the judgment in cases where an attempt has been made to proceed under section 953a and the appellant has failed to procure the reporter's transcript of the proceedings and evidence at the trial, and that the former decisions do not apply to the present rules and statute. Such has been the consistent practice ever since the amendment of section 953a in 1915. The point was expressly so decided by this court in denying a petition for rehearing after the decision of the District Court of Appeal in *McKinnell v. Hansen*, 34 Cal. App. 76, 81, 167 Pac. 887, where we held that, under rule VII, subdivision 2, an appeal on the judgment roll, prepared under section 953a, may be presented on a typewritten transcript. See, also, *Beckett v. Stuart*, 35 Cal. App. 797, 171 Pac. 107.

The filing of the typewritten record in the present case, prior to the giving of the notice to dismiss the appeal, removes the ground upon which the notice to dismiss is founded.

The motion to dismiss the appeal is denied.

We concur: LAWLOR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.; WILBUR, J.; WASTE, J.

(189 Cal. 31)

PEOPLE v. SMITH. (Cr. 2404.)

(Supreme Court of California. May 26, 1922.)

1. Witnesses §405(2)—Denial by defendant he had been employed as card dealer held collateral in prosecution for causing delinquency.

In a prosecution for causing delinquency of a minor by dealing cards to him in a gambling game, the question, asked defendant on cross-examination, whether he had previously been employed as a card dealer by the same club, while it was at a different location, related to a matter which the prosecution could not prove as original evidence, so that it was error to permit the prosecution to contradict defendant's denial.

2. Criminal law §1186(4)—Immaterial evidence admitted to impeach defendant held not prejudicial; "miscarriage of justice."

Where defendant admitted he had followed gambling for livelihood, and had dealt black jack in another state, but denied dealing to a minor, error in permitting the state to contradict his denial that he had been employed as a black jack dealer by the same club at a different location was not so prejudicial that an affirmation of the conviction would result in a miscarriage of justice, within Pen. Code, §§ 960, 1258, 1404, and Const. art. 6, § 4½.

3. Criminal law §1172(6)—Witnesses §248(2)—Instruction on alibi held not required by evidence, so that error therein was harmless; answer held not responsive to question.

Where the only evidence to support an alibi was defendant's statement, in answer to a question whether he dealt black jack to the prosecuting witness on the date in question, that he never dealt black jack in the house, which was not responsive to the question, there was no evidence to show alibi, so that error in an instruction cautioning the jury against a fabricated defense of alibi was not prejudicial.

4. Criminal law §1186(4)—Mistake in commitment as to name of minor, whose delinquency was caused is merely clerical.

Where defendant was charged with contributing to the delinquency of James E. Edmonds, the fact that the order of commitment or preliminary examination gave the name of the minor as James E. Edwards, was purely a clerical error, insufficient to justify a reversal on the ground that the information did not charge the offense set out in the order of commitment, as required by Pen. Code, §§ 809, 872.

5. Criminal law §1170(2)—Exclusion of testimony witness had been mistaken in identification of another as associated with defendant held not prejudicial.

In a prosecution for contributing to juvenile delinquency, where the minor had identified defendant as one who dealt cards to him in gambling game, the exclusion of evidence, offered by defendant, that the minor had identified as a participant in the game another who was not in the city at the time was not prejudicial to accused, where the minor was asked at the trial of accused whether he had seen that

other at the place in question, and had replied that he did not suppose so, because the other had been acquitted of ever having been there.

6. Criminal law §692—Erroneous admission of conclusion of witness held waived by failure to cross-examine thereon.

Error in permitting a witness for the prosecution to state his conclusion that detectives who shadowed him were employed by defendant, over defendant's objection, was waived, where the court, in admitting the evidence, suggested that defendant could cross-examine the witness as to the basis for the conclusion, and defendant failed to act on the court's suggestion.

7. Criminal law §1169(2)—Admission of evidence that place in which defendant was employed was gambling house held not prejudicial.

The admission of evidence that the club in which defendant was employed had the reputation of being a gambling house, if erroneous, was not prejudicial to accused, where the prosecuting witness testified he was directed to that club by a taxi driver, from whom he inquired where he could find a game, and was admitted without identification and without a membership card, and defendant admitted he had formerly been employed by and was a frequenter of the club, so that he must have had knowledge of its character.

8. Infants §20—Evidence in prosecution for contributing to delinquency held admissible to show knowledge of character of club wherein minor was allowed to gamble.

In a prosecution for contributing to juvenile delinquency by dealing cards to a minor in a gambling game, evidence that the club by which defendant was employed had been raided by the police as a gambling house, while it was maintained at another location, was competent to show defendant's knowledge of the character of the club, which was the same organization, notwithstanding the change of location.

9. Infants §20—Evidence held to sustain verdict finding defendant contributed to delinquency of minor.

In a prosecution for contribution to the delinquency of a minor, evidence that defendant dealt cards and sold chips to the minor in a gambling game, and talked with him during the game, though he did not ask the minor to play or gamble, is sufficient to sustain a conviction, notwithstanding an instruction to find defendant not guilty if the minor went on the premises without inducement or persuasion by defendant and engaged in gambling there.

10. Criminal law §361(3)—Evidence of defendant's preparations to entrap prosecuting witness in attempting to bribe held inadmissible.

Where prosecuting witness had visited the defendant on several occasions before the trial, and claimed defendant was attempting to bribe him to leave the jurisdiction, while defendant claimed the witness was attempting to extort blackmail, evidence that on one occasion, when the witness was expected at defendant's home, defendant had photographers present to take

pictures showing the witness entering the house and leaving it, and also had a detective and stenographer to report the conversation, though it would have shown defendant's suspicion of the witness' purpose, had no bearing on the witness' frame of mind, and was properly excluded.

11. Infants — Provision of Juvenile Court Law, making it a misdemeanor to contribute to delinquency, is constitutional.

The provision of Juvenile Court Law, § 21, making it a misdemeanor to commit any act which causes or tends to cause a minor to become such a person as is described in section 1, subd. 11, of the act, is constitutional.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Samuel Smith was convicted of causing a minor to perform an act or follow a course of conduct which would tend to cause him to become a delinquent, and he appeals. Affirmed.

Frank J. Murphy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rior-dan, Deputy Atty. Gen., for the People.

LAWLOR, J. The defendant, Samuel Smith, appeals from a judgment of conviction of a misdemeanor triable in the superior court, in having violated section 21 of the Juvenile Court Law (Stats. 1915, p. 1225), to the effect that any one who shall commit any act which causes or tends to cause any minor under the age of 21 years, among other things, to become such a person as is described in subdivision 11 of section 1 of said act, or any person who by any act, threat, command, or persuasion induces or endeavors to induce any such minor to perform any act, to follow any course of conduct, or to so live as would cause or tend to cause him to become or remain a person coming within the provisions, among others, of said subdivision 11, shall be guilty of such a misdemeanor.

Appellant was charged by information with the violation of this statute, in that he induced, persuaded, and encouraged James E. Edmonds, then of the age of 16 years, to frequent a public gambling house, to wit, the Thirty-Third Assembly District Club, at 32 Turk street, in the city and county of San Francisco, and there engage in the playing of cards and other games of chance for money. It was alleged these acts of appellant tended to and did encourage Edmonds to become such a person as is described in subdivision 11 of section 1 of the Juvenile Court Law, to wit, a person under the age of 21 years, who is leading, or is in danger of leading, an idle, dissolute, and immoral life.

It appears that Edmonds, whose home was in New Orleans, left that city and came to San Francisco, unaccompanied by and without the consent of his parents. His first visit to the Thirty-Third Assembly District Club was on the night of October 28, 1920; he having been directed there by a taxicab driver. He was admitted to the club after he told the doorkeeper he was 22 years old. Edmonds testified that on the occasion of his first visit appellant, who was a member of the club, was present, but that no conversation passed between them. The two succeeding nights Edmonds again visited the club, and, according to his testimony, appellant was dealing black jack there on both those nights, in which games Edmonds played, and during which he talked to appellant. Edmonds also returned to the club on the nights of October 30 and November 1, but did not remember seeing appellant on those visits. He testified that he played cards on each of the five nights, and that he lost in all something over \$700. Appellant denied he was employed by the Thirty-Third Assembly District Club at the times Edmonds visited it, and that he ever dealt black jack at 32 Turk street.

1. We shall first consider appellant's contention that the court erred in allowing him, after he had testified in his own behalf, to be impeached by another witness concerning asserted collateral matter brought out on cross-examination. We quote from appellant's testimony on his direct examination:

"Q. Have you ever been employed in a place where they played cards for money? A. I have. Q. Where? A. In Nevada—different states. Q. Have you ever been employed in San Francisco? A. In clubrooms here; yes, sir. Q. Where? A. 225 Ellis street [the former location of the Thirty-Third Assembly District Club]."

On cross-examination he testified:

"Q. Isn't it a fact that you dealt black jack in the Thirty-Third Assembly District Club when it was located at 325 Ellis street? A. 225 Ellis? Q. When it was on Ellis street? A. No, sir. * * * Q. And you now say under oath, Mr. Smith, that while you were working for the Thirty-Third Assembly District Club, when it was located on Ellis street, that you did not deal black jack? A. No sir. * * * Q. How long previous to July of 1920 [when it moved to 32 Turk street] had it been that you were employed by this Thirty-Third Assembly District Club? A. Possibly two years."

None of this testimony was objected to. The following testimony was given in rebuttal by John C. Miles, a police officer:

"Where did you first see him [appellant]? A. 225 Ellis street. Q. When? A. Oh, various times, and often between 1917 and 1918. * * * Q. Do you know what his occupation was there? A. Why that of a card dealer.

* * * Q. What kind of a game was he dealing?

"Mr. Murphy: I will object to that upon the ground it is calling for impeaching testimony upon a collateral matter.

"The Court: I will allow the question. A. I have seen him dealing California stud poker and black jack; that is all."

The court had previously stated in regard to the admission of the impeaching testimony:

"I am willing to have this go in, provided, first, that it is on the matter of occupation, and that the witness knows that it is on the matter of occupation."

In *People v. Chin Mook Sow*, 51 Cal. 597, 600, it was said:

"It is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness on cross-examination which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked him the question; but it is conclusive against him. But when the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule does not apply."

See, also, *People v. Dye*, 75 Cal. 108, 16 Pac. 537.

[1] It was held in *People v. Niles*, 44 Mich. 606, 7 N. W. 192, that, unexplained, testimony concerning the occupations of a defendant in a criminal case was irrelevant. In *State v. Blassengame*, 132 La. 250, 61 South. 219, the court held that the circumstances of a case might make such evidence relevant. It is true that counsel for appellant, in the case at bar, brought up the subject of appellant's occupations, evidently to present him in the most favorable light before the jury. In his opening statement he had said he would show appellant had been engaged in many occupations—"all ordinarily referred to as legitimate hard work, and that he has also engaged in playing cards, following an injury, after which he has spent much of his time as a card player," and that "he was not employed at any time in the Thirty-Third Assembly District Club." Since appellant brought up the subject of his occupations, and testified on direct examination that he had been employed at 225 Ellis street, it was proper on cross-examination to question him as to the nature of such employment. In fact, this was not objected to. But it does not follow that such evidence was relevant, and not collateral. It has not been made to appear that the testimony as to his past occupations was relevant to the main issue, or was such a matter as the prosecution might have proved as an independent

fact as a part of its case in chief. In our opinion, evidence that appellant, two years before the commission of the crime in question, was employed as a black jack dealer, even by the same employer, was but proof of a prior wrongful act, unconnected with the crime charged. Such evidence would ordinarily not be relevant (*Jones on Evidence*, vol. 1, § 143), nor a proper subject of impeachment (*Steen v. Santa Clara Valley, etc., Co.*, 134 Cal. 355, 66 Pac. 321), and it has not been shown to be relevant to any issue in this case. The ruling was therefore erroneous.

[2] It remains for us to consider whether an affirmance of the judgment, in view of this error, would result in a miscarriage of justice. An examination of the record satisfies us that the verdict was not affected by this ruling. It is plain from the evidence that the jury believed Edmonds told the truth when he testified as to appellant's connection with two of the games in which he participated, and also that such conduct on the part of appellant constituted a violation of the statute. Appellant admitted that he had followed gambling for a livelihood, that he had dealt black jack, denying, however, that he had done so in this state. It must be assumed, from the evidence as a whole and the adverse verdict, that the jury did not accept this qualification, but believed from all the circumstances that he dealt black jack for the Thirty-Third Assembly District Club, and that he did so on the occasions testified to by Edmonds. Appellant's testimony was in direct conflict with that of Edmonds, and when it is considered that the latter's testimony was vigorously attacked from every angle, and that no effort was spared to impeach it, it cannot reasonably be concluded that the item of impeaching testimony prejudicially affected the jury on the point whether appellant dealt black jack at 32 Turk street when Edmonds was present. Pen. Code, §§ 960, 1258, 1404; Const. § 4½, art. 6.

[3] 2. Appellant's next claim is that the court erred in giving the following instruction on the subject of alibi:

"The defendant could not have been in two places at the same time, and in this contradiction of witnesses the jury have to determine for themselves where lies the truth. In so judging they will take into consideration the appearance and apparent candor and fairness of the respective witnesses, the probability of their statements, its coincidence with other facts or features of the case which they may deem established, and, generally, those rules of ordinary experience and general observation by which intelligent men decide as to controverted propositions of fact. The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing, as it does, that the party asserting it could not have been present at the time of the commission of the

crime alleged in the indictment, and therefore did not participate in it—is, when credited, a defense of the most conclusive and satisfactory character.

"The fact, however, which experience has shown, that an alibi as a defense is capable of being, and has been occasionally, successfully fabricated; that, even when wholly false, its detection may be a matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance—these are considerations attendant upon this defense which call for some special suggestions upon the part of the court.

"These are that, while you are not to hesitate at giving this as a defense full weight—that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant, or as creating a reasonable doubt, which entitles the defendant to an acquittal—still you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

This instruction, although the same as that approved in *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183, was disapproved in *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631, and *People v. Lattimore*, 86 Cal. 403, 24 Pac. 1091, and in *People v. Roberts*, 122 Cal. 377, 55 Pac. 137, a similar instruction was held to be reversible error, upon the grounds that it constituted a charge upon the weight of the evidence, and that it cast the burden of proof upon the defendant. However, we are of the opinion that the state of the evidence in the case at bar renders the error harmless. Appellant correctly states that—

"It must be remembered that the appellant was the only witness who testified as to the alibi in this case."

An examination of the transcript shows that, although he did state he had never seen Edmonds prior to his arrest, his only testimony approaching the subject of alibi was as follows:

"Q. From the 20th day of October to the 2d day of November, were you employed at the Thirty-Third Assembly District Club? A. I was not. Q. Were you there, on any of those days above mentioned, inclusive, ~~dealing black~~ jack? A. I never dealt black jack in the house."

The answer given is not responsive to the question, and does not tend to show whether appellant was or was not present at the time and place of the alleged commission of the crime. The instruction was therefore not applicable, and hence appellant was not prejudiced thereby. *People v. Walsh*, 48 Cal. 447.

[4] 3. Appellant assigns error to the refusal of the trial court to set aside the information on the ground that it did not charge the offense set out in the order of commitment. Pen. Code, §§ 809, 872; *People v. Lee Look*, 137 Cal.

590, 70 Pac. 660; *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490; *People v. Parker*, 91 Cal. 91, 27 Pac. 537. The complaint was filed and the preliminary examination conducted in the juvenile department of the superior court, and charged an offense of contributing to the delinquency of James E. Edmonds. The order of commitment gave the name of the minor as James E. Edwards, and the information as James E. Edmonds. At the arraignment, on December 12, 1920, appellant moved to set aside the information, and the hearing was continued until December 21; the court directing the district attorney to procure an amendment of the order of commitment. On December 20, the committing magistrate, by a minute order, amended the order of commitment to conform to the information as to the name of the minor, reciting that the discrepancy was due to a clerical error. The amended order was presented to and filed in the trial court, which, on December 21, 1920, denied appellant's motion to dismiss the information. It is not necessary to determine whether this mode of correcting a purely clerical error is regular or not. The mistake was one of those defects or errors in pleading which are declared to be insufficient to justify a reversal or a new trial by the sections of the Constitution and the Penal Code already referred to.

[5] 4. The next contention of appellant is that the court erred in refusing to permit the defense to introduce evidence tending to prove that Edmonds was mistaken in his identification of one James Young, who gave the name of James Thomas, at the preliminary examination of Young for the same offense as that charged against appellant. Young was one of the persons Edmonds stated to have been present at the time he visited the Thirty-Third Assembly District Club. Upon cross-examination Edmonds was asked the following question, to which an objection was sustained:

"Q. Is it not a fact that upon the preliminary examination in the case of *People v. Thomas* you identified Thomas as one of the participants in the game in which you claim Smith was dealing, * * * that you also identified him as the man that you pointed out to Mr. Floyd on the night of November 6, 1920, and is it a fact now that you were mistaken as to your identification of Mr. Thomas, both as to being a participant in the game and as having identified him to Mr. Floyd on the night of November 6, 1920?"

James Young, testifying in behalf of appellant, was asked on direct examination:

"Well, did James E. Edmonds identify you as a person who was present at the Thirty-Third District Club between October 28 and November 1, 1920?"

An objection to this question was also sustained. The district attorney objected, upon the grounds that it was incompetent,

immaterial, irrelevant, and not proper cross-examination, and that the inquiry was going too far afield; that, if the testimony were allowed, the prosecution would be entitled to bring in a number of witnesses to testify that Edmonds had identified all the persons involved in the several charges. Counsel for appellant offered to prove that—

"This witness [Edmonds], in a hearing before Judge Murasky, in the case of *People v. Thomas*, charged with contributing to the delinquency of a minor, positively, and without equivocation, identified the defendant in that case, Thomas, as having participated in the very games in which this defendant is charged with having played, and we will then undertake to prove, and do now undertake to prove that this witness was absolutely wrong, and that Thomas, the man whom he then positively identified, was in San Diego at the time the alleged game took place."

Assuming that the inquiry should have been allowed, it cannot be held the rulings were prejudicial. The following testimony of Edmonds shows that he did not insist upon this trial that Young was one of the persons he saw at the Thirty-Third Assembly District Club:

"Q. Now, I will ask you if you know a man known as James Thomas? A. I do. Q. And where did you first meet him? A. I first saw him in the preliminary hearing at which he was tried. Q. Did you ever see him in the Thirty-Third District Club? A. I don't suppose so; he was acquitted of ever being there."

Moreover, Edmonds was subjected to a searching examination as to the correctness of his identification of appellant. The excluded testimony would therefore have been but additional to the same point.

[6] 5. It is insisted the court erred in permitting Edmonds to testify on redirect examination, over the objection that the evidence was incompetent, irrelevant, and not binding on appellant, that he knew that while he was in New Orleans, and while he was on his way to San Francisco to attend the trial, he was being shadowed by detectives in the employ of appellant, on the ground that—

"There was no evidence in the case to show that such alleged detectives were employed by the defendant, or that the defendant had any knowledge of such employment. Testimony of this character has always been held to be inadmissible"—citing *People v. Dixon*, 94 Cal. 256, 29 Pac. 504; *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379.

It was developed on the cross-examination of Edmonds that, after returning from New Orleans, he went to see appellant's counsel, and also that he had telephoned to and called on appellant, and the latter claimed these communications were had for purposes of blackmail. The testimony in question was offered as tending to explain Edmonds' mo-

tive in having these communications; it being asserted by counsel for the people that—

"He was induced to go and see them by this very defendant himself, for the purpose of inducing or bribing him to leave the jurisdiction of this court after he arrived."

It may be conceded that, if the witness had any knowledge he was being shadowed by appellant's agents, he should have been asked to state the facts upon which he based his knowledge, rather than the conclusion itself. But the court, in admitting the testimony, said:

"It is open to re-cross-examination as to what the basis of his knowledge was, as to whether it was such knowledge as to justify his answer."

As the defense did not choose to act upon the suggestion of the court, we cannot hold, in the face of the judgment of conviction, that the witness did not have primary knowledge of the fact. Inasmuch as the defense did not inquire into the matter, the objection will be deemed to have been waived.

[7] 6. Appellant's next contention is that, on the ground it was hearsay, the court erred in admitting evidence to the effect that, at the times Edmonds visited the Thirty-Third Assembly District Club, the place had the reputation of being a gambling house. Even conceding this ruling to have been erroneous, appellant could not have been prejudiced by it. That the Thirty-Third Assembly District Club was a public gambling place might also have been inferred from Edmonds' testimony that he was first directed to the place by a taxicab driver, when he asked if the latter could "show me where there was a little game," and that he was admitted to the club without being known and without a membership card. In any event, no prejudice could have resulted from the admission of the testimony in question, for the purpose of showing appellant's knowledge of the character of the premises, for according to his own testimony he had formerly been employed by and was a frequenter of the club.

[8] 7. It is next claimed the court erred in receiving evidence that the police raided the premises at 225 Ellis street, the former location of the Thirty-Third Assembly District Club. This testimony is asserted to be erroneous on the grounds that it was incompetent, irrelevant, immaterial, not proper cross-examination, called for the opinion and conclusion of the witness, impeached and disgraced appellant in the eyes of the jury, and that the jury might have concluded that, inasmuch as appellant had once been an employee in a gambling club, it was probable he was engaged in a like employment at the time of the alleged commission of the crime for which he is now being prosecuted. Before the questions objected to were propounded, appellant had testified, without objec-

tion, that the Thirty-Third Assembly District Club was the same one that had been located at 225 Ellis street, and that he had worked in the club at that location. It also appears from his testimony that the character of the club had not materially changed since the time it occupied 225 Ellis street. Then he testified:

"Q. Don't you know, as a matter of fact, in 1918, while you worked there, and while you were in the place, the police raided it as a gambling institution, and carted everybody off to the city prison? * * *

"Mr. U'Ren: I just want to go into this man's knowledge as to the reputation of the place; isn't that the fact? A. I was there twice, on two different occasions, when the place was raided."

An objection to further evidence along the same line was sustained; the court announcing that the point was sufficiently covered by the testimony under review.

There was no error in the admission of this evidence. Although housed in a different location, the club was the same one in which Edmonds testified he had played cards for money. Appellant's knowledge of the character of the club was relevant, and testimony that he knew of its character while at one location tended to prove that he knew of it while at another.

[9] 8. It is insisted that the verdict is against law. The jury were instructed in effect that if they found that Edmonds frequently and without any inducement, persuasion, or encouragement upon appellant's part, went to the premises described in the information, and engaged in gambling, they must find appellant not guilty, and also that, if they found "no acts proven on the part of defendant which would induce" Edmonds to become or remain addicted to the habit of gambling, they must find appellant not guilty. It is argued that, as Edmonds testified that appellant never asked him to play or gamble, it was the duty of the jury under the above instructions to return a verdict of not guilty. However, from the record as a whole, and particularly from Edmonds' testimony that when he played black jack he bought chips from appellant to bet on the cards, that he talked to appellant during the game, and that appellant dealt for him occasionally, we cannot say there was not evidence upon which the verdict might have been predicated under the instructions.

[10] 9. Error is also assigned to the refusal of the court to permit evidence for appellant that he invited Edmonds to his apartment for the purpose of entrapment. The evidence shows that Edmonds visited the apartment, but while he claimed it was to get his money back and for the purpose of following up a suggestion of a bribe which he asserted was to be offered to persuade

him to leave the jurisdiction, appellant insisted it was for purposes of blackmail.

As tending to prove the latter contention, appellant offered to show that upon one occasion he had stationed a photographer outside the apartment house to get a picture of Edmonds entering and leaving it, and that a stenographer and a detective were stationed inside to report the conversation between Edmonds and appellant. However, upon that occasion Edmonds did not appear at all. It is contended by the Attorney General that such testimony would be irrelevant, immaterial, and self-serving. Conceding that the suggested preparations by appellant for Edmonds' visit might tend to prove his distrust of Edmonds, we do not see how they could tend to prove Edmonds' state of mind in going there. The ruling was proper.

[11] 10. The last contention is that—

"Section 21 of the Juvenile Court Law, as qualified and supplemented by subdivision 11 of section 1 of the same law, is unconstitutional and void."

In *People v. De Leon*, 35 Cal. App. 467, 170 Pac. 163, the constitutionality of the Juvenile Court Law was upheld, and a petition for a hearing of the cause in this court was denied. An examination of the petition for a hearing in this court shows that the question of the constitutionality of the act was raised therein and the subject fully presented. Appellant's contention is therefore without merit.

The judgment is affirmed.

We concur: SHAW, O. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; SHURTLEFF, J.

(139 Cal. 44)

WEAKLEY v. MELTON. (S. F. 9693.)

(Supreme Court of California. May 29, 1922.)

1. Gifts \Leftrightarrow 49(1)—Evidence held sufficient to establish unconditional gift.

Testimony of a mother that the turning over to her by her son of a part of an inheritance from an uncle was without condition, and with the understanding that she would return what was left to him because she wanted him to inherit the balance, held to establish an unconditional gift.

2. Trusts \Leftrightarrow 49—Declaration of trust held to have been procured by "undue influence."

Where a son procured from his mother a declaration of trust for a sum which he had turned over to her, by representing that he desired the trust to prevent the sister from making trouble or from getting it after his mother was through with it, and the mother testified that she was greatly disturbed mentally at the time and did not hear distinctly when the declaration was read to her, and

that she did not want to sign it, *held*, that the declaration of trust was procured by undue influence as defined by Civ. Code, § 1575.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

3. Trusts **§49**—Procurement of deed of trust after unconditional gift not justified as exercise of legal right.

Where a son made an unconditional gift to his mother of a sum of money, the subsequent obtaining by him of a deed of trust thereto could not be justified as the exercise of a legal right.

4. Compromise and settlement **§5(1)**—Unsigned agreement attempting settlement of trust no defense to suit to vacate trust alleged procured by undue influence.

In a suit to vacate a trust, alleged procured by undue influence, a proposed, unsigned agreement undertaking to make final settlement, was not binding on any of the parties, and was at most an accord without satisfaction, and did not constitute a defense to the action.

In Bank.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Jennie E. Weakley against George L. Melton. From a judgment of the superior court, in an action to set aside trust to quiet title and recover on a promissory note, defendant appeals. Affirmed.

Lucas F. Smith, Lucas F. Smith, Jr., and Stanford G. Smith, all of Santa Cruz, for appellant.

A. W. Hare and Netherton & Johnston, all of Santa Cruz, for respondent.

LAWLOR, J. Plaintiff, Jennie E. Weakley, brought this action to have declared null and void a declaration of trust of real property, located in the city of Santa Cruz in favor of defendant, George L. Melton, and to have the record thereof canceled; to have her title to said property quieted as against defendant, and to recover \$2,900 alleged to be due to plaintiff on a promissory note, executed in her favor by defendant, together with costs. Judgment was entered in favor of plaintiff, granting all the relief prayed, and from that judgment defendant takes this appeal.

Respondent, a woman of advanced years, and appellant are mother and son. Respondent's first husband, appellant's father, died when the latter was about 3 years old. Thereafter respondent remarried, and a daughter, now Mrs. A. L. Munger, was born of the second marriage. Respondent worked and supported appellant until he was about 15 years of age. At that time he inherited between \$20,000 and \$30,000 from the estate of a paternal uncle. Respondent was ap-

pointed guardian of appellant's person and estate, in which capacity she acted until he came of age in 1892. After appellant attained his majority, he transferred to respondent the sum of \$9,000, she claiming that it was a gift and he asserting it was given in trust during her lifetime. This money she dealt with in her own name, but she always kept it separate from her second husband's property. On one occasion in 1896, appellant said to her:

"Dr. Workman told me I ought to have some writing to show I get this money after you are done with it. But I am not going to ask it of you."

In 1910 appellant wrote to respondent, explaining that he intended her to have the use of the money only during her life, and that upon her death, the money, or the property in which it had been invested, should revert to him. On September 5, 1911, appellant visited respondent at her home in Santa Cruz, which home consisted of a house and lot which respondent had purchased out of the \$9,000 she received from appellant. At that time respondent executed the following declaration of trust in appellant's favor, of the property constituting her home:

"Whereas, my son, George L. Melton, on or about the 6th day of April, 1892, did convey to me the sum of nine thousand dollars (\$9,000) to be held by me during the term of my natural life in trust for him, his heirs or assigns, this is to certify that said money is now invested as follows: [Her home described by street number, and a loan of \$3,800 to A. L. Munger]. Witnesseth: That said real estate with all and singular the rents, tenements, and hereditaments thereunto appertaining and said loan, together with accretions and interest due thereon and property or properties derived from said real estate or loan shall at the expiration of said trust be immediately placed in possession of said George L. Melton."

This declaration of trust appellant caused to be recorded, and is the one respondent seeks to have declared null and void by this action, on the ground it was obtained by undue influence. Appellant told respondent he desired the declaration of trust because he feared respondent's daughter, Mrs. A. L. Munger, would eventually receive part of the property covered by it.

According to the evidence, respondent became so nervous and distressed over having given appellant the declaration of trust that she began to break down physically. As a result, her son-in-law, A. L. Munger, endeavored to secure the release of the declaration of trust. At that time Munger owed respondent \$2,900 of the \$3,800 he had borrowed from her. He and appellant, who was at that time short of money, agreed that the \$2,900 should be paid to appellant through a bank in Fresno—he to assume the debt to

respondent—and, according to Munger, that a cancellation of the declaration of trust should be delivered through the same bank upon the making of the payment. The money was accordingly paid and the following document deposited with the bank:

"At the request of Jennie E. Weakley and for the sole purpose of enabling her to better enjoy the life interest in the property transferred to her as a life estate, I hereby surrender and authorize the cancellation on record of the acknowledgment of trust executed by Jennie E. Weakley on September 6, 1911, and recorded on that day in vol. 6 of Miscellaneous, page 247, Santa Cruz (California) County Records."

Appellant, on November 14, 1913, gave respondent his note for the \$2,900 loaned to him, upon which one cause of action in this suit is based. He regularly paid the interest on this note until November 14, 1916. Respondent was dissatisfied with the purported cancellation of the declaration of trust, so a proposed agreement, dated June 1, 1919, was drawn up between appellant, respondent, A. L. Munger and his wife, looking to the settlement of the entire matter. By its terms respondent was to convey to appellant the property covered by the declaration of trust, and surrender as paid the note of November 14, 1913. Appellant was to pay respondent the interest due on the note, and an allowance for her support of \$25 a month. The Mungers were to make her a like allowance. This attempt to adjust the matter failed, and respondent refused to enter into the proposed agreement.

Respondent then began this action to secure the cancellation of the declaration of trust, alleging in effect that appellant acted fraudulently in giving to respondent the authorization to cancel of record instead of surrendering the declaration of trust. The note was set out in *hæc verba*. Appellant in his answer alleged that the \$9,000 was given to respondent as a life estate only, the residue to revert to him on her death; denied that the declaration of trust was given under undue influence or that he acted fraudulently or deceived her in giving the authorization to cancel of record. Appellant further alleged that the \$2,900 was a part of the \$9,000 life estate; that he was only to pay interest at the rate of 8 per cent. per annum and not the principal, and that, on respondent's death, the note was to be surrendered to him. The court found:

That "after defendant arrived at the age of majority and after the accounts of the guardian had been settled, he made a gift to his mother of \$9,000. This gift was made by defendant to plaintiff as an outright gift and without reservation, exception, or limitation, and was accepted by plaintiff as such"; that "defendant secured the execution of said document [the declaration of trust] by said plaintiff while said plaintiff was in an extremely agitated and nervous condition, and through the exercise by

defendant of undue influence upon said plaintiff"; that "prior to the said delivery to the said Munger, as agent for plaintiff, of said purported cancellation of declaration of trust, it was understood and agreed between plaintiff and defendant that said instrument of trust should be thereby wholly canceled and that the cancellation received by her was intended to accomplish that end."

Appellant contends the evidence is insufficient to support these findings. It was also found that no part of the principal or interest of the note was paid; that the matters in dispute were never settled or compromised; and that the purported agreement of settlement was never signed by any one but appellant.

1. Appellant first asserts that—

"plaintiff's testimony, fairly and reasonably considered, goes only to the extent that the gift of this property and money to her by the defendant was for her support and maintenance, with the right to consume the principal if that should be necessary, and that, whatever remained over upon her death, should belong to defendant."

We are of the opinion this position cannot be maintained. Respondent, on direct examination testified as follows:

"Q. Then when, Mrs. Weakley, did you receive the money from the defendant which you have since claimed as your own? A. Well, I received it after he was of age, but we had talked it over, and he had promised to give it to me even before that, but I didn't ask it of him until he was of age. * * * But I told him if his father had lived until Uncle Amon had passed away I would have been entitled to half of it and he to half, and I said, 'If you will give me a third, because there is enough for both of us' * * * and he willingly said he was willing for me to have half, but I didn't ask it and didn't accept it. * * *

"Q. Now what was the substance of the conversation as near as you can recollect that occurred when this \$9,000 was turned over to you, delivered to you? In other words, what were the conditions imposed, if there were any conditions? A. * * * We never to my knowledge had one minute of controversy over this property, and he was willing and saw the justice of my having a share of it. We didn't call it a gift, and I didn't demand it, but I did ask it of him as a moral right. * * *

"Q. As I understand it, there was a conversation between yourself and your son in reference to the amount of money he had received from the different sources, and, as I understand, you related to him at that time in reference to your care of him and what you thought you should have, and then the \$9,000 was delivered to you. Now were there any specific conditions imposed upon the gift of the \$9,000? A. No, not any, but after—I remember after I had it I told him I would be careful of it and I would return what was left, what I didn't use, and I always kept it separate from Mr. Weakley's property, because I wanted George to inherit what was left of the \$9,000.

"Q. You say that was after you received it?
A. That was after I received it."

[1] This testimony is clearly sufficient to support the finding that at the time it was turned over to her, the \$9,000 was given absolutely to respondent, free from any condition, limitation, or trust. Respondent stated there were no conditions attached to the gift, but that, after it was made, she said she would return what was left, because she always wanted appellant to "inherit" what was left. It is not claimed that this promise to give appellant what was left created any trust in his favor. While in certain letters he had written he maintained that the money was held by respondent in trust for him, and he testified it was "to be used by her, as we expressed it, during her lifetime, and to be returned to me undiminished at the time of her death," respondent stated "it is not true, not one word of it. It is awful to sit here and deny my son's word, but he has not stated the facts correctly." The evidence on this issue is involved in sharp conflict, and, since respondent's testimony alone is sufficient, we are bound by the findings that the money was given to her unconditionally.

2. It is next claimed the evidence is insufficient to sustain the finding that the declaration of trust was executed while respondent was in an extremely agitated and nervous condition and through the exercise of undue influence by appellant. It is provided, in section 1575 of the Civil Code that—

"Undue influence consists: (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or, (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress."

[2] In *Soberanes v. Soberanes*, 97 Cal. 140, 81 Pac. 910, a mother made a gift of certain real property to her son. In discussing the claim that he obtained the property through undue influence, the court said:

"Some of the cases hold that undue influence is not to be inferred from the relation of parent and child * * * (*Millican v. Millican*, 24 Tex. 446); but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer (*Todd v. Grove*, 33 Md. 194; *Higberger v. Stiffler*, 21 Md. 352, 83 Am. Dec. 593)."

Respondent testified that appellant came to her home on the evening of September 5, 1911, and that he brought up the subject of the declaration of trust at that time. On direct examination she stated that—

"he commenced and told me how much he had always done for me, and how he considered it was his, and I just sat there and didn't make any reply, but his plea was he wanted to keep my daughter from getting a share of it, and my argument was they didn't want it and didn't expect it."

She further testified:

That she was so wrought up and nervous over the incident that she did not sleep that night; that the next morning she asked appellant, "Who has put you up to this?" that he said, "Not anybody;" that she was worried and cried; that she understood they were to draw up an agreement; but that, while they were waiting for the car, appellant took an agreement, already drawn up, from his pocket. That agreement was the declaration of trust which respondent later signed. She stated that he read the agreement over to her, but that, as she was hard of hearing, she did not hear half that he said, and that, as she did not have her glasses, she could not read it; that "I kept asking him not to ask me to sign it, and I asked him that at home in the kitchen, I said, 'Don't ask me to sign this, George, it is going to ruin my life, I will never care for the home if there is a cloud on the title,' and he said I would have all the privileges I ever had, 'The money is yours while I live,' * * * and I went and signed it, but I didn't know what I was signing."

On cross-examination she said:

"I don't remember anything that happened going down town, but I remember I was awfully excited and nervous. * * * I remember of George—I drew back a little bit, and I don't know that I told him I didn't want to sign it, but I drew back, and he patted me on the shoulder and he says, 'It is all right, mother, it is just to keep Pearl from making any trouble or getting it after you are through with it.'"

[3] In view of the authorities cited and this evidence, we cannot hold that the finding of undue influence was not warranted. Appellant cites *Van Valkenburgh v. Oldham*, 12 Cal. App. 572, 577, 108 Pac. 42, 44, to the proposition that—

"Persuasion is not coercion; insistence upon one's legal rights is not undue influence and pertinacious zeal to secure the payment of a just debt is not fraudulent."

But we have shown appellant had no claim to the property—that it was given to respondent free from any condition—and his obtaining of the deed of trust cannot therefore be justified as the exercise of a legal right.

3. Appellant makes the further contention that the evidence is insufficient to support the finding that he—

"fraudulently procured said sum of \$2,900 from said plaintiff and gave said plaintiff his promissory note therefor * * * and induced plaintiff to believe she was to receive a complete cancellation in consideration thereof."

He insists he "consistently refused to renounce his claim to the remainder over of the fund after plaintiff's death, but he yielded to the importunities of plaintiff and agreed to clear the record title of the Santa Cruz residence and for this purpose executed the informal release" of October 7, 1913. It is unnecessary to consider this contention, for respondent's claim to a cancellation of the declaration of trust is based upon the claim of undue influence exerted to induce her to sign it. Inasmuch as the findings support the judgment, and respondent's right to cancellation dates back to the execution of the declaration of trust, the finding as to the fraudulent securing of the loan is immaterial, and the point is without merit. Aside from the claim that all of the property is held in trust for him, he does not dispute the finding that the \$2,900 is owing to respondent.

[4] 4. Appellant contends the court erred in not admitting in evidence the proposed agreement of June 1, 1919, by which the controversy was to be settled, and which, it is asserted, would constitute a complete defense to this action. It is claimed this agreement went into effect, notwithstanding it was not signed by respondent, because it had been assented to by her attorney. But, as we have shown, the court found against the execution of the agreement, and this finding is not attacked. This being the case, it was not binding on any of the parties, and was at most an accord without satisfaction. As such, it would not constitute a defense to the action. *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534. There was no error in excluding the evidence.

The judgment is affirmed.

We concur: SHAW, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

(189 Cal. 7)

O'CONNOR v. WEST SACRAMENTO CO.
et al. (Sac. 1926.)

(Supreme Court of California. May 26, 1922.
Rehearing Denied June 22, 1922.)

1. Landlord and tenant §93—In provision for tenant's reimbursement on landlord's termination of lease the term "per acre per year" held to refer to unexpired term.

In a lease providing that the landlord might at any time or times after a fixed date terminate the lease in whole or in part, the terms "per acre per year" used in a provision for reimbursement of the lessee on termination of lease construed to refer to unexpired term, and not to the whole term.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Per Acre.]

2. Landlord and tenant §93—Phrase "credit on rent" in a reimbursement clause in case of landlord's termination of lease held to mean a credit on the rent for the entire term.

Where a lease reserved a lump sum rental payable in installments and provided that, after a named date, landlord could terminate the lease, and provided for reimbursement in such case, at different prices per acre, such to be "a credit on the rent," held to mean a credit on the whole amount of rent due.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Credit.]

3. Landlord and tenant §93—Lease construed as holding tenant for rental for entire term, although lease was sooner terminated by landlord in estimating the stipulated amount to be paid by the landlord.

Where a lease provided that lessor could terminate it after a fixed date by making certain payments "per acre per year," to be allowed as credits on the rent, held that the lump sum rental for the whole term, which was to be paid in installments, was considered an obligation of the tenant in estimating the amount to be paid by the lessor upon his termination of lease, whether such termination was in whole or in part.

4. Landlord and tenant §93—Contract as to reimbursement of tenant on termination construed.

In a tenant's action against landlord for reimbursement under the terms of a lease providing that the landlord might terminate it upon making certain payments "per acre per year," which were to be credited against the rent, which was fixed at a lump sum payable in installments, held, that the court cannot read into the contract the words "due and unpaid," and thus hold the landlord for the full amount "per acre per year," without charging against it the amount of unpaid rent for the whole term.

5. Contracts §176(2)—Construction is always for the court, no matter how ambiguous or uncertain its terms.

The construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms, and the jury can only assist the court in determining disputed fact questions.

6. Trial §199—Submitting to jury the question of parties' intention to be derived from contract's language and extrinsic evidence was error.

It was error to submit to the jury the question of the intention of the parties, to be derived in part from the language of the contract and in part from extrinsic evidence.

7. Trial §191(3)—Instruction assuming that construction of contract must be reasonable and just held error.

In a case involving the construction of the terms of a lease, an instruction which assumes, as does the entire presentation of facts by the plaintiff, that the parties drew a contract whose construction must be reasonable

and just under all circumstances, whereas the real question for determination is the meaning of the written contract, is erroneous.

8. Landlord and tenant §37—Court cannot, under guise of interpreting lease, make new contract.

The court cannot under the guise of interpreting a lease make a new contract for the parties.

9. Landlord and tenant §93—Right to claim breach of contract held waived by stipulation.

In a tenant's action against landlord to recover under reimbursement clause in a lease on its termination by the latter, plaintiff's failure to surrender the premises as constituting a breach of contract and defense to the action was waived by stipulation submitting the amount of compensation for determination.

10. Election of remedies §7(1)—Plaintiff held not estopped by selection of remedies inconsistent with right to compensation on termination of lease by landlord in view of stipulation.

It cannot be claimed that plaintiff tenant was estopped by selection of a remedy inconsistent with the right to compensation under lease provisions requiring reimbursement of rent on termination of lease by landlord in view of a stipulation by which they mutually converted the proceeding into one for compensation.

11. Landlord and tenant §18(3)—Verdict against fraud by tenant in procuring lease held supported by the evidence.

In tenant's action for money due under lease provisions upon landlord's terminating tenancy, where defendant claimed that the lease was procured by plaintiff's fraudulent representation that he was the lessee, when in fact he was acting for a corporation composed of himself and his brothers, where the lease was made to plaintiff individually, and the corporation was formed thereafter, there was no merit in the claim that there was no evidence to support the verdict against fraud.

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Thomas O'Connor, as executor of the estate of J. Harbinson, deceased, against the West Sacramento Company and others for an injunction to restrain the termination of a lease. Verdict and judgment for plaintiff, and the defendants appeal. Trial court directed to modify its judgment by reducing the amount of damages assessed.

Arthur C. Huston and Harry L. Huston, both of Woodland, and Charles W. Slack, Chauncey S. Goodrich, and John T. Pigott, all of San Francisco, for appellants.

John S. Partridge, of San Francisco, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondent.

WILBUR, J. In its final form this action is one to recover from the defendant landlord an amount claimed to be due the plaintiff tenant under the terms of the lease upon the termination on November 2, 1917, of the lease wherein the landlord let to the tenant 408.4 acres of land for three years from November 1, 1916, to and including October 31, 1919, at a gross rental of \$16,740.75, to be used for the planting and raising of alfalfa. The landlord admits an indebtedness of \$2,955.52 and tendered that amount. The tenant claims \$20,451.75 as the proper amount. The jury returned a verdict for \$13,625, and the defendant appeals from the judgment rendered thereon. The provision of the lease involved is as follows:

"15. The lessee further covenants and agrees that the lessor shall have the right, at any time or times after the 1st day of June, 1917, to terminate this lease, and the estate hereby granted, as to the whole or any portion of the said premises, by notice in writing to the lessee, given either personally to the lessee, at least thirty (30) days prior to such termination, as follows:

"Mr. J. Harbinson, 915 Second Street, Sacramento, Cal.

"In the event of such termination of this lease, for a portion only of the said premises, this lease shall continue in full force and effect as to the remainder of the said premises, subject to the continuing right of the lessor to terminate this lease, in the manner hereinafter provided, as to the whole or any portion of the remainder of the said premises. The lessor further covenants and agrees to compensate the lessee for any portion of the said premises as to which this lease shall be so terminated as follows:

"If said lease shall be terminated as to any portion of the said premises designated by green lines on the map or plat attached hereto, the lessor will compensate the lessee for each and every acre of the said premises, as to which this lease shall be so terminated, at the rate of eight and no/100 (\$8.00) dollars per acre per year if such termination shall occur on or before the 1st day of November, 1917; at the rate of ten and no/100 (\$10.00) dollars per acre per year if such termination shall occur on or before the 1st day of November, 1918; and at the rate of twelve and no/100 (\$12.00) dollars per acre per year if such termination shall occur on or before the 1st day of November, 1919.

"If said lease shall be terminated as to any portion of the said premises designated by red lines on the map or plat attached hereto, the lessor will compensate the lessee for such portion of the said premises as to which this lease shall be so terminated as follows: The lessor will compensate the lessee for each and every acre of the said premises as to which this lease shall be so terminated, at the rate of twenty and no/100 (\$20.00) dollars per acre per year if such termination shall occur during the period from June 1, 1917, to July 15, 1917; at the rate of seventeen and 50/100 (\$17.50) dollars per acre per year if such termination shall

occur during the period from July 15, 1917, to August 15, 1917; at the rate of sixteen and no/100 (\$16.00) dollars per acre per year if such termination shall occur during the period from August 15, 1917, to October 1, 1917; at the rate of fifteen and no/100 (\$15.00) dollars per acre per year if such termination shall occur during the period from October 1, 1917, to October 31, 1917; at the rate of seventeen and 50/100 (\$17.50) dollars per acre per year if such termination shall occur during the period from October 31, 1917, to October 31, 1919. Provided, however, such cash reimbursements shall be made by allowing the lessee a credit on the rent."

The lease contains almost the same provisions with regard to the "reimbursement of" and "compensation to" the tenant in case the landlord constructs "levees, canals, ditches, and other works, for the purpose of reclamation, drainage, or irrigation, or any thereof." The lease in that regard provides as follows:

"The lessor further covenants and agrees to reimburse the lessee for any portion of the said premises over which such levees, canals, ditches, or other works shall be so constructed, as follows: If such works shall be constructed on any portion of the said premises designated by green lines on the map or plat attached hereto, the lessor will compensate the lessee for each and every acre of the said premises, which shall be covered by such works, at the rate of eight and no/100 (\$8.00) dollars per acre per year if such works shall be constructed on or before the first day of November, 1917," etc.

The balance of the clause is identical with the above-quoted clause applicable to the termination of all or any part of the lease as to times and amounts within the green and red line areas, except that the phrase "if such works shall be constructed" is used instead of the phrase "if such termination occur." This clause ends like the other with the proviso:

"Provided, however, such cash reimbursements shall be made by allowing the lessee a credit on the rent."

These two clauses, practically identical, with reference to the use of a part of the premises for irrigation works, etc., and the termination of the lease, are obviously used in the same sense, and, if we can ascertain the meaning of one, it will point to the correct interpretation of the other similar clause.

[1] The tenant's contention is that the clause contains two ambiguities, one the phrase "a credit on the rent," and the other "per acre per year." With reference to the first clause it is said that it is doubtful whether or not the credit "per acre per year" is for the whole term (three years) or for the unexpired term, which in the present instance, as the lease was terminated at the expiration of the first year (November 2, 1917), is two years. Or, to express the doubt

in terms of money, the question is whether a credit of \$35 or of \$52.50 per acre should be allowed in the red boundary area and \$20 or \$30 in the green. These areas, it may be said, are 371.1 acres in the red and 32.2 acres in the green. There does not seem much room for doubt as to the meaning of the phrase "per acre per year" when it is remembered that the purpose of the "reimbursement" or the compensation is to make compensation to the tenant for his loss, which is represented by loss of the use of the land occupied by levees, etc., or as to which the lease is terminated for the balance of the term.

[2] The other phrase, "a credit on the rent," seems plain enough when it is remembered that the lease reserves a lump sum as rental (\$16,740.75) and makes no provision for an annual or monthly rental, or for the payment of the rent in equal installments at yearly, semiannual, or monthly periods, from which it might be inferred that the rent was adjusted with reference to such periods. The only rent mentioned in the lease is in the following phrase:

" * * * Yielding and paying unto the lessor, as rental of the said premises, the sum of sixteen thousand seven hundred forty and 75/100 (\$16,740.75) dollars, payable by the lessee to the lessor * * * in installments as follows."

These installments are: Two items, \$1,323.14 (evidenced by a note executed contemporaneously with the lease) and \$1,323.13, total \$2,646.27, on June 25, 1917; \$3,286.30 on November 1, 1917; \$1,963.17 June 25, 1918; \$4,257.11 November 1, 1918; \$2,293.95 June 25, 1919; \$2,293.95 before October 31, 1919. This would make \$5,933.57 payable during the first year, \$6,220.20 during the second, and \$4,597.90 during the third year. The average yearly rental would thus be \$5,580.25, or an average annual rental of \$13.34 per acre. It seems clear enough that the phrase should be read "allowing the lessee a credit on the rent (reserved in the lease)." In the case of the larger tract (371.1 acres) the amount agreed to be allowed as a "credit on the rent" is in each instance greater (\$20, \$17.50, \$16, \$15, \$17.50) than the average rental (\$13.34) per acre, and, if we assume that the rental value of the two pieces is in proportion to the allowances made in the respective areas, it is evident that the allowance is in each instance greater than the average rental per acre so apportioned. This is the interpretation of the lease adopted by the lessor when he tendered the sum of \$2,955.52 at the termination of the lease.

[3] We will now consider the claims made by the respondent tenant. First, it is claimed that the proviso should be construed as though it read "a credit upon the rent due and unpaid at the time of the termination of

the lease." And in this connection it is also urged that the termination of the lease ipso facto terminated the obligation to pay rent. It could not be applied to rent due and paid, because money so paid becomes the property of the landlord. It is no longer "rent," nor could the stipulated set-off well be applied to moneys already paid, nor could it well be applied to future rents; for according to the contention of the tenant there would be no future rents. Hence the construction contended for that the proviso applies to rents due and unpaid. But it is presumed that the tenant will pay his rent when due, and, if he does, there will be no period of time except the day when the rent is due when there will be any rent upon which the amounts specified may be "credited."

As it appears that this theory is the one adopted by the jury, we will give it further consideration. The jury were instructed as follows:

"(2) If you find that the intention of the parties was that Mr. Harbinson should receive compensation for the balance of the term at the rate of \$10 per acre for the 32 acres, and \$17.50 per acre for the 371 acres, then your verdict must be for the plaintiff for the sum of \$13,625.10."

The jury returned a general verdict for that amount, thus adopting this view. The tenant paid the rental due November 1, 1917 (\$3,286.30), and hence the tenant was allowed the reimbursement without "crediting on the rent," for on this theory there was no rent on which to credit it. The fundamental assumption on which this verdict is based is that all rental ceased upon the termination of the lease. This would ordinarily be true and is true here in a sense, for, if the allowance to the tenant on termination of the lease in every case is equal to or greater than the rent reserved for the balance of the term, as is the case here, then there will be no further rent paid. Indeed, it is conceded that the landlord must make a payment to the tenant at the termination of the lease, and that the tenant makes no further payment to the landlord. The lease as a contract is not terminated. It is still in effect between the parties, and the plaintiff is seeking to recover under its terms. What the parties dealt with in the clauses under consideration was the termination of the tenant's estate in the land, or, in the case of irrigation works, etc., of the beneficial use of the land by the tenant. In the absence of any contract with relation to the matter, no doubt the tenant's obligation to pay all future installments of rent would cease. In this case the lease does not fix the rental value of the land for any period less than three years, and it was as appropriate to make provision for the rights of the parties upon its termination during

that period as it would have been if all the rent was to be paid in one installment at the termination of the lease.

The particular form of the agreement evidently resulted from the fact that the clauses in question contemplated the termination or use by the irrigation works of a part only of the premises rather than a termination of the entire leasehold, although provision was also specifically made for the latter event. In the case of irrigation works, etc., the tenant's right to the possession of the acreage devoted to this use continued. The lease still remained in full force and effect as to the entire 403.4 acres. The allowance made as a credit on the rent is because the tenant has lost the beneficial use of that portion as an alfalfa farm. Hence he is credited with the value of the use thereof on the rental. He is thus "reimbursed" or "compensated," to use the language of the lease.

The significance of this clause concerning the construction of irrigation works, etc., lies in the fact that there is no occasion or opportunity to consider the legal effect of a surrender or termination of the lease, and no chance to argue that the right to rental ceased, in whole or in part, with the whole or partial termination of the lease, for the lease is still in full force and effect; the tenant's beneficial use thereof has merely been impaired by the works in question. It would follow that a similar construction should be placed upon the termination clause, couched, as it is, in the same language. The only occasion for considering the clause with reference to the construction of irrigation works, etc., is the fact that this clause demonstrates that the continuance of a legal estate in the part as to which the lease is terminated or used is a false quantity in the case; the amount to be credited under the lease is the same in each event. Another consideration leads to the same conclusion. The termination clause deals with whole or partial termination. If partial, it is clear that the obligation still remains to pay the entire rent reserved in the lease, less the credit for which provision is therein made. If this is a correct conclusion, there is no adequate reason for adopting a totally different construction where the whole estate is terminated. It is not reasonable to assume that the parties intended that the retention of a single acre, or part of an acre, for instance, should result in the tenant being required to pay all future installments of rent, amounting in this case to \$10,818.18, and should pay no part of it if the last acre was also included in the notice of termination. The parties have a perfect right to fix any terms they can agree upon as the basis of adjustment upon the termination of the tenancy, and there is no reason to believe that they contemplated a wholly different adjustment of their rights

in case of a partial and of a total termination. They might have done so, but there is nothing in the language of the lease under consideration which points to such a conclusion. It is apparent that the form of agreement resulted from the fact that the lease reserved a lump sum rental. For that reason it would have been difficult to frame a provision for reimbursement for partial loss which was not in the form of a credit upon the whole rental reserved where there was no apportionment of the rental to either time or acreage.

It is clear then, we think, that the allowance to the tenant is the same per year per acre, whether the allowance is for 100 acres or for 403 acres or for the whole 403.4 acres, and that the lump sum rental was considered an obligation of the tenant in estimating the amount to be paid by the landlord upon the termination of the lease, whether whole or partial.

[4] The appellant's claim is untenable that the above-quoted proviso should have read into it the words "due and unpaid" as to the rent upon which the allowance was to be credited. To add these words to the lease is beyond the power of the court or jury. Such a construction would defeat the claim of the plaintiff, for he here seeks to recover \$20,000, not as a credit upon rent "due and unpaid," for there was no such rent, but by a judgment requiring the defendant to pay to him that amount. The amounts to be allowed to the tenant upon termination bear no relation to the time or amount of the payment of the installment of rents. Apparently the amount to be paid the tenant the first year was fixed wholly with reference to the maturity of the crop on the land, and without reference to the payment or nonpayment of rent or of other considerations which will be presently mentioned. The tenant claims that, if the notice terminating the lease had been effective October 31, 1917, instead of November 2, 1917, he would have wholly escaped the payment due November 1, 1917, of \$3,286.30, because such rental would not have been due on October 31, 1917, and for that reason he complains somewhat that the landlord selected November 2d as the date of termination.

The payment or nonpayment of the rent must be an immaterial factor in the problem. It is not reasonable to believe that the parties intended that the selection of a date of termination with relation to a date of payment of an installment of rent should have any such result, thus making a difference of over \$10 per acre per year (\$4,257.11) between a termination of the lease October 31, 1918, and November 2, 1918. Such a construction is wholly inconsistent with the care with which the exact allowance per acre per year is regulated during the sum-

mer and autumn of 1917. If the lease is terminated in June or the first two weeks in July the rate is \$20 per acre; from July 15th to August 15, 1917, it is \$17.50 per acre, although a payment of \$6.56 per acre (\$2,646.27) is made July 25, 1917. The rate from October 1st to October 31st is \$15 per acre, and changes on that date to \$17.50, and remains the same for the balance of the term, although a payment of \$8.15 per acre (\$3,286.30) is due the next day (November, 1917) and remains the same, although three payments, amounting to about \$5 per acre, and one of over \$10 per acre, are made during this period. It is clear from the foregoing that the allowances to the tenant were made without reference to the dates or amounts of rent installments, which leads to the conclusion that the allowances were to be made against the whole rental reserved, which amount, except in the case of a termination of the whole lease, or nearly the whole lease, would be larger than the allowance.

[5, 6] While we have no doubt that this is the correct construction of the lease, and this conclusion determines the case, we will nevertheless deal with some of the points of the parties, particularly as the appellant claims that the reimbursement clause is too uncertain to be enforced, and the respondent claims that it is so ambiguous as to permit and require extraneous evidence for its interpretation. The appellant contends, and the respondent admits, that the construction of the lease is a question of law.

"Of course," says respondent, "it is elementary that the construction of a contract is always a legal question or a question of law for the court. However, where parol evidence is required to clear up the meaning of ambiguous language, such evidence should be submitted to a jury, which must determine the meaning of such ambiguous language. With the meaning of such language made clear by the jury, the court determines the legal effect of the writing. * * * All that was submitted to the jury's consideration was the meaning of the language 'per acre per year' and 'credit on the rent.'"

In this connection it should be observed that no such question was submitted to the jury. They were nowhere asked to construe the meaning of either of these terms or phrases. The instruction on which they returned a verdict is quoted above. The jury were thereby instructed to bring in a verdict for the plaintiff for \$13,625.10, "if you find that the intention of the parties was that Mr. Harbinson should receive compensation for the balance of the term at the rate of," etc. The object of all construction is to arrive at the intention of the parties, so that the instruction submitted to the jury a question of law just as truly as if the court had used the equivalent phrase, "if you construe the contract to provide that Mr. Harbinson

should receive," etc. This instruction and similar instructions were erroneous.

The respondent cites as justifying the instruction section 66, *Blashfield on Instructions*; *Coquillard v. Hovey*, 23 Neb. 622, 627, 37 N. W. 479, 8 Am. St. Rep. 114; *Taylor v. McNutt*, 58 Tex. 71; *Chambers v. Ringstaff*, 69 Ala. 140, 146; *State v. Patterson*, 68 Me. 473, 475; *Cunningham v. Washburn*, 119 Mass. 224, 226; *T. E. Foley v. McKinley*, 114 Minn. 271, 131 N. W. 316, 318; *Rapp v. H. Linebarger & Son*, 149 Iowa, 429, 128 N. W. 555; *Durand v. Heney*, 33 Wash. 38, 73 Pac. 775; *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454; *Hope v. Maccabees*, 91 N. J. Law, 148, 102 Atl. 689, 691, 1 A. L. R. 455; *Paepcke-Leicht Lumber Co. v. Talley*, 106 Ark. 400, 153 S. W. 833, 836; *Yost v. Silvers*, 138 Mo. App. 524, 119 S. W. 971, 973; *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 998, 96 N. W. 1007; *Vulcan Iron Works v. Electro Magnetic Mining Co.*, 54 Ind. App. 28, 99 N. E. 429, 431, 100 N. E. 307; *Jones v. De Coursey*, 12 App. Div. 164, 42 N. Y. Supp. 578; *Arlington Heights Realty Co. v. Citizens' Railway & Light Co.* (Tex. Civ. App.) 160 S. W. 1109.

We will not undertake to analyze these cases for the reason that the fundamental principle involved is elementary, and is recognized in these decisions, namely, that the construction of a contract is always a matter of law for the court, no matter how ambiguous or uncertain or difficult its terms, and that the jury can only assist the court by determining disputed questions of fact. If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury, and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances. On the other hand, if such circumstances are in dispute, and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury, but in no case can the proper construction of the contract be left to a jury. *California W. D. Co. v. Cal. M. O. Co.*, 178 Cal. 337, 341, 177 Pac. 849. Any instruction that leaves more than this to a jury is erroneous. The dispute may be concerning the accepted meaning of trade or technical or colloquial terms in such cases, and in such cases only does the jury determine the meaning of the terms or language used in a contract. No such condition exists here. The terms of the contract are couched in ordinary language to be determined according to accepted usage, unless the circumstances of the parties and the entire contract show that the language used in the contract must receive a different or unusual construction.

In note to 12 L. R. A. 376, it is said:

"The meaning of terms of art or business is for the jury.

"This is the rule where testimony is necessary to determine the meaning of the term; but when the meaning is determined, the construction of the contract with the meaning so determined is for the court"—citing *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 19 L. Ed. 987, and other cases.

"The construction of a written contract is for the court alone, as soon as the true meaning of the words used and the surrounding circumstances, if any, have been ascertained as facts, and it is the duty of the jury to take the construction from the court"—citing *Levy v. Gadsby*, 7 U. S. (8 Cranch) 180, 2 L. Ed. 404, and other cases.

"So where the meaning of words is affected by a custom or usage of trade, it is for the jury to say in what sense they were used by the parties." 1 *Blashfield's Instructions to Juries*, § 66, p. 133.

And this would be true where the contracts between the parties and the ordinary course of business contemplated by them in connection with the contract gave to the terms therein used a peculiar meaning, such, for instance, as in the case of *First National Bank v. Bowers*, 141 Cal. 253, 74 Pac. 856, where the words "with B-L attached" were to be construed. It was admitted by the parties that the letters "B-L" meant a bill of lading, but the question in issue was what sort of a bill of lading was contemplated by the parties. It was contended, on the one hand, that the bill of lading intended was one which vested title to the oranges therein described in the bank, and, on the other hand, that according to the course of business of the parties it meant any bill of lading accompanying a draft for oranges even where the consignee was an agent of the consignor and regardless of whether or not the bank secured a lien upon the oranges by the bill of lading. The trial court having instructed the jury to bring in a verdict for the defendant, it was held that the instruction was erroneous for the reason that the court thereby determined that the defendant was only liable as guarantor for such drafts as had attached thereto bills of lading which conveyed title, whereas it was shown that according to the ordinary course of business as conducted for the two years covered by the guaranty it had been the custom of the Haight Fruit Company, whose drafts were guaranteed by the defendant, to use the form of draft by which the shipper retained control over the consigned fruit until delivered. Under these circumstances it was held that the jury should determine the sense in which the parties used the term "bill of lading attached." The main question considered by this court was whether or not the construction of the contract of guaranty by the trial court was correct, and the court does not in-

dicating the form of instructions by which the questions should be submitted to the jury. Upon the second appeal in that case, 153 Cal. 95, 94 Pac. 422, it is said:

"Upon appeal [the previous appeal] this court held that the wording of the guaranty was not so plain, unambiguous, and certain as to have justified the court in refusing evidence explanatory of it."

The decision of the court in *First National Bank v. Bowers*, supra, goes no further than to hold that, where a technical phrase like "bill of lading" is used, it can be properly left to a jury to determine the form and terms of the bill of lading intended by the parties as ascertained by their conduct and dealings with reference to bills of lading. This case is not authority for submitting to the jury the general question as to the intention of the parties to be ascertained by construing a contract, and expressions in the opinion which would so indicate cannot be considered as authority because juries are triers of the facts and not of the law, and because of subsequent decisions in which the functions of the jury in matters of interpretation are determined. *Estate of Donnellan*, 164 Cal. 14, 19, 127 Pac. 166, 168; *Estate of Thomson*, 165 Cal. 290, 131 Pac. 1045; *Cal. W. D. Co. v. Cal. M. O. Co.*, supra. In *Estate of Donnellan*, supra, wherein the construction of a will was involved, it was said:

"It is a fundamental and indisputable proposition that, wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is one of law; it is an application of legal rules governing construction either to the will alone or to properly admitted facts to explain what the testator meant by the doubtful language. In those cases where extrinsic evidence is permissible there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact. But, when the facts are thus found, those facts do not solve the difficulty. They still are to be applied to the written directions of the will for the latter's construction, and that construction still remains a construction at law. In such cases, where the evidence of the facts is in conflict, it is permissible for the court or for the jury to find the facts and those findings, under firmly established principles, will not here be disturbed. But the application to the will itself of the facts found, admitted, or established presents a question of legal construction, which is as purely a question of law as is a construction of the will without resort to extrinsic evidence. Therefore, if the facts have been found by the court upon conflicting evidence, this court, accepting the findings, will still review the construction of the court in probate and determine whether or no a wrong construction at law has been reached. If the facts are admitted, or established without conflict, the justness of the application which the court made of those facts in its construction will equally, as a legal proposition, be the subject of review. Again, it is fundamental that in all cases where extrinsic evidence is admis-

sible to aid in expounding the will the evidence is limited to this single purpose. It is considered for the purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed (though perhaps obscurely) by the language of the will itself."

The same rules apply to interpretation of contracts. In *Estate of Thomson*, supra, at page 296 of 165 Cal., at page 1048 of 131 Pac., it is said:

"Appellant contends that this [the question of construction] is really a conclusion of law, and that the determination of the scope and meaning of a contract is always a question of law. *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166. It is perfectly true that the construction of a contract, whether that construction is to be arrived at from a mere reading of the contract itself, or from such reading aided by extrinsic evidence of circumstances and the like, is always a construction of law. But, upon the other hand, it is equally true that whether or not there is a sufficient consideration to support a contract is always a question of fact."

In *Cal. W. D. Co. v. Cal. M. O. Co.*, supra, it is said:

"The construction of the contract in the light of the real facts is a matter of law."

In that case it was held improper to submit to the jury the question as to the intention of the parties in using the phrase "into the oil sand" contained in an oil drilling contract unless that phrase had some "special local meaning, or customary construction, with reference to which the parties contracted."

It was error in this case to submit to the jury the question of the intention of the parties to be derived in part from the language of the contract and in part from extrinsic evidence.

[7, 8] Let us next consider the character of the extrinsic evidence relied upon to ascertain the proper construction of the contract. The situation, as stated by the respondent, is as follows:

"To aid the court and jury in construing this language, the witness Harbinson was permitted to testify to many extrinsic circumstances and matters which establish, and from which, as we have pointed out, the jury concluded, the intent of the parties was that the company was to compensate Harbinson for the *unexpired* term of the lease, deducting therefrom, however, such rent as might be due. * * * From the testimony of the witnesses Harbinson, Glide, and Klingsmith a conflict arose. There was testimony from which the court or jury could infer or conclude that Harbinson *was to be compensated so much per acre per year for the unexpired term*, and while the appellant has made no assertions as to what the testimony of Glide and Klingsmith established, if we are correct in our presumption there was also testimony from which the court or jury might infer or conclude that Harbinson *was to be compensated*

only so much per acre, regardless of the length of the unexpired term." (Italics ours.)

The evidence upon which this statement is based may be summarized as follows: Harbinson testified that he had seeded the land to alfalfa, and that in January, 1917, frost destroyed the young alfalfa, and that therefore he was compelled to reseed the land; that the reasonable expense of mowing, raking, plowing, discing, harrowing, clod-mashing, and seeding would be \$4,826 and of re-seeding \$1,976, total \$6,802, and that therefore his total expenditures for the first year were \$12,734; that the anticipated return for alfalfa for the first year would be one ton, or \$10 net per acre, while the second and third years the return would be six tons per acre, making a net return to the tenant of \$48,360 for the last two years and a loss of \$8,704 for the first year.

The appellant presented a witness who testified to a conversation between the plaintiff and the defendant's agent at the time the lease was being drawn to the effect that the amounts of \$20, \$17.50, \$16, \$15, and \$17.50 were fixed with reference to the time of cutting the alfalfa and a crop of volunteer barley on the place during the year 1917. Nothing was said in that conversation about the installments of rent falling due under the contract, or about the payments "per acre per year."

The reason advanced by respondent for the reception of the evidence offered on his behalf is thus stated by respondent's counsel:

"But, further than that, one of the circumstances that the court or the jury are entitled to in getting at the meaning of this lease is what would be a fair compensation to Joe Harbinson when it was terminated."

Assuming that such evidence was admissible, where was the conflicting testimony to be submitted to the jury? There was no dispute about the cost of improving the land or about the conversation. If either of these factors were applicable to the interpretation of the contract, it was the duty of the court to make the application. Instead, the jury were instructed as follows:

"Gentlemen of the jury, you are instructed that you are entitled to take into consideration all the circumstances and facts as shown by the evidence and bearing upon the subject-matter of this lease. The subject-matter of the lease is the land, and in determining what compensation the plaintiff is entitled to, if any, for the termination of the lease, you are entitled to take into consideration the condition of the land at the time the lease was made, what would be necessary to do to the land to get it into a condition to get a stand of alfalfa, and also what would be necessary to produce on it a good stand of alfalfa. You are also instructed that you are entitled to take into consideration the amount of expense which the parties had in mind in so cultivating the land and getting a good stand of alfalfa. You are likewise entitled to take into consideration the amount of rent

paid and to be paid, and also what would have been the value of the leasehold interest in the land to Mr. Harbinson with a good stand of alfalfa on it; and in determining what should be the amount of your verdict, if any, for the plaintiff, you are entitled to determine whether or not the parties entering into the lease took into consideration the expense of getting a stand of alfalfa, the amount of rent to be paid, and the value of the land in alfalfa for the portion of the time left after the lease should be terminated; and if, in the light of these circumstances you believe that the intention of the parties was that if the lease should be terminated Mr. Harbinson should receive \$17.50 per acre per year for the three years, then you must find your verdict accordingly, and estimate and determine the amount. If, however, you determine that the intention of the parties was, in light of all the circumstances, that the amount of compensation should be \$17.50 per acre for the remainder of the time from November 1, 1917, to November, 1919, then you must render your verdict accordingly. In other words, you are instructed [here follow hypothetical instructions, including that upon which the verdict was based]."

By this instruction the jury were directed in effect to place themselves in the position of the parties and to construe the contract, while this was exclusively the duty of the court. If the expense of planting the land to alfalfa was a legitimate matter to be considered, the evidence was before the court for that purpose. The fact is that the instructions virtually left the jury to determine whether \$20,451.75 or \$2,955.52 or \$9,643.57, or nothing was a fair compensation to the plaintiff under the circumstances, for the court expressed no opinion whatever on the subject of the proper interpretation of the contract. The fact is that the only difficulty in the case arises out of the extrinsic evidence, and the apparent hardship thus shown to result to the tenant from the termination of the lease on November 2, 1917. The instruction to the jury assumes, as does the entire presentation of the facts by the respondent, that the parties drew a contract, whose construction must be reasonable and just under all the circumstances, whereas the real question for determination is the meaning of the written agreement. The parties may not have anticipated and evidently did not anticipate every possible condition arising from a termination of the lease at different periods during the term of the lease. It is, of course, true that the lease should be given an interpretation which would work no obvious injustice to either party if the language used is susceptible of such an interpretation, but, if not, it must be construed according to its plain import. As we have said, the terms of the lease are plain and unambiguous. The effort of the jury to give to the lease an interpretation that would be just, based upon a speculation as to what the parties intended, in effect requires the landlord not only to remit the rental for the last

two years of the term, but in addition to pay the tenant a larger amount for the land for that part of the term (\$13,625) than the tenant had agreed to pay for that period. In other words, the landlord is required to pay the tenant \$6,812.50 per year for two years for its land instead of receiving from the tenant \$5,580.25 per year (if we assume that \$5,932.57 it received is a fair rental for the first year), while, if respondent's claim had been adopted, the amount paid by the landlord for the last two years (\$20,451.75) would exceed the entire rental reserved for the whole term. On the other hand, the interpretation we have placed on the lease means a loss to the tenant of \$5,748.48. If we subtract from that loss the amount due to the unforeseen frost, it follows that the lease was so drawn that a loss of \$3,772 was likely to result to the tenant by the termination of the lease on November 2, 1917. It is therefore not a reasonable agreement as applied to the particular date of termination, but it can be made reasonable only by making a new contract for the parties, which cannot properly be done, and should not be attempted under the guise of interpreting the lease. The extrinsic evidence introduced in this case did not aid in its interpretation or justify the conclusion of the court and jury.

[9] This action was begun by the plaintiff on November 1, 1917, to restrain the defendant from taking possession of the land in pursuance of its notice of September 12, 1917, terminating the lease on November 2d. The basis of the action was the alleged insolvency of the defendant and the fact that the amounts due to the plaintiff under the lease were unpaid. The defendant answered and tendered \$2,955.52, the amount it admitted to be due to the plaintiff. Thereafter on November 6, 1917, it was stipulated that the plaintiff should immediately surrender possession of the premises to the defendant, that defendant would pay \$10,000 to the clerk of the court to secure to plaintiff any amount found due to him by the defendant, and that it be determined in the action what amount of money was due the plaintiff by reason of the termination of the lease. Thereafter the plaintiff filed an amended and supplemental complaint, January 8, 1919, and an amendment thereto January 14, 1919, the answer to which was filed during the trial. The defendant now claims that the failure of the plaintiff to surrender possession on November 2, 1917, was a breach of the contract, which prevents any recovery by the plaintiff. In view of the stipulation surrendering possession on November 6, 1917, and in the express agreement to submit the amount of compensation to determination in this case, it is clear that the breach, if any, was waived by the stipulation.

[10] It is claimed that the plaintiff was estopped by the selection of a remedy incon-

sistent with a right to compensation but, in view of the stipulation, that question cannot arise, for this action was by mutual agreement converted into one for compensation.

The same thing is true in regard to the alleged failure of the plaintiff to prove performance of the terms of the lease which was alleged in the general terms permitted by the Code. The claim is that plaintiff's refusal to surrender the possession of the premises on November 2, 1917, was a breach, but, as we have said, this was waived by the stipulation.

[11] Defendant claims that the lease was procured by fraud, and that the verdict in that regard was against the uncontradicted evidence. The fraud is alleged to consist in representation by the plaintiff to the defendant that he was the lessee, when, in truth and in fact, he was acting for a corporation composed of himself and his brothers. The lease was made to him individually and the corporation was not formed until after the lease was executed, so there is no merit in the claim that there was no evidence to support the verdict against fraud.

What has been said disposes of other points raised by the appellant. The respondent is entitled to the sum tendered by the appellant, and should have interest thereon and costs because the appellant virtually withdrew its tender when it advanced the claim that the plaintiff should recover nothing.

The trial court is directed to modify its judgment by reducing the same to the amount of \$2,955.52, with interest from November 2, 1917, at the rate of 7 per cent. per annum, plus the plaintiff's costs of the first trial; appellant to have his costs on appeal deducted from the judgment.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SHURTLEFF, J.

SLOANE, J. I dissent. In my judgment the proviso for paying lessee compensation for terminating his lease two years before the expiration of the term "by credit on the rent" is ambiguous as to what rents were referred to in the use of that expression. It was an ambiguity which could only be resolved by a consideration of all the conditions and circumstances surrounding the transaction in order to determine in what sense the word "rent" was used, whether as referring to rents "due and unpaid" for the expired part of the term as found by the verdict of the jury or rent "reserved in the lease" as determined by the majority opinion on this appeal.

The facts developed in evidence tending to throw light upon the interpretation which should be given to the use of the word "rent" in this connection, while established by unconflicting testimony, give rise to conflicting inferences; that is, some of the conditions and

transactions suggest that the words "credit on the rent" were used in one sense, and some that they were used in the other. Under these circumstances the question was clearly one of fact for the jury.

The authorities cited in the opinion of Mr. Justice WILBUR to the point that the construction of a contract is always a question of law for the court, no matter how ambiguous its language, if the extraneous evidence explaining the ambiguity is not conflicting, are unquestioned. It is equally as well settled, however, by these authorities and others, that where the evidence is conflicting, it becomes a question of fact for the jury, not to construe the contract, but to determine what meaning the parties themselves attached to the ambiguous terms, and it is also recognized that such conflict may arise from different inferences which may be drawn from undisputed facts, as well as from a dispute as to the facts themselves. *T. E. Foley Co. v. McKinley*, 114 Minn. 271, 131 N. W. 316; *Rapp v. Linebarger & Son*, 149 Iowa, 429, 128 N. W. 555; *Durand v. Heney*, 33 Wash. 38, 73 Pac. 775.

First National Bank v. Bowers, 141 Cal. 253, 74 Pac. 856, is a case in point, and closely parallel to the one before us. There the ambiguity arose in the use of the term "bill of lading attached." As the main opinion states, in reviewing the decision:

"The question in issue was what sort of a bill of lading was contemplated by the parties."

It was contended, on the one hand, that the bill of lading intended was one which vested title in certain oranges, and, on the other hand, that it meant any bill of lading accompanying a draft for oranges regardless of whether the consignee secured a lien by the bill. The matter was to be determined by evidence as to the custom existing in similar transactions. The court says, quoting *Thompson v. McKay*, 41 Cal. 228:

"The rule is well established that, in construing doubtful instruments, they must be interpreted in the light of the surrounding circumstances. After ascertaining the relation of the contracting parties to each other, and the subject-matter of the contract, the court will, if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, provided it can be done without disregarding the language of the instrument, when all its parts are considered.' * * * The purpose to be subserved by this rule is to place the court or jury in the position of the parties at the time the contract was made, and enable it to intelligently interpret the language used by them. * * * Under these principles the plaintiff had a right to have submitted to the jury the question of what was intended, understood, and meant by the parties in the use of the term 'bill of lading attached.'"

In the instant case the opposing parties contend, on the one hand, that in using the

term "credit on the rent" the parties had in mind such rents as might be due and unpaid when the lease was terminated; on the other, that the rent referred to was the term "rent" stipulated in the lease, which remained unpaid covering the remaining two years of the term for which the lease had been canceled.

It may be conceded that it is possible from certain expressions of the lease contract to give the interpretation to the disputed clause contended for by appellant, without recourse to extraneous evidence. But, on the other hand, there are other declarations that are inconsistent with such interpretation.

The lessor contracts to compensate the lessee for the loss of the remainder of the term, in case of an exercise of the option to terminate the lease, and the stipulated damages for the two years of the unexpired term in this instance was \$13,625.

When the lessor exercised his option to terminate the lease as to the entire premises, the obligation of the lessee to pay future rentals was also terminated. It is conceded that all accrued rents had been paid. If the contract for damages had stopped at the unqualified agreement to compensate the lessee in the sum of \$13,625, for the loss of the unexpired term, there would have been no question of the latter's right to recover that amount, without deducting therefrom over \$10,000 of rent that he did not owe. Is it a reasonable interpretation of the provision that this payment should be made by a "credit on the rent" that the parties thereby intended to bind the lessee to account for rents which, under the terms of the contract, were not due or owing?

Under this construction of the contract it will be seen by a little computation that, had the lease been terminated six months earlier or six months later, the stipulated compensation would have been entirely canceled by the unexpired term rental, and all the lessee would have received from the agreement to compensate him would have been a release from obligation to pay rent on the terminated leasehold, which release he already had by virtue of the voluntary cancellation of the lease by his landlord.

The conditions of the termination of the lease as it occurred here left a balance due the lessee over the unpaid term lease of \$2,955.52, which, under the ruling of the majority opinion, is all the compensation he will receive for the unexpired two years of his valuable leasehold.

When we consider, under the extraneous evidence, together with other significant facts, that the parties to the lease in framing this contract had under consideration the amount of remuneration which would compensate the lessee for the loss of the last two years of a three-year lease upon 400 acres of land which was to be planted to alfalfa

the first year, at a probable net loss for that season, and contemplated matured crops for the last two years which were expected to net to the lessee many thousands of dollars the second and third years, it is a violent interpretation which accepts the one of two meanings of the term used, which would leave the tenant with only a nominal compensation for his loss.

It is argued that, if the unpaid term rent was not the thing referred to in this proviso, the reference to rent could have no application, as all accrued rents were presumed to be and had actually been paid before the termination of the lease. The option, however, reserved by the lessor to so cancel the lease extended to all or any part of the acreage, and it may well have been within the contemplation of the parties that such option would only be exercised as to part of the land, leaving accruing rents on the remainder to be applied on the stipulated damages.

I think the interpretation adopted by the jury was consistent with the conditions shown in evidence and supports the verdict for \$13,625.

When the lessor agreed to "compensate" the lessee at a fixed rate per acre per year for the loss of the canceled two years of his leasehold, it agreed to give him something of value for surrendering the remainder of his term. There is no compensation in merely granting to the lessee the privilege of paying himself by applying to his claim rentals which he no longer owes, on lands which he no longer possesses.

The verdict of the jury is based upon a rational, common sense interpretation of the intent of the parties, and supports the only construction of the contract consistent with justice and fair dealing.

In the language of Justice Shaw in *Stein v. Archibald*, 151 Cal. 223, 90 Pac. 537:

"It is a well-settled principle applicable to the construction of contracts that, where one construction would make the contract unreasonable, unfair, or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted."

It is true that the question of fact as to the interpretation of the ambiguous language of this lease was not submitted to the jury under an appropriate instruction, and instructions were given which, it is claimed, left with the jury the construction of the contract. But, even so, this error would only call for a reversal and new trial, and should not be followed by a judgment of this court taking the interpretation of the controverted language from the consideration of a jury.

Ex parte FUJII. (Cr. 2420.)

(Supreme Court of California. June 1, 1922.)

1. Constitutional law \Leftrightarrow 240(1)—Evidence \Leftrightarrow 18—Weights and measures \Leftrightarrow 2—Prohibiting sale of strawberries in half-pint containers a reasonable classification.

The provision of Fruit and Vegetable Standardization Act, § 7, that the standard basket for strawberries shall be the dry pint, though the same section permits half-pint baskets for other berries, is not unreasonable or discriminatory, since it is a matter of common knowledge that strawberries are larger and of more irregular shape than other berries, so that the sale in small containers would be detrimental to the purchaser, and since the pint and half-pint containers had the same surface area, the difference being in their depth, which is not observable when the baskets are packed, as they usually are, in six-basket trays.

2. Weights and measures \Leftrightarrow 2—Acts to limit deception in marketing should be liberally construed.

Acts providing standard containers for fruits and vegetables, having for their purpose the protection of the purchasing public by the elimination of deceptive methods in the marketing of products, are beneficial in a high degree, and are to be liberally construed.

In Bank.

Application of Frank Fujii for a writ of habeas corpus, prayed to be directed to the Sheriff of the City and County of San Francisco, to secure the release of petitioner from custody on a charge of violating the California Fruit and Vegetable Standardization Act. Writ denied.

Eugene F. Conlin, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and R. W. Harrison, Deputy Atty. Gen., for respondent.

PER CURIAM. Application for a writ of habeas corpus. The applicant was arrested upon the charge of a violation of the provisions of an act of the Legislature known as "The California Fruit and Vegetable Standardization Act" (Stats. 1921, c. 719), committed by the applicant on or about the 29th day of October, 1921, in the city and county of San Francisco, as follows:

That the said Frank Fujii "then and there unlawfully, feloniously and willfully did sell, offer for sale and expose for sale certain strawberries in containers holding less than one dry pint, to wit, one-half dry pint, contrary to the force and effect of the statute," etc.

The applicant now seeks this writ, basing his application upon the ground that the particular provision of said act with the violation of which he is charged is unconstitutional, for the reason that the same is not uniform in its operation, but is discrimina-

tory, in that it imposes an arbitrary and unreasonable limitation and restriction upon the property rights of the applicant in the ownership and sale of his strawberries. The particular provision of said act which the application thus assails reads, in part, as follows:

"Sec. 7. Standard packages are hereby established as follows: * * *

"(2) Standard berry baskets, dry pint containing an interior capacity of approximately thirty-three and six-tenths cubic inches and dry one-half pint containing interior capacity of approximately sixteen and eight-tenths cubic inches; *provided, that the standard basket for strawberries shall be the dry pint.*"

[1] Section 14 of the act makes it unlawful for any person, firm, company, organization or corporation "to pack or cause to be packed for sale, or shipment, import, sale, offer for sale or deliver for shipment, any of the fresh fruits, nuts or vegetables specified in this act that do not conform to the standards herein provided. It shall also be unlawful to prepare, sell or offer for sale, a deceptive pack of fresh fruits, fresh vegetables," etc., "or to mislabel any package of such fruits, nuts or vegetables." The particular discrimination upon which the applicant herein relies is that created by the foregoing provisions in section 7 of said act as between the growers and sellers of strawberries and the growers and sellers of other berries, such as blackberries, loganberries, raspberries, huckleberries, currants, and the like, which latter berries may be packed, shipped, and sold in dry one-half pint containers, while strawberries may only be packed, shipped, and sold in dry pint containers. This, the applicant contends, creates a discrimination for which no proper basis in the way of legitimate classification exists. The applicant offers no evidence in support of this contention, but relies upon the face of the statute itself, and, in a measure, upon common knowledge as to the comparative sizes and properties of these respective species of berry product as furnishing the necessary support of his claim. The respondent to the petition herein, on the other hand, presents, as a part of his showing in support of the lawfulness of the petitioner's detention, the actual containers used in the packing, shipment, and sale of these respective berry products in conformity with the standards fixed by the statute, both in the form of the individual basket in both the pint and half-pint sizes and of the larger container known as the berry box or tray, which holds six baskets of either the pint or half-pint size. In this meager state of the record we are asked by the applicant to hold this act, as to the particular provision above quoted, unconstitutional, as showing upon its face an unjustified discrimination against the growers, shippers, and sellers of strawberries.

We are unable to so hold even with the aid of that common knowledge of the similarities

and differences in the several species of berries which the applicant seeks to invoke in aid of his contention. It is a matter of common observation and knowledge that strawberries are, as a rule, much larger than the other varieties of berries referred to, and that, as a rule, they are less uniform as to size and also as to form, especially in the larger varieties. It is also a matter of common observation and knowledge that strawberries cannot be placed as compactly in containers as other varieties of berries can without rendering them liable to crushing, with the consequence of their speedy degeneration and decay. These facts of themselves would seem to furnish some basis for a classification having to do with size of containers, but when there is added to these matters of common observation and knowledge the showing made by the respondents as to the particular forms and sizes of berry containers in common use, both as to the individual basket and as to the larger box or tray, holding in each case six baskets, the reason for the classification made by the act in question becomes obvious. The half-pint basket in common use for berries is shown to have the same area as to its upper surface as the pint basket, the difference in content being due to the fact that it is much shallower in depth and of much less area as to its bottom. It is reasonably plain that this reduction in area would work to the disadvantage of the larger, more rigid and less uniform strawberry, or, in other words, that the ratio in quantity and weight would not remain constant with the reduction in size of the container. But the chief difficulty does not lie here, but rather in the divergences in ratio and opportunities for deception furnished by the customary use of the larger box or tray in the packing, shipment, and sale of the berries. These larger boxes or trays are of uniform size, whether containing the pint or half-pint basket. In each case six baskets fill the tray. When these baskets are filled with berries and placed in these trays the upper and visible area is the same in the tray containing half-pint baskets as it is in the tray containing pint baskets. The interior or lower area of each size of basket, is concealed, and thus the purchaser has no ready means of detecting the difference in content of the two trays, although the one has but half the content of the other. This opportunity for deception would not be so serious if the two sets of trays and baskets were exhibited side by side for comparison or other test as to their content, but this condition would rarely be presented if the purpose of the seller was that of deception. The act in question evidently had this precise matter in view in its provision, above quoted, making it unlawful "to prepare, sell or offer for sale a deceptive pack," etc. It may be argued that this opportunity for deception is as great in the other species of berries as in the case of strawber-

ries, but the answer is that the same inconsistent proportion in content which was seen to exist in case of the individual baskets would also appertain in a larger degree to a cluster of baskets in the trays of uniform area. We think, therefore, that there is a sufficient basis for the classification made use of in this act to justify the discrimination as to the size of containers for strawberries.

[2] With the policy of the law we have not to deal, but it may be said that acts of this character, having for their purpose the protection of the purchasing public by the elimination of deceptive methods in the marketing of products, are beneficial in a high degree, and that such acts are to be liberally construed so as to give effect to their salutary regulations.

The writ is denied, and the petitioner remanded.

RICHARDS, Justice pro tem., and LAW-
LOR, WILBUR, SHURTLEFF, and WASTE,
JJ., concur.

(189 Cal. 50)

GEARY ST., P. & O. R. CO. v. ROLPH et al.
(S. F. 9350.)

(Supreme Court of California. June 2, 1922.
Rehearing Denied June 29, 1922.)

1. Corporations §243(3)—Principal is liable for calls on stock held in agent's name as trustee.

Where stock of corporation stood on the company's books in the name of a trustee, who was agent for the real stockholder and holding the stock for his principal within the scope of the authority of the agent, the principal is liable to the corporation for calls for a portion of the unpaid balance of the subscription price of the stock.

2. Principal and agent §132(1)—Principal is liable for agent's contracts within scope of authority, though made in agent's name.

A principal is responsible to third persons for the ordinary contracts of his agent made with third persons in the course of the business of the agency and within the scope of the agent's powers, though such contracts were made in the name of the agent, and did not purport to be other than the agent's personal obligations.

3. Principal and agent §145(4)—Third person cannot hold undisclosed principal after electing to hold agent.

The rule that a third person can hold an undisclosed principal on contracts made by his agent in the agent's name is subject to exception when the third person knows he is dealing with an agent and knows who is the principal, and thereafter elects to hold the agent, and not the principal.

4. Corporations §228—Liability of stockholder for unpaid portion of subscription is not in writing.

The liability of a stockholder to an insolvent corporation for the unpaid portion of the par value of the stock is not evidenced by a written agreement, but arises from his relation to the company as a stockholder.

5. Principal and agent §132(1)—Fact that principal was known to third person does not relieve his liability on contracts in agent's name.

The mere fact that the principal is known to a third person at the time the latter makes a contract with the principal's agent in the name of the agent instead of the principal does not alone prevent the third person from holding the principal liable on the contract, in view of Civ. Code, § 2330, stating that an agent represents his principal for all purposes, and that liabilities which would accrue to the agent if they had been entered on his account accrue to the principal.

6. Corporations §89(1)—Insolvency of corporation is not necessary to entitle it to enforce stockholder's liability for unpaid par value.

It is not necessary that a corporation be insolvent to entitle it to enforce the liability of its stockholders for the unpaid balance of the par value of stock subscribed for by them.

7. Corporations §228—Insolvent corporation owes duty to call for unpaid subscriptions for stock.

It is the duty of an insolvent corporation to resort to the liability of its stockholders for unpaid portions of the par value of its stock to enable the corporation to discharge its debts, and, if it fails to perform its duty in that respect, the creditors can enforce such liability.

8. Corporations §243(3)—Statute requiring transfer on corporate books does not prevent holding undisclosed principal liable for stock in agent's name.

Civ. Code, § 324, providing that a transfer of corporate stock is not valid except as to the parties thereto until it is entered on the books of the corporation, does not prevent a corporation from enforcing a call for the unpaid balance on its stock against a stockholder whose stock stood on the books of the corporation in the name of an agent as trustee.

9. Corporations §89(1)—Calls by corporation on unpaid subscriptions must be equal on stockholders.

The call by a corporation upon its stockholders for portions of the unpaid price of the stock, to be enforceable in statutory proceedings, must be equal on all stockholders, so that, when all have paid the call, each will have paid the same amount on each share of stock subject to the call.

10. Corporations §228—Creditors can hold any stockholder for entire amount due on subscription.

Creditors of a corporation can require any stockholder to pay the entire amount due on his stock subscription for the satisfaction of

their claims, leaving it to the stockholder to bring suit against the other holders to equalize the burden.

11. Railroads ⚡15—Evidence held not to sustain finding that greater amount had been paid on some stock subscriptions.

In an action to enforce a uniform call on the holders of all the stock of a railroad corporation, evidence that, when a corporate franchise was procured, 1 per cent. of the stock was subscribed and 10 per cent. of the par value of that stock paid, as required by Civ. Code, §§ 293, 294, but that thereafter calls were made and apparently paid in equal amounts by the stockholders, does not sustain a finding that a portion of the stock, erroneously stated by the trial court to be 10 per cent., had been subject to payments larger than the rest of the stock, so as to render an equal call against all shares of stock invalid, but rather supports the inference that the amount paid in to secure the franchise had been returned to those who advanced it or had been credited on subsequent calls.

12. Corporations ⚡90(6)—Evidence held not to sustain finding stock was full paid as between corporation and stockholders.

Evidence that one by-law of a corporation declared that certificates should be issued only for full paid stock, which was contradicted by another by-law providing for the issuance of stock when 20 per cent. had been paid thereon, with evidence that the stock in controversy did not recite that it was full paid when issued, which was not required by Civ. Code, § 323, prior to its amendment by St. 1906, p. 397, held not to show that the stock issued to defendant had been issued as full paid as between the corporation and the stockholders, so that the corporation could not levy a call thereon exceeding 10 per cent. under Civ. Code, § 332.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Geary Street, Park & Ocean Railroad Company against James Rolph, trustee, and Robert F. Morrow, in which William Grant Morrow and another, as executors, were substituted as defendants after the death of Robert F. Morrow. Judgment for defendants, and plaintiff appeals. Reversed.

Pillsbury, Madison & Sutro and Alfred Sutro, all of San Francisco (Eugene M. Prince, of Berkeley, of counsel), for appellant.

William M. Abbott, Wm. M. Cannon, K. W. Cannon, and E. J. Foulds, all of San Francisco, for respondents.

SHAW, C. J. This is an action by the plaintiff to recover of defendants the amount due from them upon an assessment or call for a portion of the unpaid subscription price of its corporate stock, amounting to \$54,876 upon 1,614 shares of the stock. The action

was begun in 1916, in the lifetime of Robert F. Morrow, against James Rolph, as trustee, and said Robert F. Morrow. On June 3, 1918, Morrow died. Thereupon his executors were substituted as defendants in his stead, and a claim for that amount was duly presented to them for allowance and was by them rejected. Whereupon the action proceeded to trial and judgment for the defendants. The plaintiff appeals.

The complaint alleges the number and value of the shares of the plaintiff's capital stock; that its par value is \$100 per share; that only \$37.50 had been paid thereon; that a call had been regularly made on the stockholders for the payment of an additional sum of \$34 per share thereon for the purpose of raising money wherewith to pay its debts; that it has no assets with which to do so other than the liability of the stockholders for the unpaid balance of the stock value; and that it had duly elected to collect the amount called for by action instead of by sales of the stock. It then alleged that Robert F. Morrow was, at the date of the call, and had been ever since July 17, 1902, the owner of 1,614 shares of said stock, which shares at all times mentioned had stood and still stood in the name of James Rolph, trustee, on the books of said corporation, and for which, prior to July 17, 1902, certificates had been issued in the name of James Rolph, trustee, by plaintiff at the request of said Morrow, which certificates were by plaintiff delivered to Morrow and which he accepted and which he at all times thereafter owned; that said Rolph never had any interest in or title to the stock; and that Morrow, as such owner, had demanded and received from the plaintiff all the dividends declared by the plaintiff on said stock. The answer admitted that the said shares stood in the name of Rolph, as trustee, and that certificates had been issued to him in his name by the plaintiff, but denied the ownership thereof by Morrow, the receipt of any dividends thereon by him, the delivery of the certificates to Morrow, and the acceptance thereof by him.

The court made findings showing that the plaintiff had issued the amount of stock aforesaid; that only \$37.50 had been paid on the par value of 90 per cent. thereof; that \$47.50 had been paid on the remaining 10 per cent.; and that the call had been regularly made, as alleged, for \$34 on each share of the entire stock. The findings also state that the 1,614 shares of stock in controversy were issued to James Rolph, trustee, and at all times stood on plaintiff's books in that name. No findings in response to the allegations of ownership by Morrow were made. The findings merely state that the shares were not issued in the name of James Rolph, trustee, at the request of Morrow, and that they were not delivered by plaintiff

to Morrow or accepted by him. The failure of the court below to find upon the allegation of ownership was evidently based on the theory that Morrow could not be the owner of stock, so as to become liable to the corporation or its creditors for calls thereon for unpaid subscriptions, unless it stood on the corporate books in his name, or unless the corporation had in some manner and with his consent recognized him as the holder thereof, and that the facts that he was the beneficial owner, and the record holder his agent or trustee to hold the stock in that manner for his use and benefit, were immaterial.

It was further found that it is not true "that said Robert F. Morrow, otherwise than as the agent or representative of said James Rolph, trustee, demanded or received from plaintiff any dividend or dividends on said stock or any thereof." Technically the finding that the dividends were not received "from plaintiff," except as to one or two of them, is correct. But, if it was intended as a finding that Morrow had never received for his own use and benefit any of the dividends declared and paid by plaintiff on the stock, it is directly contrary to the undisputed evidence. The evidence shows that 116 dividends were declared and paid after May 26, 1895, the date when the first 400 of the 1,614 shares were issued to Rolph, trustee. The dividends were uniformly paid by means of checks payable to James Rolph, trustee. Rolph testified that he had regularly received these checks; that the same were usually delivered to him by Morrow, or by some one for him; that he always indorsed these checks to the order of Morrow at once and redelivered the same to him; and that he had never received or kept any of said checks for his own personal use. This evidence was not contradicted or in any manner impeached.

The plaintiff assigns as error the failure to find the facts in regard to the allegations of ownership. An examination of the record shows that there was abundant evidence to justify a finding that Morrow was at all times after its issuance the real and actual owner of this stock, and that in taking and holding it in his own name Rolph was acting solely as agent for Morrow and for the exclusive use and benefit of Morrow. In addition to the testimony of Rolph, as aforesaid, the testimony of Morrow himself, although evasive in the extreme, was sufficient to warrant the conclusion, beyond doubt, that he was the real owner. It follows that, if such ownership and agency are material to the right of the plaintiff to recover, or if the facts show such relations between Morrow and the corporation as to make him liable for calls for unpaid subscriptions, the failure to find such facts was error which requires a reversal of the judgment. Two questions are thus presented: (1) Whether or not a call for unpaid subscriptions of stock, made for

the purpose of obtaining money necessary to pay the debts of an insolvent corporation, can be recovered by the corporation from one who is the real owner of stock which stands on the books of the corporation in the name of another as trustee or agent, the trust or agency being for the sole purpose of holding the stock for the use and benefit of the real owner; (2) whether or not the conduct of Morrow with respect to this stock and the corporation put him in such relation or privity with the corporation as to make him directly liable to it for such calls.

It will not be necessary to consider the second question. We are of the opinion that under the facts of this case Morrow became liable to the corporation for the call in question.

[1] Rolph held the legal title to this stock. It was registered on the corporate books in his name as trustee. Morrow's ownership was not disclosed by the registry. But Rolph held it solely for the use of Morrow and as Morrow's agent for that purpose. As such holder Rolph assumed the obligation to the corporation to pay the balance remaining unpaid upon the subscription price, which, in the absence of any contrary showing, is presumed to have been the par value. He assumed this obligation in carrying out his agency, and it came within the scope of his powers as such agent.

[2] It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract.

"It is thoroughly well settled in the law of agency that, when a simple contract, oral or in writing, other than a negotiable instrument, is in fact entered into by one of the parties as the authorized agent of another, but in his own name, and without disclosing to the other party the name of the principal, or even the fact that he is contracting as agent at all, the other party to the contract, while he has a right to sue the agent on the contract, may, at his option, maintain an action against the undisclosed principal, when discovered." 1 Clark & Skyles on Agency, § 457, p. 1006.

See, also Story on Agency, § 446; 2 Mech- em on Agency, § 1710. The following cases in this state enforce or announce this rule: Ellis v. Crawford, 39 Cal. 526; Thomas v. Moody, 57 Cal. 219; Goss v. Helbing, 77 Cal. 190, 19 Pac. 277; Puget S. L. Co. v. Krug, 89 Cal. 244, 28 Pac. 902; Ferguson v. McBean, 91 Cal. 72, 27 Pac. 518, 14 L. R. A. 65; Bergholdt v. Porter B. Co., 114 Cal. 689, 46 Pac. 738; Schader v. White, 173 Cal. 445, 160 Pac. 557; McKee v. Cunningham, 2 Cal. App. 688, 84 Pac. 260; Walton v. Davis, 22 Cal. App.

459, 134 Pac. 795; *Eldridge v. Mowry*, 24 Cal. App. 186, 140 Pac. 978.

It has been said in some cases that this rule does not prevail when, at the time the contract is entered into, the principal is known. In *Ferguson v. McBean*, supra, the court, in the course of its discussion, said:

"It is undoubtedly true that when the principal is undisclosed he may sue or be sued, but not when he is known, and especially not when he is present at the making of the contract."

But the court was there considering the question whether or not one Bills was interested in or bound by a written contract executed by McBean alone, upon negotiations conducted by plaintiff with both McBean and Bills in which the interest of Bills, if any, was fully disclosed. The decision was based on the conclusion that the plaintiff deliberately chose to take the contract of McBean alone instead of a contract by both, and that under the peculiar circumstances of the case parol evidence could not be received to show an intent to deal with both so as to make Bills liable as an interested party, because it would violate the rule that parol evidence is inadmissible to vary the terms of a writing. The above-quoted statement was not necessary to the decision, nor was the decision based on it.

[3] The rule is subject to the well-recognized exception that the principal cannot be held liable when the third person knows that he is dealing with an agent and knows who is the principal, and elects to hold the agent rather than the principal. 1 Clark & Skyles, Agency, §§ 459, 461, 462. It was to this proposition that the above statement was leading.

[4] In this case the exception stated in some cases that the rule cannot be applied when the contract is in writing is of no importance, for the liability of Rolph for the unpaid subscription is not evidenced by a written agreement to that effect, but arises from his relation with the company as a stockholder. *Rhode v. Dock Hop Co.*, 184 Cal. 376, 194 Pac. 11, 12 A. L. R. 437. It does not appear that the corporation was informed, at the time Rolph became the holder of this stock, that he was holding it for Morrow, as agent or otherwise, nor that it has ever endeavored to enforce the obligation against Rolph, instead of Morrow, or otherwise elected to hold Rolph liable therefor in place of Morrow.

[5] We are also of the opinion that the better reason, as well as the weight of authority, is against the proposition that the mere fact that the principal is known to the third person at the time he contracts with the agent prevents such third person from holding the principal liable on the contract made in the name of the agent. We treat this point because upon a new trial it may appear that the agency was fully known to plaintiff.

That the principal is not liable in such a case if the circumstances, or the terms of the contract, or the two combined, show an intent by the other party to take the agent as his debtor or obligor, in preference to the principal, is, as we have said, well established, and it is manifestly in accordance with reason and justice. In such a case the election takes place at the time of the making of the contract. But, where no such election or intent appears and there is nothing more than a contract made in the name of the agent, knowing him to be such and with knowledge of the identity of his principal, the case is, and should be, governed by the well-known principle that he who acts by another acts by himself; that the contract of the agent, within the scope of his authority, is in legal effect the contract of the principal. The Civil Code states that—

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent * * * within such limit, if they had been entered on his own account, accrue to the principal." (Section 2330.)

Here Rolph was engaged by Morrow to register Morrow's stock in his, Rolph's, own name, and hold it for the use of Morrow. It was a necessary incident of such agency that Rolph should assume in his own name the obligation to pay up, on call, the balance of the stock subscription. He was therefore authorized by Morrow to assume such obligation. If Rolph had entered into this relation on his own account the liability for the calls would, of course, have "accrued" to Rolph. Consequently, under the rule of section 2330, the liability to respond to such calls "accrued to the principal," Morrow.

The authorities fully support this conclusion. Mr. Story says:

"The liability of the principal to third persons upon contracts made by his agent, within the scope of his authority, is not varied by the mere fact, that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit is given to the agent."

And he extends this doctrine to written contracts. Sections 446, 446a. And as to the exceptions he says:

"The exceptions to this liability of the principal may easily be gathered from what has been already stated. If the principal and agent are both known, and exclusive credit is given to the latter, the principal will not be liable, although the agent should subsequently fail; for it is competent to the parties to agree to charge one, exonerating the other; and an election, when once made, is conclusive and irrevocable." Section 447.

"Sometimes a subscription for stock is made by one person in his own name, but really he is acting as the agent of another, and the stock is entered on the corporate books in the name

of the agent. In such a case it is the rule that corporate creditors may hold either the principal or the agent responsible on the stock." 1 Cook on Cor. § 249.

"In America the relation of the real owner to the 'dummy' is held to be that of principal and agent, and the principal is held liable, on the ground that an undisclosed principal is liable on the contracts of his agent." 1 Cook on Cor. § 253.

In *Clark & Skyles on Agency* it is said that the doctrine stated might seem to be—

"opposed to the general principle of the law of contracts that a contract cannot impose a liability upon a person who is not a party to it, but this principle is held inapplicable because of the doctrine of the identity of principal and agent. The principal, although not named in the contract or disclosed at all, is regarded as having become a party thereto through the agent. The minds of the parties meet because, as was said in substance in a New York case, the agent's mind is his undisclosed principal's mind."

The reference is to *Kayton v. Barnett*, 116 N. Y. 627, 23 N. E. 24.

An examination of the decisions of the subject show that the idea that the principal cannot be held liable in cases where the third person, at the time of contracting, knew the principal and his relation to the transaction, arises from the unfounded assumption that, since the decisions holding the principal liable when the contract does not disclose his name or interest, refer to him as the "undisclosed principal," the doctrine does not prevail when he is known. But this language is used because the principal was insisting, not that he is not liable when he is known, but that he is not liable when the contract does not on its face purport to bind him, or to be for his behoof or benefit. It is this circumstance that is referred to by the word "undisclosed." The principal would have no standing in court to say he is not liable when his authorized agent makes a contract purporting to be for him and the party taking it had full knowledge of the fact that it was for him. The liability when he is undisclosed does not arise from his not being known, although sometimes fraud from that fact is also involved, but from the fact that the contract of his authorized agent, though not in his name, is really for his benefit and in his business. Thus Mr. Mechem says:

"The principal is also liable on all informal contracts entered into on his account and by his authority and not expressly made on the agent's responsibility rather than the principal's. * * * Where a person is known to be acting as the agent of a disclosed principal, the presumption is that the principal, and not the agent, is to be bound." 2 Mechem on Agency, § 1710; see, also section 1717.

[§, 7] It is not necessary to the enforcement of this liability that the insolvency of the plaintiff corporation or its inability to

pay its debts should appear, for the liability exists under the general principles of law. In this case, however, the insolvency does appear, and these liabilities for calls are not only part of the corporate assets, but they constitute the whole thereof. It is the duty of the corporation to resort to them for the payment of its debts, and, if it fails in that respect, its creditors may do so. *Sanger v. Upton*, 91 U. S. 60, 23 L. Ed. 220; *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; *Rhode v. Dock Hop Co.*, 184 Cal. 378, 379, 194 Pac. 11, 12 A. L. R. 437. There are many cases holding that, where the corporation is insolvent, the creditors have the benefit of the liability of the real owner of stock held on the books of the corporation in the name of an agent, disclosed or undisclosed, but really for the benefit of the real owner. Among them are the following: *Brown v. Artman* (C. C.) 166 Fed. 485; *Brown v. Huey* (C. C.) 166 Fed. 483; *Kurtz v. Brown*, 152 Fed. 374, 81 C. O. A. 498, 11 Ann. Cas. 576; *American, etc., Co. v. Kurtz* (C. C.) 134 Fed. 665; *White v. Marquardt*, 105 Iowa, 147, 74 N. W. 930; *Fell v. Securities Co.*, 11 Del. Ch. 234, 100 Atl. 788; *Gordon v. Cummings*, 78 Wash. 519, 139 Pac. 493; *State ex rel. v. Superior Court*, 44 Wash. 108, 87 Pac. 40; *Cole v. Satsop*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; *Ohio V. N. Bank v. Hulitt*, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423.

[8] In opposition to this conclusion, the defendants rely on section 324 of the Civil Code and on the decision of this court in *People's Home Savings Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280, *Geary Street, etc., Co. v. Bradbury*, 179 Cal. 46, 175 Pac. 457, and *Visalia, etc., Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136, which, they claim, prevent the application of such rule in this state.

The provisions of section 324 relating to the question are as follows:

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock * * * are personal property, and may be transferred by indorsement, by signature of the proprietor * * * and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer."

It is claimed by the defendants that this provision forbids and prevents the existence of any liability for calls upon unpaid stock in favor of the corporation, against any one except the registered owner. It will be seen from the language of the section that it does not purport to declare anything concerning the liability of a stockholder for the unpaid part of the subscription price. It relates ex-

clusively to transfers of shares of stock and to the things necessary to make such transfers valid as to other persons than the transferor and the transferee. We are not here concerned with the validity of the transfer of the stock to James Rolph, trustee, as between him and the person who transferred it to him. The record does not show how or from whom Rolph received the stock. The theory upon which the plaintiff here is allowed to choose to resort to the liability of the principal for the obligations of his agent is not based upon the proposition that the transfer of this stock to Rolph as trustee for Morrow was invalid. On the contrary, it assumes the validity thereof, and places the liability of Morrow upon the doctrine already stated that the principal is liable to such third person on any valid obligation incurred by the agent to such person in carrying out the business of the agency. There is nothing in the provisions of section 324, or in any other provision of the Code, that in any manner relates to or affects the right which the corporation would have, under the general principles of law, to enforce against the principal the obligation incurred by the agent. Such right depends on the relation of principal and agent existing between Morrow and Rolph with respect to the stock. That relation is perfectly lawful, and its lawfulness is not affected by the fact that Morrow could not maintain any right as a stockholder to participate in the management of the corporate affairs at stockholders' meetings, or to inspect its books, except through the medium of Rolph as his agent and trustee. The right of the corporation to pursue Morrow for Rolph's liability is not at all inconsistent with the absence of any right in Morrow to personally act in or control the corporate business. The provisions of section 324, therefore, do not constitute a defense to this action.

We find nothing in the decisions cited by the defendants which gives to section 324 the effect claimed for it, or which impairs or destroys the plaintiff's right to pursue Morrow for the amount of the call formally and technically made upon Rolph as holder of this stock.

People's Home Savings Bank v. Stadtmuller, supra, is the leading case in this state on the subject. In that case the plaintiff attempted to enforce an unpaid call by action against Anna Stadtmuller. The stock had been subscribed for and had been issued to F. D. Stadtmuller, her husband, in his lifetime, and he died the owner thereof. Upon the settlement of his estate the certificates and title thereto were distributed to said widow. She accepted the certificates and retained the same, but never caused the transfer thereof to her to be entered on the books of the corporation, nor otherwise assumed the relation of a stockholder with the

plaintiff. The corporation about that time became insolvent, and shortly afterward duly made a call for the unpaid portion of the subscription price of the stock. The court said that, where stock had been transferred from the record holder to another who does not cause the transfer to be registered, "or in some way equivalent in the eye of the law establishes the relationship of stockholder between himself and the company, and is thus accepted by the company as a substituted stockholder for the original holder," the corporation "has no right of action against the transferee, because, as between him and the corporation, the contractual relation of stockholder has not been created." It will be seen that there had been no agency of the husband to hold the stock for his wife; the corporation did not attempt to enforce the original subscription of the husband as her agent or in his own behalf, but was proceeding solely to enforce the obligation which it claimed had been created by implication of law against the wife upon the acceptance by her of the stock distributed to her. There was no suggestion or claim that she was liable as principal for the obligation of her agent incurred for her in the course of his business as such agent. That question did not arise, and the decision does not affect it in any manner.

In *Visalia R. R. Co. v. Hyde*, supra, the stock was entered on the corporate books in the name of Hyde, but before the making of the call thereon he had sold it to another person and had indorsed and delivered the certificate to that person. That transfer, however, had not been entered on the corporate books. It was held that the defendant was liable for the call, notwithstanding the previous sale and the fact that he was not the owner thereof when the call was made. The mere statement of the facts shows that the right of the corporation to sue the principal for an obligation assumed in his behalf by his authorized agent was not involved in the case. In *Geary Street, etc., Co. v. Bradbury*, supra, it is said incidentally in the course of the argument that a purchaser of stock not fully paid up does not become liable to the corporation for calls thereon until in some manner he comes into privity with it as a stockholder. But the defendant in that case was the registered owner of the stock at the time the call was made, which, it may be remarked, was the same call as is here involved, and no question of the character here involved and urged was presented or could be presented. These cases, therefore, do not conflict with our conclusion that Morrow became liable as principal.

Upon the foregoing principles we are of the opinion that Morrow became liable to the plaintiff for calls regularly made on the subscription price of this stock, that his ownership of the stock and Rolph's agency were

facts material to the plaintiff's case as alleged, and that the court below erred in failing to find such facts.

The respondent contends that the assessment is invalid because it is unequal in operation. The point is based on the findings that in 1915, when the assessment was made, there were outstanding 10,000 shares of stock of the par value of \$100 each, upon 90 per cent. of which \$37.50 a share was paid up, and upon the other 10 per cent. \$47.50 a share was paid up. This would mean that 9,000 shares were paid up to \$37.50 a share and 1,000 shares up to \$47.50 a share.

[9] The prevailing rule with regard to calls made by the corporation itself on unpaid subscriptions for additions to its working capital is that they must be equal, so that, when all have paid the call, all the stockholders included in the call will have paid the same amount on each share of their stock subjected to the call. 4 Thompson, Corp. § 3713; 1 Cook on Corp. § 114; 1 Clark & M. on Corp. § 499f; O'Dea v. Hollywood, 154 Cal. 70, 97 Pac. 1.

[10] Where creditors proceed by bill in equity to apply the unpaid stock subscription to the payment of corporate debts, this rule does not prevail; each is liable for the full amount unpaid on his subscription, and any inequality resulting from the proceeding is adjustable only by suits for contribution between the respective stockholders. Kaye v. Metz (Cal. Sup.) 198 Pac. 1049; 1 Cook on Corp. § 211; Pentz v. Hawley, 1 Barb. Ch. 123. While this call and the action to enforce it is really for the benefit of creditors, it is nevertheless a statutory proceeding, and, so far as we are advised, it is uniformly held that such a call by the corporation pursuant to statutory authority is void unless it is made in such manner as to produce no inequality between stockholders. To apply this rule to the present case, for illustration, a call for \$34 a share could not be lawfully made on all the shares, if some of them are only \$37.50 paid up and others are \$47.50 paid up. Hence, under this rule, if the facts are as stated, the call would be invalid.

[11] The only basis for the finding that 1,000 shares were paid up to the amount of \$47.50 a share is the statement in the plaintiff's articles of incorporation, dated November 5, 1878, that the amount of the capital stock is \$1,000,000, divided into 10,000 shares of \$100 each; that the amount thereof actually subscribed was 100 shares; that this was more than \$1,000 per mile of the length of the road; and that 10 per cent. thereof had been paid in to the treasurer. One hundred shares, it is to be noted, was only 1 per cent. of the total capital stock, not 10 per cent., and the remainder thereof was 99 per cent., not 90 per cent. The sum paid in was not \$10,000; it was only \$1,000. Therefore

the finding that \$47.50 was paid up on 1,000 of the shares is not sustained by the evidence.

The effect on the validity of the assessment might perhaps be the same, the inequality would still be manifest, if \$38.50 instead of \$47.50 per share had been paid on part of the stock assessed, and only \$37.50 on the remainder. There is evidence, however, showing that the inequality did not exist. The books and records of the corporation were partly destroyed by the great fire of April, 1906. There was uncontradicted evidence, partly secondary and partly derived from books not destroyed, to the effect that the books showed that on May 30, 1879, an assessment was made for \$5 a share on the whole 10,000 shares of capital stock, and that it was on that day paid to the treasurer and credited thereon to the respective stockholders, amounting to \$50,000, and that the next credit entry on the book was "June 4, 1879, Franchise (S. C. Bigelow) \$1,000." Bigelow was the treasurer. It was also shown by like evidence that thereafter on the same books follow credits to the respective holders of all the stock for payments of seven other assessments, made at monthly intervals thereafter, six for \$5 a share and one for \$2.50 a share, the whole amounting to \$375,000, or \$37.50 on each of the 10,000 shares; that neither the \$1,000 nor any part thereof was credited to the original subscribers, or to any stockholder as a payment on his stock, nor credited as a payment on account of capital stock at all, but only as "Franchise." This evidently refers to the franchise obtained by filing the articles of incorporation, for the recital in the articles was obviously made to show compliance with the provisions of the Civil Code requiring that before such articles are filed by any railroad corporation stock must be subscribed to the amount of \$1,000 for each mile of road (section 293), and that "there must be paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed" (section 294). The articles do not expressly say that the 10 per cent. paid in to the treasurer was paid by the 10 persons named therein as subscribers, or either of them, or in their behalf. The inference from all this is very strong either that the \$1,000 was paid by some person on behalf of all the persons who then and afterwards took up all the stock, and was afterward refunded to him, or that before any assessment was made it was in some way equalized so that all were liable to calls in equal amounts per share. The fact that each of them, or their successors in interest, within 15 months after the filing of the articles, voluntarily paid eight separate calls of the same amount upon each share, amounting in all to \$375,000 without raising any objection on account of inequal-

ty, coupled with the fact that said evidence also shows that for 35 years following, up to the year 1915, when the present call was made, the books of the corporation continuously carried charges amounting to precisely \$375,000 against said stockholders, as balances unpaid on the subscription price of their capital stock, and credits amounting to exactly \$375,000 to said stockholders for payments made by them thereon, instead of \$376,000, as it would have been if the \$1,000 had not been in some way refunded, is very persuasive, if not conclusive, proof that this "Franchise" payment was either repaid out of the general funds of the corporation to the person or persons who paid it, credited in the collection of the subsequent calls, or otherwise adjusted, so as to equalize the matter between all the stockholders. The record shows that the court below, in its consideration of the evidence, assumed that \$10,000 was paid in on the 1,000 shares subscribed before the filing of the articles. This, in effect, was considering a fact which was not true and which was not in evidence. It constitutes error in character the same as the receiving of incompetent evidence, or as an erroneous interpretation of the effect of a writing on a material matter. With this erroneous idea as to the amount paid in, the court would not give the same weight to the above-mentioned strong circumstantial evidence of a subsequent return or distribution of the comparatively small sum of \$1,000 actually paid and of the consequent equalization of the amount paid per share by the several stockholders. The entry of "Franchise \$1,000" would be wholly without significance, and there would be nothing to explain the absence of any account of the \$10,000. In so far as the possible inequality of \$1 per share on 1,000 shares might be sufficient to support the judgment, if that fact had been found, or in so far as the finding of a larger inequality could be regarded as immaterial in view of the actual existence of the smaller one, it would be a judgment based on a fact which the court did not find, and which it is extremely doubtful that it would have found but for the erroneous interpretation of the effect of the evidence as aforesaid. Consequently the judgment should be reversed in order that the trial court may give the due effect to all the circumstances bearing on the point. It may be remarked in this connection that the opinion of the learned judge of the court below is printed in respondent's brief, and that it does not discuss or mention this point, but places the decision for the defendant altogether on the two propositions that Morrow could not be held liable unless he was the registered holder of the stock, and that there was no estoppel to prevent him from denying such ownership.

[12] There is also a finding that ever since

its issuance the whole of the capital stock of the corporation plaintiff has been and "is now fully paid up as between plaintiff corporation and its stockholders." Upon this finding the defendant contends that, under section 332 of the Civil Code, no assessment thereon could exceed 10 per cent., and therefore that the assessment of 34 per cent., or \$34 a share, is invalid. The finding by its terms implies that the stock is not paid up as between the corporation and its creditors, for whose benefit this assessment was levied, and hence it may be doubtful if it affects that assessment. But we do not think it is sustained by the evidence. The only support for it is an inference drawn from the by-laws adopted in 1878. These by-laws are contradictory on the subject so far as they relate to it all. Section 29 declares that "certificates of stock shall be issued only for fully paid stock." This, it is said, implies that no certificates were afterward issued except for stock that was fully paid up. Section 31 declares that stock shall be transferrable on the company books, on proper assignment and delivery to the assignee of "the receipts for the installments paid on such stock, or the certificates of stock when fully paid," but not "until all previous calls or installments thereon shall have been fully paid in," nor "unless at least twenty per cent. has been paid thereon and receipts issued thereon." This clearly indicates that the stock was not paid up at that time. The subsequent proceedings and transactions and the books of the company repel and destroy all inferences that the stock was issued as paid-up stock, or was, in fact, fully paid. On April 25, 1899, the order for the first assessment of \$5 a share was made. It was all paid in full on May 30, 1879. The entry made at the time on the books shows that the entire capital stock had been subscribed for, the names of the subscribers, the number of shares held by each, and the payment by each of them of the \$5 assessment on each share held by him. If the stock had been fully paid for previously, as now contended, there would have been a credit in the cash account for \$1,000,000 in money paid for the capital stock. But no such credit appears, or ever did appear, and no one has ever claimed that any such payment was ever made. There is no record of the expenditure of such money by the corporation, or of its possession thereof. If that amount of money had been paid to the corporation at that time, there would have been no reason or necessity for any assessment on the stock, or for any issue of bonds. Yet the record shows, as above stated, that calls or assessments on the stock were made and paid monthly from April, 1879, to January, 1880, amounting to \$375,000. It also shows that in 1890 the corporation issued bonds to the amount of \$484,000, secured by a mortgage

covering all of its properties, and that the present assessment was made to raise the money necessary to pay a deficiency judgment entered against the corporation on a foreclosure sale under said mortgage; also, as already stated, that the stock account carried a charge of \$1,000,000 against the stockholders for the aggregate amount owing upon the several stock subscriptions; that this was reduced by the credits for payments on the eight calls made and paid thereon, amounting to \$375,000; and that the balance owing from stockholders was thereafter carried on the books at \$625,000. It also appears that each of the eight orders or resolutions for the aforesaid calls began with the words, "It is hereby ordered that an assessment upon the subscribed capital stock" be levied. If there had been assessments upon paid-up stock, the word "subscribed" would not have been appropriate, and its use shows that the assessment was understood to be upon subscriptions owing, and not as or for a demand for an additional contribution to the corporate assets. The record indicates that the entire investment of the company did not reach the sum of \$1,000,000, which, it is now claimed, was paid in by the stockholders at the beginning of its operations. There is no evidence whatever that the stock was ever sold or offered for sale by the corporation at a price less than its par value, or that the certificates originally issued therefor declared that the stock represented thereby was fully paid for. All the certificates to Rolph were issued prior to July 17, 1902. Up to that time, and afterwards until 1905, when section 323 of the Civil Code was amended (Stats. 1905, p. 397), stock certificates were not required to show the amount paid thereon, or that anything had been paid thereon. The findings recite that thereafter, in 1907, in transferring certificates for 356 shares to new holders, the corporation made and issued certificates to the new owner showing on their face that the stock was fully paid. This was not the stock held by Morrow. We are not referred to any part of the record which supports this finding or relates to it. But the evidence we have already mentioned shows that, if such statements were made in those certificates, they were not true. This finding was of an evidentiary fact only, and it is not a finding that such stock was fully paid up at that time, nor that any of the certificates held by Morrow in Rolph's name were fully paid up.

For the foregoing reasons we conclude that the judgment of the court below was not in accordance with the law and the facts, and that it cannot stand.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; SHURTLEFF, J.; WASTE, J.

PAYNE, Director General of Railroads v.
RICHARDSON, State Treasurer.
(S. F. 9763.)

(Supreme Court of California. June 8, 1922.)

1. Taxation \S 393—Carrier's transportation of its own freight should not be considered in arriving at gross receipts.

In arriving at the gross receipts of a railroad for the purpose of taxation, the railroad's own transportation should not be considered.

2. Taxation \S 390(1)—Taxes to be paid on railroads by Director General are to be ascertained in same manner had railroad remained in private control.

Under the Federal Control Act, § 15 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½), providing that nothing in the act shall be construed to affect the existing laws or powers of the states in relation to taxation, the taxes to be paid by the Director General of Railroads to various states or municipal bodies are to be ascertained in the same manner that they would have been levied and assessed had the railroad remained in private control.

3. Taxation \S 393—Receipts of railroad under federal control include amount due from government for transportation.

Under the Federal Control Act, § 15 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½), providing that nothing in the act shall affect existing laws or powers of the states in relation to taxation, where a state tax on railroad property was based on a percentage of gross receipts, as a basis of valuation of the property, the amount of transportation furnished the government for which a railroad company had not been paid should be included in the gross receipts for the purpose of taxation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by John Barton Payne, as Director General of Railroads, United States Railroad Administration, against Friend W. Richardson, as State Treasurer of the state of California. From judgment for defendant, plaintiff appeals. Affirmed.

Henley C. Booth, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guertena, Deputy Atty. Gen., for respondent.

WILBUR, J. This action was brought to secure an adjudication that the plaintiff has overpaid the state of California the sum of \$186,711.22, for taxes upon properties of the Southern Pacific Railroad Company in the state of California, this amount having been paid under protest, the plaintiff suing under and by virtue of the provisions of section 3660a of the Political Code, as added by St.

1917, p. 357, to establish the illegality of the tax and to secure judgment upon which basis an appropriation for reimbursement may be sought from the Legislature. The court sustained a general demurrer to the complaint and rendered judgment in favor of the defendant. Several questions are raised by the parties with relation to the authority of the plaintiff to bring the suit in question and as to the authority of the defendant to represent the state of California in defending against the claims of the plaintiff. We will, however, consider the main question upon its merits. The plaintiff claims that the state board of equalization improperly included in the gross receipts, upon which the tax of 5¼ per cent. was computed, the sum of \$3,556,404.28, which amount constitutes the amount charged against the United States of America for transportation of passengers and freight for war purposes. The appellant thus states his position:

"The ground of our claim that the sum sued for was erroneously and excessively levied, and collected from the Director General is that it represents 5¼ per cent. of the value of—not the amount collected for—transportation furnished by the United States to itself on, and while in exclusive possession and operation of, Southern Pacific Company operative properties in California during the calendar year 1918, and that, as the constitutional provision and statutes authorizing the gross receipts method of taxation use the words 'gross receipts from operation,' such amounts so included over the protest of the plaintiff were not gross receipts or any receipts at all."

[1, 2] The rule is well settled that the carrier's own transportation should not be considered in estimating the gross receipts of the railroad. In support of this rule appellant cites *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614; *Union Pacific Railroad Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274; *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426; *State v. Northwestern Telephone Exchange Co.*, 107 Minn. 390, 120 N. W. 534. It may be conceded that the transportation of the railroad company's freight would not augment the gross receipts of the company. The question presented here is quite different. Under section 15 of the Federal Control Act, 40 U. S. Stats. at Large, pp. 451, 458 (U. S. Comp. St. 1918, U. S. Comp. St. Supp. 1919, § 3115½), it is provided:

"Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

We think it clear from this provision of the federal statute that it was intended that the

taxes to be paid by the Director General to various states or municipal bodies were to be ascertained in the same manner that it would have been levied and assessed had the railroad corporation remained in control. This view has also been entertained by the courts. *Wabash R. Co. v. Board of Review*, 288 Ill. 159, 123 N. E. 259; *Penn. Coal Co. v. Saddle River Township* (N. J. Sup.) 114 Atl. 157; *St. Louis-San Francisco Ry. Co. v. Middlekamp*, 256 U. S. 226, 41 Sup. Ct. 489, 65 L. Ed. 905. For that reason it was proper to include in the taxes the revenue derived from government transportation.

[3] Appellant's contention, however, is that the amount of \$3,556,404.28 merely represents an estimate at regular tariff schedules of the amount which would be chargeable at those rates to the government, and that it is, therefore, not a receipt at all. It is so alleged in the complaint and admitted by demurrer. The point is thus stated in the appellant's brief:

"The amounts representing what would have been charged the United States Government for transportation of men and property of United States, if the Southern Pacific Company had remained in control, should have been excluded from the gross receipts, and the tax based thereon was erroneous and excessive."

The respondent claims that this question cannot be raised upon the record, for the reason that the statement furnished by the plaintiff to the state board of equalization upon which the tax was levied and collected showed that said amount had been paid and was included in the gross receipts. However, we will assume, as alleged by the plaintiff and admitted by the demurrer, that the amount has not been paid by the United States to the plaintiff, its agent, or to the railroad company, and that the statement made to the state board of equalization is also susceptible of that construction. Nevertheless, if the taxes were to be levied and assessed exactly as if in private ownership, as seems to be contemplated by the Federal Control Act (section 15, supra), there was no error in the assessment. It is true that the United States, through the plaintiff, was operating the road as a private owner would, and was not therefore required to charge to itself any freight pertaining to the operation of the railroad, or pay or charge to itself freight or passenger fares for war transportation, but for purposes of state taxation it is clear that the United States intended, as manifested in its Federal Control Act (section 15, supra), that such taxes should be ascertained on the same basis as if the railroad had remained in private ownership. Otherwise, the power of the state would be "affected" by the change of management. The system of taxation by requiring a percentage of the gross receipts to be paid to the state is merely a basis for the taxation of the property of

railroads (Pullman Co. v. Richardson [Cal. Sup.] 197 Pac. 346), and the value of the railroad is obviously the same, whether operated by the company itself, or by the Director General. To depreciate the value of the property by a failure to include in the gross receipts the amount of transportation furnished the government, which would be a charge in private ownership, would be to fix a different property tax in one case from that in the other, and thus affect the state tax in violation of section 15 of the Federal Control Act, supra. That being true, it follows that the tax in question was properly collected.

Judgment affirmed.

We concur: LENNON, J.; SHURTLEFF, J.; SLOANE, J.; LAWLOR, J.; WASTE, J.

SHAW, C. J. I concur.

The agreement under which the United States took possession of the railroad system of the Southern Pacific Company provided that the Director General should pay all taxes lawfully assessed by the state on the property taken, or on the right to operate as a carrier, or save said company harmless therefrom. Under the scheme of taxation provided in the Constitution of California (article 13, § 14), the state imposes upon the railroad company annually a percentage tax upon the "gross receipts from operation" of its lines situated within this state. If the company had continued to operate the lines and the United States had transported thereon the same freight and passengers that were transported for the road for government purposes under the management of the Director General during the year in controversy, the earnings from such transportation would have included the amount produced at the regular rates for such carriage. It is evident that the taxes should be computed on the same basis as if such operation had continued, and that it was not contemplated that the earnings from the transportation on government account should go free from the burden of taxation, as the plaintiff, in effect, demands.

(189 Cal. 78)

O'BRIEN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10248.)

(Supreme Court of California. June 5, 1922.)

I. Executors and administrators ¶296—Receipt for inheritance taxes is prerequisite to distribution, only if report shows taxes due.

Inheritance Tax Law 1921, § 10, forbidding the distribution of the property of any estate, unless a receipt for the inheritance tax due thereon, signed by the state controller, shall first be filed in the court, must be construed with section 16, permitting a report by the

appraiser to the court that no inheritance tax was due, and, when so construed, does not prohibit distribution without production of a receipt for the tax, if the report filed shows no tax was due.

2. Mandamus ¶169—Proceedings dismissed after compliance with alternative writ.

Where respondent has complied with the alternative writ of mandate, it is unnecessary to proceed further, and the cause will be dismissed.

In Bank.

Application by Constanca O'Brien for writ of mandate, prayed to be directed to the Superior Court of the City and County of San Francisco, and Hon. Frank H. Dunne, as Judge thereof, requiring said judge to sign and file a decree of distribution. Proceeding dismissed, because of compliance with alternative writ.

J. F. Bluxome, of San Francisco, for petitioner.

PER CURIAM. [1] In this case the superior court refused to sign and file a decree of distribution, after the same had been prepared, basing its refusal on the ground that section 10 of the Inheritance Tax Law of 1921 (Stats. 1921, p. 1510) forbids the distribution of any property of an estate, unless a receipt for the inheritance tax due thereon, signed by the state controller, shall first be filed in said court. In this case it appears that, after the proceeding in administration was begun, the inheritance tax appraiser, regularly appointed to that office, reported to the court an appraisal of the estate in question, showing that the shares of the several parties interested therein were all exempt from inheritance tax, and that no inheritance tax was leviable upon any part of the estate. Thereafter this report was submitted to the court, and the court made an order approving the same and declaring that no tax was due upon the property of said estate. All this was done in pursuance of the provisions of section 16 of said act. These two sections are to be considered together and in such a manner as to be harmonious. There is no difficulty in doing this. Section 10 applies only to cases where the report of the inheritance tax appraiser shows taxes due upon the property of the estate or some part thereof, or where, after that report is made, other property has been discovered upon which no report has been made. It has no application to cases where the record in the estate itself shows that no tax is due. Therefore the court should have signed the decree of distribution.

[2] An alternative writ of mandate was issued herein, in accordance with the petition, to compel the court to sign said decree. Up-

on the service of that writ, the court complied with it and makes return accordingly.

This makes it unnecessary to proceed further in the case, and the proceeding is dismissed.

SHAW, C. J., and LENNON, SHURTLEFF, WASTE, WILBUR, LAWLOR, and SLOANE, JJ., concur.

(189 Cal. 87)

MARTIN v. BARTMUS. (L. A. 7128.)

(Supreme Court of California. June 6, 1922.)

1. Quieting title \S 10(2)—One in course of acquiring title to government land may maintain action to quiet title.

A person, in the course of acquiring title to government land, may maintain an action to quiet title against parties to whose claims of title her equities are superior. Code Civ. Proc. \S 738.

2. Judgment \S 747(6)—Judgment for unlawful detainer not admissible, under plea in bar in action involving title to premises in dispute.

A judgment for unlawful detainer, is not admissible, under a plea in bar in an action involving the title to the premises in dispute.

3. Public lands \S 106(1)—Holding of Department of Interior determining rights of conflicting claimants to public lands final.

Where the record in an action disclosed that the question of the conflicting rights of the parties to the action to obtain title from the United States Government, under the Desert Land Act March 3, 1877, as amended by Act March 3, 1891 (U. S. Comp. St. $\S\S$ 4674-4678), was fully presented to the Department of the Interior, in the method provided by said act for determining the rights of the conflicting claimants, and was therein finally determined, such holding is final and conclusive as to the issues involved in such hearing.

4. Quieting title \S 51—Trespassers not entitled to reimbursement for voluntary improvements.

Where, in an action to quiet title, defendants by counterclaim alleged that, while in possession of the land, they had made certain improvements thereon, but in respect to these the trial court found that such improvements were voluntary and made while the defendants were mere trespassers, defendants were not entitled to reimbursement for such improvements.

5. Quieting title \S 50—Granting writ of possession in action to quiet title held proper.

In an action to quiet title, the trial court, after finding defendants were mere trespassers on the land in question, and finding otherwise in plaintiff's favor, did not err in granting to the successful plaintiff the incidental remedy of a writ of possession, permitted by the express terms of Code Civ. Proc. \S 880.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Lillie E. Martin against Peter Bartmus and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Sebold L. Cheroske, of Los Angeles, and E. R. Simon, of El Centro (W. J. Tremear, of Los Angeles, of counsel), for appellant.

Frank C. Prescott and Frank G. Falloon, both of Los Angeles, for respondent.

RICHARDS, Justice pro tem. This is an appeal from a judgment in favor of the plaintiff, in an action to quiet title to a tract of 320 acres of land in the Imperial Valley. The land was and still is government land, subject to entry and acquisition under the provisions of the act of Congress approved March 3, 1877, and amended March 3, 1891, commonly known as the Desert Land Act (U. S. Comp. St. $\S\S$ 4674-4678). By the terms of the act, the entryman was not required to live upon the land but was required to make first, second, third, and fourth and final proof of certain expenditures toward the irrigation, reclamation, and cultivation of such lands. The plaintiff, in her complaint herein, alleges that, on the 4th day of March, 1913, she had filed a desert land entry upon said land and that, on the 4th day of March, 1914, she had submitted in due and legal form her first annual proof as required by said act, and thereafter had also in due time and form submitted her second and third annual proofs, and had thereby gained the right to take possession of said land and to make her fourth and final proofs necessary to secure a patent to said land, but that the defendant has wrongfully and illegally entered upon said land and forcibly and wrongfully holds and occupies the same to the exclusion of the plaintiff, and, by so doing, prevents her from the acquisition of such possession of the same as is necessary to enable her to make her final proofs thereon and obtain her patent therefor. Wherefore the plaintiff prays that the defendant be required to set forth the nature of his adverse claims, in order that the same may be determined and her right and title to said land be quieted as against such claim, and that she may be adjudged entitled to the possession of said land and have a writ of possession for the same.

The defendant in his answer denies most of the material averments of the plaintiff's complaint. He also, by way of a further and separate answer, alleges the existence of a certain judgment in his favor in an action of unlawful detainer brought by the plaintiff against him, and which he alleges constitutes a bar to the present action. He also pleads certain affirmative matter by way of counterclaim and also of cross-complaint. There were certain other parties named in the complaint besides the appellant, Bartmus, but as to these they either defaulted or filed disclaimers, and no relief was sought or awarded.

ed as to them. The facts, as developed at the trial and as found by the trial court, were briefly these: The plaintiff had, as she averred, and as the defendants admitted, filed her desert land entry on March 4, 1913, and a year later had submitted in due form her first annual proof as required by the Desert Land Act. On October 26, 1914, the defendants Peter and Dora Bartmus filed a contest in the United States land office at Los Angeles against the plaintiff's said entry, to which contest the plaintiff herein filed an answer. Upon the hearing thereon, the local land officers decided the same in the contestants' favor, but, upon appeal by plaintiff herein to the Commissioner of the General Land Office and thence to the Secretary of the Interior, said contest was finally decided in the said plaintiff's favor, the Secretary of the Interior by his decision dismissing said contest and deciding that the said plaintiff had made a legal desert land entry and had duly made her first annual proofs thereon and had duly submitted her second and third annual proofs thereon and was entitled to have the same approved. Said decision of the Secretary of the Interior was rendered on March 12, 1917, but, prior thereto and on the 25th day of June, 1915, the defendants Bartmus had entered upon said land and continued thereafter to hold the same to the exclusion of the plaintiff therefrom. During the time of their said possession of said land, the said defendants had made certain improvements thereon, which, however, the court found to have been made by them voluntarily and while said defendants were trespassers upon said land. In August, 1917, the plaintiff commenced an action in unlawful detainer against said defendants, in which action the defendants prevailed, the court finding and adjudging that the plaintiff was not at said time entitled to recover possession of the premises from the defendants. The trial court in the present action, however, found that the issues tendered in that action were not the same as those presented in the instant case and hence that the judgment therein did not constitute a bar to the present action. The conclusion of the trial court in the instant case was that the plaintiff was entitled to have her title quieted as against said defendants, and to have a writ of possession for the lands in question as against the defendants, whose adverse claims were adjudged to be invalid. From this judgment, the defendant Peter Bartmus prosecutes this appeal.

[1] The appellant's first contention is that, since it appears that the title to the premises in question is still in the United States government, she is not in a position to maintain her action to quiet her title to said premises as against the appellant. There is no merit in this contention. It has been repeatedly held by this court that a person who is in the course of acquiring title to government land

may maintain an action to quiet title or in ejectment, the same as against other parties to whose claims of title her equities are superior. *Wilson v. Madison et al.*, 55 Cal. 5; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Kitts v. Austin*, 83 Cal. 169, 23 Pac. 290; *Wormouth v. Gardner*, 105 Cal. 149, 38 Pac. 646. The same doctrine has been declared by the Supreme Court of the United States in *Gauthier v. Morrison*, 232 U. S. 452, 34 Sup. Ct. 384, 58 L. Ed. 680. The cases cited by the appellant in support of his contention in this regard do not run counter to the rule above stated. They are to the effect that a party holding merely the certificate of the receiver of the United States land office cannot maintain an action in ejectment against one in possession of property, the title to which is in the United States. The present action is not, however, an action in ejectment but an action to determine adverse claims under section 380 of the Code of Civil Procedure, by the terms of which section of the Code a writ of possession may follow a judgment in the plaintiff's favor.

[2] The appellant's next contention is that the judgment pleaded in his answer, as having been rendered in his favor in an action for unlawful detainer, and which was not appealed from, constituted a sufficient plea in bar to the present action. It has been consistently held by this court that, in such an action, the sole question in issue is the right of present possession and that the question of title cannot be litigated therein (*Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111), and hence that the judgment roll in an action of unlawful detainer is not admissible under a plea in bar, in an action involving the title to the premises in dispute (*Fish v. Benson*, 71 Cal. 428, 12 Pac. 454).

[3] Furthermore, the record in this case discloses that the question of the conflicting rights of the parties to this action to obtain title to the same from the United States government under the Desert Land Act was fully presented to the Department of the Interior, in the method provided by said act for determining the rights of conflicting claimants under said act, and was therein finally determined in the plaintiff's favor. Such holding is final and conclusive as to the issues involved in such hearing. *Green v. Hayes*, 70 Cal. 281, 11 Pac. 716; *Shanklin v. McNamara*, 87 Cal. 378, 26 Pac. 345; *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861; *Wormouth v. Gardner*, 125 Cal. 316, 58 Pac. 20; *Gage v. Gunther*, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141. The defendants herein by their answer attempt to put in issue the same matters which were decided adversely to them by the Department of the Interior.

[4, 5] This, under the foregoing authorities, they cannot be permitted to do. In their counterclaim the defendants alleged that,

while in possession of said land, they had made certain improvements thereon in the way of preparing the land for irrigation and of erecting certain buildings thereon, but, in respect to these, the trial court found that such improvements and expenditures were voluntary in character, and were made while the defendants were mere trespassers upon the premises, and hence that they were not entitled to reimbursement from the plaintiff for the same. We perceive no error in this ruling; nor do we think that the trial court, after finding that the defendants were mere trespassers upon the land in question and finding otherwise in the plaintiff's favor, was in error in granting to the successful plaintiff the incidental remedy of a writ of possession, permitted by the express terms of section 380 of the Code of Civil Procedure.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

(189 Cal. 92)

CONSOLIDATED ADJUSTMENT CO. OF CALIFORNIA v. SUPERIOR COURT OF SONOMA COUNTY et al. (S. F. 10162.)

(Supreme Court of California. June 6, 1922.)

1. Courts §120—Demand in action must be \$300 to give superior court jurisdiction.

In order that the superior court may have jurisdiction under the Constitution, the demand in the action must amount to \$300.

2. Courts §122—Amount of demand in action, and not in prayer of petition, determines superior court's jurisdiction.

The determining factor in ascertaining the amount involved in a suit to determine jurisdiction are the allegations of fact, and not the amount in the prayer of complaint.

3. Courts §121(2)—Amount demanded in action on contract determined to fix jurisdiction.

A contract for commissions for collections due plaintiffs, where initial payment of \$148.23 was made, with agreement by defendant to prosecute and adjust claims for plaintiff for three years, and, unless an agreed sum was collected, to return the initial payment, and to receive a commission on all amounts collected over the sum fixed, held not an agreement within Civ. Code, §§ 1448, 1449, governing agreements requiring performance of one of two acts, but that the amount demanded in an action on the contract was the amount of initial payment, and that the circuit court did not have jurisdiction thereof.

4. Prohibition §3(2) — Question of plain, speedy, adequate remedy by appeal one of fact.

The question of whether there is a plain, speedy, and adequate remedy by appeal is a

question of fact, depending upon the circumstances of the particular case.

5. Prohibition §3(2) — Appeal to district court of appeal involving inconvenience and expense held not plain, adequate, speedy remedy.

Where an appeal to the district court of appeal would involve considerable expense in transporting witnesses a distance of 50 miles and preparing transcript, held not a plain, speedy, and adequate remedy as contemplated in Code Civ. Proc. § 1103.

In Bank.

Proceedings in prohibition to prevent the Superior Court of the County of Sonoma from assuming jurisdiction and proceeding with the trial of an action therein, entitled William Evart and others against the Consolidated Adjustment Company of California. Writ of prohibition issued.

P. B. Lund and Russell W. Cantrell, both of San Francisco, for petitioner.

Emmett I. Donohue, of Sebastopol, for respondents.

SHAW, C. J. This is a proceeding in prohibition to prevent the superior court of the county of Sonoma from assuming jurisdiction and proceeding with the trial of an action therein, entitled William Evart et al., plaintiffs, versus Consolidated Adjustment Company of California, defendant.

The petition is based upon the proposition that the complaint in the action shows that the cause of action set forth therein is for the recovery of money to the amount of \$148.23 and no more, and that the superior court has no jurisdiction of a cause of action to recover less than \$300. The question for determination is whether or not said complaint sets forth a cause of action for the recovery of \$300 or more.

The complaint alleges that, in April, 1918, plaintiffs and defendant entered into a contract, whereby, in consideration of the payment by plaintiffs to defendant of \$148.23, and the agreement to pay commissions on collections thereafter made by defendant, of claims due to the plaintiffs, the defendant agreed to act in behalf of plaintiffs for the period of three years in the prosecution and adjustment of claims aggregating \$3,650.37. The agreement then proceeded as follows:

"The Consolidated Adjustment Company of California guarantees that it will recover in cash, or secured net settlement, from the claims of said client at least \$518.80, or to refund the full initial fee paid at the termination of this contract."

It also contained a reservation by the defendant of the right to rescind the contract within twelve months, which is immaterial here. The complaint then proceeds to allege that thereupon the plaintiffs delivered to de-

fendant for prosecution and adjustment the claims referred to in said contract and paid the defendant said initial fee of \$148.23; that said agreement had terminated on April 29, 1921; that defendant has not recovered \$518.80 on said claims, or any other sum whatever, and has not refunded to plaintiffs, or either of them, the initial fee aforesaid at the termination of the contract or at all. Thereupon the complaint prayed for \$518.80.

[1, 2] The fact that the prayer of a complaint is for the recovery of more than \$300 does not conclusively determine the proposition that the action is for the recovery of that amount and that the superior court has jurisdiction thereof. In order that the superior court may have jurisdiction, under the Constitution, the demand in the action must amount to \$300. In *Lehnhardt v. Jennings*, 119 Cal. 198, 48 Pac. 56, 51 Pac. 195, the court had under consideration the question whether the prayer of the complaint, or the facts stated therein, constituted the determining factor in ascertaining whether the demand in suit amounted to \$300, and it determined that the amount demanded was not conclusive, but that the allegations of fact were determinative of the question, and that, where the complaint showed that less than \$300 was really in controversy, there was no jurisdiction in the superior court. In *California, etc., Association v. Ainsworth*, 134 Cal. 462, 66 Pac. 536, the complaint prayed judgment for \$700. Upon considering the facts alleged, the court determined that the utmost the plaintiff was entitled to under the facts alleged was \$14. Thereupon it held that the action was not within the jurisdiction of the superior court. The point for consideration, therefore, is whether or not, under the facts stated in the complaint, a recovery by the plaintiff of \$300 or more can be had.

[3] The plaintiffs claim that the case comes within the terms of sections 1448 and 1449 of the Civil Code. They read as follows:

"1448. If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

"1449. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

We do not think the agreement in question comes within the provisions of either of these sections. In order to do so there must be a time when, under the terms of the obligation, the party having the option will be able to do either one or the other of the acts, as he may desire, and so may choose between the alternatives. Such is not the case here. The contract extended for three years. During

that period it was the duty of the defendant to perform its obligation to prosecute and adjust the claims due to the plaintiffs. Up to that time there was neither obligation nor opportunity to refund the initial fee. After that time there was neither obligation nor opportunity to continue the prosecution and adjustment of the claims. At the termination of the contract the defendant, even if it had desired to do so, could not have proceeded to prosecute and adjust the claims. Its duties in that regard were ended. It had not collected anything upon the claims. It therefore at that time had no alternative. The contract did not allow it then to do "one of two acts," or the other, at its pleasure. It was required to do but one; that is, to refund the initial fee of \$148.23. It could not have refunded that fee before and terminated the contract, except by exercising its right of rescission, which it was under no obligation to do. The consequence is that the only duty which the defendant owed to the plaintiffs at the termination of the contract, upon the facts alleged in the complaint, was to refund the initial fee of \$148.23. The cause of action stated was for the recovery of that sum and no more. Consequently it was not within the jurisdiction of the superior court.

[4, 5] Respondents also contend that the proceeding should be dismissed because an appeal to the District Court of Appeal would be a plain, speedy, and adequate remedy. Prohibition lies against any inferior tribunal only where there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1103. It has been held in several cases that, where an inferior court, such as a police or justice's court, is proceeding in a cause of which it has no jurisdiction, the right to appeal to the superior court of such county is plain, speedy, and adequate, and that prohibition will not lie. *Hamberger v. Police Court*, 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614; *Simpson v. Police Court*, 160 Cal. 530, 117 Pac. 553; *Germain Seed & Plant Co. v. Justice's Court*, 41 Cal. App. 397, 182 Pac. 784. The question whether or not there is a plain, speedy, and adequate remedy in such cases is a question of fact depending upon the circumstances of the particular case. In the cases cited regarding the police and justice's courts, it is obvious that an appeal to the superior court of the county in which the justice is acting is plain and ordinarily will be speedy, and that it is presumed to be adequate, since the appeal will be heard in the same county and may be heard quickly, and it is to be presumed that the superior court will decide the cause in accordance with law. In the present case, however, it appears that the office and principal place of business of the defendant is in the city and county of San Francisco, which is alleged to be more than 50 miles distant from the city of Santa Rosa, where the trial is to be had by the superior court of that

county, and it is alleged that the defendant will be put to the cost of transporting its witnesses to that county. Also it is obvious that an appeal to the District Court of Appeal in such a case will involve considerable expense, since the transcript must be prepared and filed and all the expense thereof must be paid. This will also entail considerable delay and the expense of attending the district court at its courtrooms in the county of Sacramento. We think the case comes within the rule laid down in *Ophir, etc., Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340, and that the appeal is not a plain, speedy, and adequate remedy under the circumstances.

It is ordered that the writ of prohibition issue as prayed for.

We concur: SLOANE, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

(189 Cal. 97)

GARROWAY v. JENNINGS et al.
(L. A. 7324.)

(Supreme Court of California. June 6, 1922.)

1. Frauds, statute of §18(2)—Promise to debtor to pay attorney fees due from latter held an original obligation which need not be written.

A promise to a debtor for a consideration to pay attorney's fee due from the latter is an original obligation within Civ. Code, § 2794, and need not be in writing.

2. Judgment §143(3)—Refusal of motion to set aside judgment by default on account of neglect of party held proper.

In an action by an attorney for fees, motion of defendant to set the judgment by default aside under Code Civ. Proc. § 473, permitting a court to relieve a party from a judgment against him through his inadvertence or excusable neglect, was properly overruled, where defendant, an attorney, alleged that he believed that an order overruling a demurrer was appealable and would stay all proceedings until the appeal was determined, and did not know that default and judgment would be entered against him for failure to answer the complaint while the appeal was pending.

3. Appeal and error §654—Appellant held entitled to amend record by filing therein an authenticated notice of appeal.

Under Code Civ. Proc. § 953, as amended by St. 1921, p. 194, § 3, where a record on appeal does not contain a notice of appeal, the appellant is entitled to amend the record by filing a copy of the notice of appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Samuel M. Garroway against Netta O. Jennings and J. O. Davis. From judgment for plaintiff, defendant Davis appeals. Affirmed.

J. O. Davis, of Los Angeles, in pro. per.

Winslow P. Hyatt, of Los Angeles, for respondent.

SHAW, C. J. The complaint states a cause of action to recover judgment against the two defendants. It alleges that the defendant Jennings became indebted to Lantz, Hyatt, and Garroway in the sum of \$972.66 for services as her attorneys in two certain actions, in one of which a judgment was recovered in her favor for over \$7,000, that thereafter she assigned the judgment to the defendant Davis, who, in consideration of said assignment, promised his codefendant that he would pay the said attorneys' fees due to the said Lantz, Hyatt, and Garroway, and that said parties before the action was begun assigned the claim against said defendants to the plaintiff.

[1] To this complaint the defendant Davis separately demurred. The sole ground of demurrer is that the complaint seeks to charge Davis with the debt of Jennings upon an undertaking not in writing. The basis of this objection is that the contract alleged against Davis was a contract of suretyship or guaranty, which is invalid unless made in writing and signed by the party to be charged. This principle does not apply to contracts of the character alleged in the complaint. It was not a contract to guarantee or become surety for the obligation of Jennings, but was an original obligation on his part to pay the debt of Mrs. Jennings directly to her creditors, and it was based upon a sufficient consideration; that is, the transfer to him by her of the judgment above mentioned. It comes within the description of such original obligations set forth in section 2794 of the Civil Code, and it need not be in writing. The demurrer thereto was properly overruled. The defendant failed to answer the complaint and thereupon judgment was entered against him by default, from which he appealed. The only objection that can be made to the judgment is that it is not supported by the complaint. It is, as we have seen, not well taken. The judgment therefore must be affirmed.

[2] After the taking of the default and judgment against him, Davis moved to set it aside under section 473, Code of Civil Procedure, on the ground that it was taken against him by his inadvertence and excusable neglect. In support of the motion it was shown that after the order was made overruling his demurrer to the complaint he attempted to take an appeal from said order by filing a notice of appeal therefrom.

TURNER et al. v. JOHNSON et al.
(No. 10752.)

(Supreme Court of Oklahoma. May 30, 1922.)

(Syllabus by the Court.)

1. Quietting title \S 43—Judgment quietting title will not be reversed because of misdirection in a deed, where plaintiffs were vested with title by inheritance.

In an action to quiet title, where plaintiffs claimed to be owners of the land by virtue of a deed from their father, who thereafter died, and plaintiffs also claimed to be the sole and only heirs of said deceased, and the record discloses the deed failed to properly describe the land, a judgment in favor of said plaintiffs, quietting title to said land against a third party, will not be reversed because of misdescription in the deed, which is immaterial, as the record in the case disclosed that, if the deed was invalid to convey title to the land, the title vested in plaintiffs by inheritance upon the death of their father.

2. Quietting title \S 30(1)—Heirs or devisees may quiet title to land inherited against any one except the executor or administrator without the latter joining in suit.

By virtue of section 6322, Rev. Laws 1910, the heirs or devisees may maintain an action to quiet title to real estate inherited by them against any one except the executor or administrator without the executor or administrator joining in said suit.

3. Appeal and error \S 766—Supreme Court may affirm judgment without examining entire record to see whether judgment is against the weight of evidence where appellant has failed to abstract the evidence.

Where a party contends there is no evidence in the record to support the judgment of the court, but fails to comply with rule 26 of this court (165 Pac. ix) by abstracting the evidence of the case, and the defendant in error sets out in his brief an abstract of the evidence sufficient to support the judgment, the judgment will be affirmed, without this court examining the entire record to see whether the judgment is clearly against the weight of the evidence.

Appeal from District Court, Okfuskee County; Geo. C. Orump, Judge.

Action by Cornelia Johnson and others against D. J. Turner and another. From a judgment therein, the defendants appeal. Affirmed in so far as plaintiffs are concerned, but the judgment in favor of the defendant C. M. Brooks and against the defendant Turner is reversed and set aside.

J. C. Wright and J. B. Patterson, both of Okemah, for plaintiffs in error.

Martin L. Frerichs and E. Huser, both of Okemah, for defendants in error.

McNEILL, J. This action was commenced in the district court of Okfuskee county by

His excuse for failure to answer is that, although he was an attorney at law, admitted to practice as such in the courts of this state, he was not familiar with the rules and procedure of the courts, that he believed that the order overruling the demurrer was appealable, and that an appeal therefrom would stay all further proceedings in the action until said appeal was determined, and, further, that he did not know that default and judgment would be entered against him for failure to answer said complaint while such appeal was pending. All of these things he could have readily and easily ascertained by taking the trouble to read the provisions of the Code of Civil Procedure relating thereto, and the numerous decisions of this court directly holding that no appeals from an order overruling a demurrer. Instead of showing an excuse for his failure to file the answer, his affidavit shows that it was due to his own gross neglect to take any pains whatever to inform himself as to the law affecting his case. The only reason he gives for his ignorance is that he had never been in active practice. That being the case, reasonable care would have induced him to make some inquiry and research to ascertain the law with which he professed to be familiar and which he could easily have ascertained. In denying a motion to set aside a default the court below was exercising its discretion. We cannot overturn its decision thereon unless the discretion was abused. We see no ground upon which to say that it was abused in this case. We are of the opinion that the motion was properly denied. The defendant appealed from the order denying that motion. We are forced to the conclusion that this appeal is also without support in the record.

[3] As the jurisdiction on appeal depends on the fact of the filing of a notice of appeal and not upon the fact of its being contained in the record, we have deemed it advisable to treat the case on its merits. It will therefore be unnecessary to act upon the application made by the appellant, since the filing of a transcript, to amend the same by inserting therein an authenticated copy of the notice of appeal. The appellant would be entitled to amend the record by filing such copy, as, of course, under section 953, Code of Civil Procedure, as amended in 1921. We have assumed that the appeal was properly taken, and that the record discloses it, although the notice of appeal was set forth in the bill of exceptions and was not directly certified by the clerk as a correct copy.

The judgment and order appealed from are affirmed.

We concur: SHURTLEFF, J.; WASTE, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.

Cornelia Johnson, Ida Williamson, Lillie Kidd, Ella Simpson, and Annie Carr, for themselves, and Cornelia Johnson as trustee for the aforementioned persons and for Green Williamson. The petition alleged that J. H. Williamson was a resident of Okfuskee county, and died November 22, 1913, leaving the plaintiffs as his sole heirs; that thereafter C. M. Brooks was appointed administrator of the estate. Plaintiffs further alleged that they were the owners and entitled to possession of certain land described in the petition since the death of J. H. Williamson. It is also alleged that, prior to his death, J. H. Williamson executed and delivered a deed to the land in question to Cornelia Johnson, under the name of Cornelia Carr, and she took title in trust for her brother, Green Williamson, and the other plaintiffs, including herself, each owning an undivided one-sixth interest. It is also alleged that the defendant Turner is unlawfully in possession of the same.

The second cause of action prayed judgment against Turner for \$1,410 for rents and profits. The third cause of action alleges the Echols Dry Goods Company obtained a judgment against J. H. Williamson and numerous other defendants for \$1,573, and thereafter \$500 had been paid on said judgment; that said judgment had never been properly revived after the death of Williamson, but execution was issued and levied upon the property, and the property sold and bid in by Turner. The petition then charges Turner with certain acts that amounted to fraud regarding the sale of the land, and asks that the sheriff's deed to Turner be canceled. The fourth cause of action alleged that J. H. Williamson was the owner of three lots in the town of Boley, and had executed a deed to Cornelia Johnson, in the name of Cornelia Carr, for the use and benefit of the plaintiffs, and alleges that Brooks is in possession of the lots, and that Brooks and Turner claim some title or interest in the land, and asks for judgment for \$480, and for rents and profits. The fifth cause of action alleges the title to the land is in the plaintiffs, and asks that the title be quieted and they recover possession.

To this petition the defendants answered. The defendant Turner alleged that he was the owner of the 60 acres of land by virtue of a certain judgment against J. H. Williamson, and the land was sold under execution and the sale confirmed by the court in him. The defendant also alleges that the deed from Williamson to the plaintiff was without consideration, and to defraud creditors. Brooks adopted Turner's answer, and filed a supplemental answer, alleging the estate had not been closed, and, if the estate had any interest in the land, he was entitled to possession of the same as administrator. The case was tried to the court, and the court rendered judgment in favor of the

plaintiffs, and canceled the sheriff's deed to the 60 acres of land, and quieted title in plaintiff. In reference to the three lots in Boley, the court quieted the title in plaintiffs and against the defendants, Turner and Brooks. The court also found that Turner was the owner of three judgments against J. H. Williamson. The court found that Turner had been in possession of the land in question, collected the rents and profits therefrom, and, after deducting all rents and profits and taxes paid by Turner, there was still due \$800, and that was a valid lien on the premises. The court rendered judgment in favor of Brooks and against Turner for \$500. From said judgment the defendants have appealed.

[1] For reversal the defendants first contend that the deed executed by Williamson to the plaintiffs did not properly describe the land, and the description in the deed was different from the description of the land purchased by Turner at the sheriff's sale. Admitting the deed was of no force and effect, and did not properly describe the land, or admitting the deed was made without consideration to defraud the creditors, this would be immaterial, because the petition alleges that the plaintiffs were the sole and only heirs of Williamson, and inherited the land, and the evidence supports this contention, so it is immaterial whether the plaintiffs acquired title to the land by deed or by inheritance.

[2] It is next contended that the demurrer to the petition should have been sustained, for the reason the petition disclosed the estate had not been fully administered upon, and the debts had not been paid, and the county court has jurisdiction over the estate for the purpose of administration. Section 6322, R. L. 1910, provides in part as follows:

"* * * The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator."

This section of the statute authorizes the heirs to maintain a suit to quiet title, with or without the executor or administrator being joined in said proceeding, and there was no error in overruling the demurrer.

The administrator was not claiming to be in possession of the lots in Boley as administrator, but was holding the land in his individual capacity, and in regard to the 60 acres of land he was not in possession of the same, so the suit could be maintained by plaintiffs.

[3] The plaintiffs in error next contend the court erred in satisfying the judgments against J. H. Williamson, which judgments are now owned by Turner, for the reason that portion of the judgment was not within the pleading. The judgments were introduc-

ed in evidence, being three in number, and it is admitted that Turner owned the same. The plaintiffs ask to have their title quieted; these judgments were liens on the land, and the court would have a right to quiet title, and in making an accounting took these judgments into consideration. The plaintiff in error failed to set out the evidence in their brief, or in what way they contend the evidence is insufficient to support the judgment. The defendants in error have abstracted a portion of the evidence in their brief, which tends to support the judgment of the court, so under rule 26 of this court (185 Pac. ix) this court will not examine the record to ascertain whether the judgment of the court is clearly against the weight of the evidence. The brief of plaintiffs in error points out no other error except the fact that the court should not have rendered judgment in favor of C. M. Brooks and against Turner. The attorneys appearing for Brooks also appeared for Turner, and Brooks makes no objection to having the judgment in his favor set aside. There being no objection, that portion of the judgment will be set aside.

The death of Lillie Kidd having been suggested, this court by proper order revived the case against Ida Williamson, administratrix of the estate of Lillie Kidd, deceased, and against Cornelia Johnson, Ida Williams, Ella Simpson, Annie Carr, and Green Williamson, as heirs of Lillie Kidd, deceased.

For the reasons stated, the judgment is affirmed in so far as the plaintiffs are concerned, but the judgment in favor of C. M. Brooks against Turner will be reversed and set aside and held for naught.

JOHNSON, KANE, ELTING, and NICHOLSON, JJ., concur.

(36 Okl. 192)

McALESTER EDWARDS COAL CO. v. STATE INDUSTRIAL COMMISSION. (No. 12879.)

(Supreme Court of Oklahoma. May 30, 1922.)

(Syllabus by the Court.)

Master and servant §417(7)—Industrial Commission's decision on question of fact conclusive.

In a suit instituted in this court to review an award of the State Industrial Commission, the suit must be to review an error of law, and not an error of fact. The decision as to all matters of fact is final. *Held*, that the appeal herein involves a question of fact, and not an error of law.

Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Act by B. S. Sewell for compensation for injuries, opposed by the McAlester Edwards Coal Company, employer. The Industrial Commission made an award for the claimant, and the employer appeals. Petition denied and award affirmed.

Edward P. Hill, of McAlester, and Wm. P. Hill, of Ardmore, for appellant.

S. P. Freeling, Atty. Gen., R. E. Wood, Asst. Atty. Gen., and W. N. Redwine, of McAlester, for Industrial Commission.

Moore & Harries, of McAlester, for B. S. Sewell.

McNEILL, J. The McAlester Edwards Coal Company, a corporation, filed its petition in this court to reverse an order of the Industrial Commission, wherein said Commission awarded B. S. Sewell compensation for permanent loss of the use of two fingers and fixed the compensation at \$18 per week for a total of 35 weeks. The company contends the award is not supported by the fact, nor by the law, for the reason the loss of the use of said fingers was caused by the negligence of the claimant to take care of and to submit to treatment, which said neglect and refusal on the part of the claimant resulted in the loss of the use of two fingers, that being true the claimant is not entitled to an award for compensation for the loss of said fingers, but only for a period of time in which he was disabled by injury. The testimony of the physician Dr. Busley was to the effect that the claimant would not let him open or lance the infected portion of the hand, nor permit him to remove the core from the infected hand. This evidence was denied by the claimant, who testified that the doctor did lance the hand. Mr. Keller testified that he was present and saw the doctor lance the hand. Under this state of the record, the appeal involves a question of fact, and not an error of law. Under and by virtue of section 10, c. 14, Session Laws 1919, the decision of the Commission upon questions of fact are final and conclusive.

This court, in the case of Wilson Lumber Co. v. Wilson, 77 Okl. 312, 188 Pac. 686, in construing said act, held that this court would not review a question of fact. By applying the rule announced in the above case, the relief of petitioner is denied and award of claimant is affirmed.

JOHNSON, KANE, ELTING, and NICHOLSON, JJ., concur.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(36 Okl. 188)

PAYNE, Director General of Railroads, v. MOORE. (No. 12530.)

(Supreme Court of Oklahoma. May 30, 1922.)

(Syllabus by the Court.)

1. Trial ~~§~~260(1)—Refusal to give instructions not error, where the same proposition is stated in other instructions given and the charge as a whole properly states the law.

The refusal of the court to give instructions which properly state the law is not reversible error, if substantially the same proposition of law is stated in other instructions given, and where the charge of the trial court, as a whole, properly states the law.

2. Record held not to show reversible error.

Record examined, and *held*, that the same contains no reversible error. The judgment of the trial court is therefore affirmed.

Appeal from District Court, Lincoln County; Edward Dewes Oldfield, Judge.

Action by Cora M. Moore, administratrix of the estate of E. A. Moore, deceased, against John Barton Payne, Director General of Railroads, and Agent designated under Transportation Act 1920, § 206. From order overruling defendant's motion for a new trial, the defendant appeals. Affirmed.

W. F. Evans, of St. Louis, Mo., and Kleinschmidt & Grant and Herman S. Davis, all of Oklahoma City, for plaintiff in error.

Joseph I. Pitchford, of Okmulgee, and Stone, Moon & Stewart, of Muskogee, for defendant in error.

JOHNSON, J. This appeal is prosecuted from an order of the district court of Lincoln county, Okl., overruling a motion for a new trial in the case of Cora M. Moore, administratrix of the estate of E. A. Moore, deceased, against John Barton Payne, Director General of Railroads and Agent designated under section 206 of the Transportation Act of 1920 (41 Stat. 461).

Cora M. Moore, as administratrix of the estate of E. A. Moore, deceased, recovered a judgment in the district court of Lincoln county, Okl., in the sum of \$7,000 as damages suffered by her on account of E. A. Moore being killed near Okmulgee, Okl., on the 26th day of July, 1919. The plaintiff also recovered the sum of \$500 as damages to the estate of E. A. Moore, deceased, by reason of the destruction of an automobile, on the 26th day of July, 1919, at the time the said E. A. Moore was killed, in a collision with a freight train that was being operated by the defendant's predecessor, Walker D. Hines.

We will refer to the parties as they appeared in the trial court; that is, Cora M. Moore, plaintiff, and John Barton Payne, as defendant.

The defendant's specifications of error as contained in their brief are as follows:

"(1) The said court erred in overruling the motion of plaintiff in error for a new trial.

"(2) The said court erred in refusing to sustain a demurrer to the evidence of the defendant in error.

"(3) The said court erred in refusing to direct a verdict for the plaintiff in error.

"(4) The said court erred in refusing to give the special instructions submitted by the plaintiff in error, which instructions were numbered as follows: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, 17, 18, 19, 20, and 21."

Concerning which counsel say in their brief that—

"There are four assignments of error, which, for the purpose of brevity, may be considered under two heads:

"(1) Error of the court in overruling the motion of the defendant for a new trial.

"(2) Error of the court in refusing to give certain special instructions tendered by the defendant.

"We will first present our views as to the second proposition."

Then counsel set out in their brief requested instructions refused by the trial court from 1 to 10, inclusive, and 15, 17, 18, 19, and 20, after which the same are abandoned by counsel except as to requested instructions Nos. 1, 5, 6, 7, 8, 9, 17, 19, and 20, which they specifically argue and cite authorities in support thereof, after which counsel for defendant (in error) state in the concluding paragraph of their brief as follows:

"In view of the fact that there is not a line of evidence offered by the plaintiff to prove that the deceased looked and listened for an approaching train, or that he was in the exercise of ordinary care when the collision occurred, the verdict in this case is contrary to law as laid down by the trial court. It is also contrary to the rules in reference to ordinary care that have been announced in the numerous decisions of the Supreme Court of Oklahoma, two of which have heretofore been cited. It was the duty, therefore, of the trial court to set aside the verdict in this case for the reason that it is contrary to law."

Counsel for the defendant make no substantial complaint or argument in their brief that the instructions of the court to the jury were erroneous. The only error of which they complain is the refusal of the trial court to give to the jury the defendant's requested instructions specifically named above.

[1] We have carefully examined the instructions of the trial court, and it is our opinion that the same fairly, quite clearly, and correctly stated the issues involved in the case to the jury, and the instructions to the jury covered the questions contained in the requested instructions of the defendant that were refused by the trial court, and

hence there was no error in the trial court's refusal to give the requested instruction.

Such has been the rule announced by this court in numerous decisions. In the case of *Great Western Coal & Coke Co. v. Serbantas*, 50 Okl. 118, 150 Pac. 1042, in syllabus 2, the court stated:

"It is not error for the trial court to refuse a requested instruction to the jury as to law that is fairly given, although in another form, in the general instructions."

In *Tishomingo Electric Light & Power Co. v. Gullett*, 52 Okl. 180, 152 Pac. 849, the court announced the rule in the third syllabus as follows:

"The refusal of the court to give instructions which properly state the law is not reversible error, if substantially the same proposition of law is stated in other instructions given, and where the charge of the trial court, as a whole, properly states the law."

Many other decisions of this court both before and after the cases cited, supra, to the same effect, may be cited. There is competent evidence which reasonably tends to support the verdict.

[2] In view of the record and the cases cited, we are clearly of the opinion that the trial court committed no error in refusing the requested instructions of the defendant and in overruling the defendant's motion for a new trial. The judgment of the trial court is therefore affirmed.

MCNEILL, NICHOLSON, ELTING, MILLER, and KENNAMER, JJ., concur.

(36 Okl. 243)

PHILLIPS v. MITCHELL et al. (two cases).
(Nos. 11273, 12703.)

(Supreme Court of Oklahoma. April 18, 1922.
Rehearing Denied June 20, 1922.)

(Syllabus by the Court.)

Execution \Leftrightarrow 194(3)—Judgment \Leftrightarrow 895—Findings against claimant of land held supported by sufficient evidence; allowing a credit obtained by judgment creditors as a credit on judgment against defendant held proper.

Record examined, and held: (1) That the findings and judgment of the trial court are sufficiently supported by the evidence; (2) that the action of the trial court complained of by the Mitchells in their cross-petition in error is not erroneous.

Appeals from District Court, Oklahoma County; J. B. Dudley, Judge.

Action by W. O. Mitchell and another against D. M. Phillips and another, in which there was a judgment for plaintiffs, which was affirmed on appeal, and another action

by the same plaintiffs against R. I. Phillips alone resulting in judgment against the defendant. F. O. Phillips claimed to be the owner of the property levied upon in execution in these two cases, which were consolidated issues of fact decided in favor of the judgment creditors, and F. O. Phillips appeals. Judgments affirmed.

J. I. Howard and A. M. Beets, both of Oklahoma City, for plaintiff in error.

Chas. L. Moore, Stuart, Sharp & Cruce and W. O. Mitchell, all of Oklahoma City, for defendants in error.

KANE, J. The questions presented for review arise out of the efforts of the defendants in error, who will hereafter be referred to as the Mitchells to collect two separate judgments in their favor. The first of these judgments was procured by the Mitchells against D. M. Phillips and R. I. Phillips in the district court of Logan county. This judgment, which was appealed from by D. M. and R. I. Phillips, was affirmed in *Phillips et al. v. Mitchell et al.* (Okl. Sup.) 172 Pac. 85. The second judgment was procured by the Mitchells against R. I. Phillips alone in the district court of Oklahoma county, and became final upon no appeal being taken therefrom. F. O. Phillips, the plaintiff in error in these consolidated proceedings, was not a party to either of the foregoing actions, and his sole interest in the present controversy is that of a third person, who claims to be the owner of the property levied upon by the Mitchells in an effort to collect their judgments against D. M. Phillips and R. I. Phillips. D. M. Phillips and R. I. Phillips are father and son, and D. M. Phillips and F. O. Phillips are brothers, and the Mitchells claim generally that the Phillips have fraudulently conspired together for the purpose of covering up the property of the judgment debtors in order to prevent them from collecting their judgments.

Counsel for plaintiff in error in their brief truly say:

"The case-made is voluminous, and contains a very large amount of immaterial matter which should not be contained therein"

—but if we keep in mind that F. O. Phillips is the only person appealing, and that his interest in the controversy is that of a third person claiming to be the owner of, or to have a superior lien on property taken under execution by the Mitchells in an effort to enforce the foregoing final judgments, we may disregard a large part of the record made below without in any way affecting any substantial right of F. O. Phillips in the premises.

The question presented in cause No. 11273 arose substantially as follows: After pro-

curing their judgment against R. I. Phillips in the district court of Oklahoma county, the Mitchells caused an execution to issue and be levied upon certain crops growing on the quarter section of school land involved in both cases, as the property of the judgment debtor, R. I. Phillips. Thereupon F. O. Phillips filed a motion to discharge this property from levy and execution upon the ground that he was the sole owner of the school land lease and the growing crops seized under the execution. Upon the trial of this motion which followed, the court heard testimony at great length, and after due consideration overruled the motion of F. O. Phillips. The issue of fact joined by the parties upon the hearing of this motion were as follows: F. O. Mitchell claimed to be the absolute owner of the property taken. The Mitchells contended that the property belonged to R. I. Phillips, and that the claim of F. O. Phillips was in pursuance of a fraudulent conspiracy between all the Phillipses to cover up property owned by D. M. Phillips and R. I. Phillips for the purpose of circumventing the Mitchells in the collection of their judgments.

The trial court, as we have seen, decided this issue of fact in favor of the Mitchells finding specifically that F. O. Mitchell had no interest in the property claimed by him. From this brief summary of the record it becomes fairly obvious that the only question necessary for us to consider in passing upon the first assignment of error is: Are the findings and judgment of the trial court against F. O. Phillips and in favor of the Mitchells contrary to the clear weight of the evidence. Upon this point it is sufficient to say that we have examined the evidence carefully, and are convinced that the judgment of the trial court is amply sustained by the evidence.

The second assignment of error presents a similar question somewhat differently raised. This question arose substantially as follows: One Stayman commenced an action against D. M. Phillips in the district court of Oklahoma county upon a promissory note, and to foreclose a mortgage upon certain lots belonging to D. M. Phillips, situated in Oklahoma City, commonly known as the California street property, given to secure payment of the note, alleging also that he was entitled to a first lien upon the school land lease involved herein as collateral security. Stayman made the Mitchells parties defendant under the general allegation that they had or claimed to have some interest in the real estate involved. The Mitchells came in and answered, setting up their judgments against D. M. Phillips and R. I. Phillips, alleging fraudulent collusion against the Phillips as hereinbefore stated, and claiming a superior lien against the lots and the school land lease as judgment debtors

of D. M. Phillips. In this action F. O. Phillips voluntarily intervened, and again set up his claim to the school land involved, this time alleging, not only that he was the absolute owner thereof, but also claiming that he held a lien thereon which was prior and superior to the lien claimed by the Mitchells. The Mitchells again alleged fraud and collusion as previously.

After the issues were thus joined in this action, there was a full hearing before J. B. Dudley, Esq., sitting as special judge, which again resulted in findings of fact and conclusions of law against F. O. Phillips and in favor of the Mitchells. In the trial before Judge Dudley, F. O. Phillips abandoned his claim of absolute ownership of the school land lease, and directed his efforts toward establishing a lien upon the same superior to the judgment lien claimed by the Mitchells.

As we view the record, considering only the rights of F. O. Phillips, our duty in passing on this assignment of error is precisely the same as it was in considering the previous assignment of error; that is, to examine the record for the purpose of ascertaining whether the findings and judgment are against the clear weight of the evidence. We have done this, and are entirely satisfied that there is ample evidence to sustain the judgment rendered.

Counsel for F. O. Phillips in their brief point out what they say is an inconsistency in the claims of the Mitchells in regard to the title of the school land lease, in the first proceeding and in the second, and they also seek to raise several questions touching improper introduction of testimony and relating to practice and procedure, which in view of F. O. Phillips' limited interest in the cases we do not deem it necessary to notice in detail. F. O. Phillips' right to relief rests wholly upon his ability to show that he is either the sole owner or a superior lienholder as against the Mitchells of the property sought to be taken under execution. In the first proceeding the question thus presented was raised upon his own motion, and in the second case he voluntarily intervened and was permitted to try the same question again. Having had two opportunities to establish his claim in forums and under procedure selected by himself, we are unable to perceive how he can be prejudicially affected by the errors of this sort complained of. His whole case hinges on the claim that he is the sole owner of or has a superior lien on the property seized. Both of these claims having been definitely decided against him upon ample testimony, he will not be permitted to raise questions which affect only other parties or other angles to this long drawn out litigation, in which he can have no possible interest. F. O. Phillips is the sole plaintiff in error in this proceeding in error, and no other in-

terest than his has been or will be considered, except the question presented by the cross-petition of the Mitchells, which we will now notice.

This question arose substantially as follows: The lots covered by the Stayman mortgage are the property hereinbefore referred to as the California street property, and admittedly belonging to D. M. Phillips. D. M. Phillips becoming bankrupt, this property passed into the hands of the trustee in bankruptcy to be administered for the benefit of his creditors. The judgment of the Mitchells against D. M. Phillips not being released by the bankruptcy proceedings, they thereupon proceeded to contest the right of Charles Stayman to foreclose his mortgage on this property on the ground that his note and mortgage were usurious; it being admitted in the bankruptcy court that the Mitchells had a lien on the property by reason of their judgment. It then became a question of priority of liens as between Stayman and the Mitchells. The referee in bankruptcy, after a full hearing, determined that Stayman's lien was superior to that of the Mitchells, and decreed the foreclosure thereof for the purpose of paying the principal sum due on the note, together with interest thereon at 10 per cent. per annum for a number of years and an attorney's fee of something like \$300, denying the claim of the Mitchells that the note and mortgage were usurious. From this judgment, the Mitchells petitioned the United States District Court for the Western District of Oklahoma to reverse the action of the referee, and a transcript of the proceeding was duly filed in the United States court for that purpose.

While this appeal, or motion for review, was pending, Stayman and the Mitchells entered into an agreement by which the motion for review, or appeal, was to be dismissed. Stayman accepting interest on his indebtedness at 7 per cent. instead of the 10 per cent. provided for in the note, and agreeing to pay the Mitchells the difference amounting to \$1,456.50. This agreement was carried out by the money being paid to the Mitchells. In the trial before Judge Dudley, while D. M. Phillips was still a party, the question was raised whether D. M. Phillips was entitled to a credit on the Mitchell judgment in the sum of \$1,456.50, or whether Mitchell was entitled to retain that sum as a private transaction between himself and Stayman. Judge Dudley decided this question in favor of D. M. Phillips, and allowed credit on the Mitchells' judgment against

him for the sum named. We are unable to grasp the precise ground upon which the cross-petitioners in error question the action of Judge Dudley and assert the right to retain this sum of money. Under the heading, "Points and Authorities," counsel present the question in their brief as follows:

"Section 4681 of the Code requires actions such as this to be prosecuted in the name of the real party in interest. F. O. Phillips, intervenor, has no interest in the unsatisfied judgment against D. M. Phillips, nor in the amount thereof, except in so far as the same may operate against, or injuriously affect his individual property; otherwise, he has no justiciable interest in the credit complained of. Should his contention be upheld as to ownership of the school land lease, he would take and hold the same free from the Mitchell judgment, and could therefore not be interested in the amount thereof; in like manner, if the lease in fact belongs to the judgment debtor, D. M. Phillips, as found by the trial court, then F. O. Phillips could not be interested in how large the judgment is that is to be enforced against it."

From this we gather that the contention of counsel is that F. O. Phillips, by reason of his limited interest in this proceeding in error hereinbefore pointed out, cannot question the right of the Mitchells to keep the money. This is probably true, but F. O. Phillips is not undertaking to raise this question—it was raised by the Mitchells in their cross-petition—and, if it is passed upon at all, we must assume that they have joined the proper parties in this court for that purpose. Acting upon this assumption, we think the court was entirely right in allowing D. M. Phillips a credit for the amount the Mitchells received from Stayman.

The appeal prosecuted by the Mitchells from the action of the referee in bankruptcy was taken for the purpose of defeating or diminishing Stayman's claim in order that the Mitchells might profit to whatever extent they were successful. While the appeal to the United States court was never heard, yet it indirectly resulted in materially reducing Stayman's claim against the California street property to the benefit of the Mitchells in a substantial sum. We are wholly at a loss to perceive any legal or equitable ground upon which to sustain the Mitchells' claims to the money thus secured.

Finding no reversible error in the record, the judgments appealed from are affirmed.

HARRISON, C. J., and PITCHFORD, V. O. J., and JOHNSON, ELTING, MILLER, and NICHOLSON, JJ., concur.

(86 Okl. 198)

EUREKA FIRE HOSE MFG. CO. v. INCORPORATED TOWN OF STONEWALL.
(No. 10735.)

(Supreme Court of Oklahoma. June 6, 1922.)

(Syllabus by the Court.)

Appeal and error \S 773(2)—Supreme Court may dismiss appeal for failure of plaintiff in error to file brief within required time.

When a case is pending in this court and set for hearing on the regular printed docket, and the plaintiff in error fails to file brief, but obtains additional time in which to file brief, and thereafter fails to file brief within such extension of time, and the defendant in error thereafter files a motion to dismiss the appeal because plaintiff in error has failed to file brief, and the plaintiff in error fails to respond to such motion or in any way excuse its failure to file brief, this court may, under rule No. 7 of this court (165 Pac. vii), exercise its discretion and dismiss the appeal for failure to file brief.

Appeal from District Court, Pontotoc County; J. W. Bolen, Judge.

Action by the Eureka Fire Hose Manufacturing Company against the Incorporated Town of Stonewall. Judgment for defendant, and plaintiff appeals. Appeal dismissed for failure to file brief.

B. H. Epperson, of Ada, for plaintiff in error.

Geo. W. Burris, of Stonewall, and J. W. Dean, of Ada, for defendant in error.

MILLER, J. This action was commenced in the district court of Pontotoc county, Okl., by the Eureka Fire Hose Manufacturing Company, as plaintiff, against the incorporated town of Stonewall, as defendant, to recover on a contract for goods, wares, and merchandise sold by the plaintiff to the defendant. Issues were joined, and the cause submitted to the court on an agreed statement of facts, which resulted in a judgment in favor of the defendant and against the plaintiff. The plaintiff saved all necessary exceptions, gave notice of appeal, and appears here as plaintiff in error, but for convenience the parties will be referred to as they appeared in the lower court.

This case was set for submission on the regular printed docket of this court for Tuesday, April 18, 1922. On March 7, 1922, on application of the plaintiff, it was given 20 days in which to file a brief, and the defendant given 20 days from the service of plaintiff's brief to answer. On April 18, 1922, when the case was reached on the call of the docket, it was submitted on briefs to be filed. The plaintiff failed to file its brief, and on May 12, 1922, the defendant filed a motion to dismiss the appeal because the plaintiff had failed to comply with rule No.

7 (165 Pac. vii) of this court. This rule is set out in full in *Re Seizure One Chevrolet, Baby Grand Auto*, 82 Okl. 202, 200 Pac. 144.

The motion to dismiss was duly served on the plaintiff on May 11, 1922. The plaintiff has failed to respond to said motion, or excuse its failure to file brief herein, or show any cause why said motion to dismiss should not be sustained and the appeal dismissed; therefore, we think said motion to dismiss should be sustained.

Under the last paragraph of said rule No. 7, the appeal is hereby dismissed.

KANE, JOHNSON, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 209)

MISSOURI VALLEY BRIDGE CO. et al. v. STATE INDUSTRIAL COMMISSION
et al. (No. 12860.)(Supreme Court of Oklahoma. April 25, 1922.
Rehearing Denied June 13, 1922.)*(Syllabus by the Court.)*

1. Master and servant \S 417(7)—Industrial Commission's findings of fact final under Compensation Act.

By the provisions of section 10 of article 2 of the Workmen's Compensation Law (chapter 246, Sess. Laws 1915), the decision of the State Industrial Commission is made final as to all questions of fact, and on appeal to this court from an award of the Industrial Commission the court is without jurisdiction to weigh the evidence for the purpose of determining whether the same preponderates in favor or against the findings of fact made by the Industrial Commission.

2. Master and servant \S 385(11½)—Loss of hearing in one ear compensable as "loss of hearing," within statute.

Under section 9, c. 14, Sess. Laws 1919, providing for compensation for loss of hearing in an amount to be determined by the Industrial Commission, but not in excess of \$3,000, and where the commission found as a fact that the claimant as a result of an accident, suffered the loss of the hearing in his left ear, such finding entitled the claimant to the compensation provided for in the act, and the action of the commission in awarding the claimant compensation in the sum of \$1,500 is affirmed.

Appeal from State Industrial Commission.

Petition by the Missouri Valley Bridge Company, employer, and the Associated Employers' Reciprocal, insurer, against the State Industrial Commission and John Philip Cook, to review an award to the latter, an employé, made by the Commission. Judgment for respondents, and petitioners appeal. Affirmed.

Twyford & Smith and John P. Hampton, all of Oklahoma City, and Clayton B. Pierce, of Tulsa, for appellants.

JOHNSON, J. The petitioners commenced this action by petition to review the action of the State Industrial Commission in making an award in favor of John Phillip Cook, on the 10th day of November, 1921, in the sum of \$1,500, for total loss of hearing in his left ear. The award was made by the Industrial Commission, after hearing had, at which hearing the testimony of numerous witnesses was reduced to writing, including that of the claimant, John Phillip Cook, a transcript of which testimony is before the court.

The award of the Industrial Commission is in words, figures, and phrases as follows:

"Now, on this 10th day of November, 1921, this cause comes on to be determined on the claimant's claim for compensation for an injury which he alleges occurred to him while in the employment of the Missouri Valley Bridge Company, on the 12th day of July, 1920, at Calvin, Okl., and the commission having considered the testimony taken at a regular hearing at Oklahoma City, Okl., on the 25th day of October, 1921, before a member of the commission, at which hearing the claimant appeared in person, and the respondent and insurance carrier were represented by Clayton B. Pierce, and having examined all the records on file in said cause, and being otherwise well and sufficiently advised in the premises, finds the following facts:

"(1) That the claimant herein was in the employment of the Missouri Valley Bridge Company, and was engaged in a hazardous occupation within the meaning of the statute, and that while in the employment of said respondent, and in the course of his employment, the claimant received an accidental injury on the 12th day of July, 1920.

"(2) That as a result of said accident the claimant suffered the loss of the hearing in his left ear.

"(3) That the respondent had proper notice of said accident, and the employee filed his claim for compensation with the commission within the statutory period.

"(4) That the claimant's average wage at the time of his injury was \$6.50 per day.

"The commission is therefore of the opinion that by reason of the aforesaid fact the claimant is entitled under the law to compensation of \$1,500 for total loss of hearing in his left ear.

"It is therefore ordered that within 10 days from this date the Missouri Valley Bridge Company, or the Associated Employers' Reciprocal, pay to the claimant the sum of \$1,500 in full and final settlement, and also pay all medical expense incident to said injury."

The petitioner's assignments of error are:

"(1) That said award is contrary to law.

"(2) That said award is contrary to the evidence introduced at the hearing.

"(3) That said award is not supported by any legal evidence whatever.

"(4) That said award is contrary to law and contrary to the evidence.

"(5) That the injuries complained of and disability complained of did not arise in the course of employment as required by the Workmen's Compensation Act, and therefore the decision and award is contrary to law.

"(6) That the commission erred as a matter of law in making said award, because there was absolutely no evidence before said commission sustaining the claim that said injuries complained of were received by the said Cook arising out of and in the course of his employment, and therefore the award is contrary to law and is contrary to the evidence.

"(7) Because said commission erred as a matter of law making said award, because there was no evidence that said injury was an accidental injury.

"(8) That said commission erred in its construction of the Workmen's Compensation Law, and in finding that the loss of hearing in one ear is compensable under said act."

These assignments are discussed by petitioner in their brief under three subheads or propositions, which are:

(1) The claimant failed to support the burden of proof that he received the personal injury resulting from an accident arising out of and in course of his employment.

(2) The loss of hearing in one ear is not compensable under the act.

(3) The award is not sustained by the evidence.

We will consider the first and third of these propositions together.

[1] Counsel for respondents devote by far the greater portion of their brief in support of their first proposition; their position being clearly stated in their reply brief in the following language:

"In taking each of these positions respondents have fallen into an erroneous conception, both of the interpretation of the brief filed by petitioners and of the facts disclosed by the record. On reading the brief filed, it is clear that we have endeavored to show that the findings of the commission are on the same basis as the verdict of a jury or the findings of a court in a law case. We then endeavor to show that under such rules the claimant has failed to make his case."

In this contention of counsel we cannot agree, and it is a sufficient answer to say that this is not the first time that counsel in this class of cases have assumed the position of counsel in the instant case, and that this court has universally and steadfastly refused to adopt the contention made. Section 10, art. 2, c. 246, Session Laws 1915, defines the powers of the State Industrial Commission, and therein it is declared that the decision of the commission shall be final, except as provided in section 13 of this act as to questions of law.

"The decision of the Commission shall be final as to all questions of fact, and, except as pro-

vided in section 13 of this article, as to questions of law."

In the case of *Raulerson v. State Industrial Commission of Oklahoma et al.*, 76 Okl. 8, 183 Pac. 880, the court, in the first paragraph of the syllabus, said:

"In a suit instituted in this court to review an award of the State Industrial Commission, the suit must be to review an error of law, and not an error of fact. Their decision as to all matters of fact is final."

The court in that case cited with approval the case of *Board of Commissioners v. Barr* (Okl. Sup.) 173 Pac. 206.

In the case of *Choctaw Portland Cement Co. v. Short Lamb*, 79 Okl. 109, 189 Pac. 760, in the second paragraph of the syllabus, this court said:

"The decision of the commission is final as to all questions of fact, and this court is not authorized to weigh the evidence upon which any finding of fact is based."

In that case it was contended that the finding of a court or jury that was without support in the evidence presented a question of law, and not of fact, and in disposing of the contention this court, in the body of the opinion, said:

"The commission found that there has been a change in conditions, and the act provides that the decision of the commission shall be final as to all questions of fact. It is unnecessary for us to express an opinion on the proposition of law advanced by counsel that a finding of a court or jury, which is without support in the evidence, presents a question of law rather than of fact, for there is some evidence in this record supporting the finding of the commission that there has been a change in conditions, and this court is not authorized to weigh the evidence upon which that finding is based."

In *McAlester Colliery Co. v. State Industrial Commission et al.* (No. 12471) 204 Pac. 630, opinion filed January 17, 1922, not yet [officially] reported, this court stated as follows:

"Under section 10, art. 2, of the act, this court must accept the facts as found by the commission, but from the facts thus found it may draw its own independent conclusions of law. It cannot weigh the evidence to ascertain whether or not it supports the facts found by the commission. The finding of fact by the commission is binding upon this court where there is competent evidence to support it. Whether the facts found constitute a cause of recovery is a question of law to be decided by this court. In discussing this question, the court, in the case of *Choctaw Portland Cement Co. et al. v. Lamb et al.*, 79 Okl. 109, 189 Pac. 750, in an opinion by Mrs. Justice Rainey, said: 'The decision of the State Industrial Commission is final as to all questions of fact and this court is not authorized to weigh the evidence upon which any finding of fact is based.' The

same rule has been announced in *Board of Commissioners of Cleveland County v. Barr et al.*, 173 Pac. 206."

If the decisions of this court mean anything, they mean that the Workmen's Compensation Law (chapter 246, Session Laws 1915, as amended by chapter 14, Session Laws 1919), providing for the compulsory compensation of injured employees in hazardous industries, placing the supervision of the act under a commission herein created, fixing a schedule of awards, and providing penalties for the violation of the act, is a valid exercise of the power of the Legislature of this state, and the act is in derogation of the common-law rules of compensation for personal injuries, in that it creates a tribunal to hear and determine the facts constituting the claimant's cause of action for compensation for injuries coming within the provisions of the act, making the Industrial Commission the triers of the facts and its determination thereof final and conclusive, from which there is no appeal to this court. These acts, like all others in derogation of the common law, must be liberally construed. *Wick et al. v. Gunn et al.* (Okl. Sup.) 169 Pac. 1087, 4 A. L. R. 107; *Booth & Flinn v. Cook et al.*, 79 Okl. 282, 193 Pac. 36; *Rev. Laws 1910*, § 2948.

The findings of the commission in the instant case—(1) that the claimant herein was in the employment of the Missouri Valley Bridge Company, and was engaged in a hazardous occupation within the meaning of the statute, and that while in the employment of said respondent, and in the course of his employment, the claimant received an accidental injury on the 12th day of July, 1920; (2) that as a result of said accident the claimant suffered the loss of the hearing in his left ear—we find, from an examination of the record, are based upon competent evidence. Therefore this court is without jurisdiction and power to weigh the evidence, or to determine the preponderance thereof.

[2] The petitioners' second proposition "that the loss of hearing in one ear is not compensable under the act," will next be considered. Section 9, c. 14, Session Laws, 1919, fixing a schedule of injuries and the compensation therefor, and that the compensation fixed shall be in lieu of all other compensation, etc., then provides:

"In case of an injury resulting in the loss of hearing * * * compensation shall be payable in an amount to be determined by the Commission and not in excess of three thousand dollars: Provided, that compensation for loss of hearing * * * shall not be in addition to the other compensation provided for in this section, but shall be taken into consideration in fixing the compensation otherwise provided."

This provision of the act provides for compensation for loss of hearing in an amount

to be determined by the commission, but not in excess of \$3,000. Unlike the schedule of injuries provided in the act, the compensation provided for the loss of hearing is not based upon the wage received by the claimant at the time of the injury, but the amount of compensation to be awarded for loss of hearing is to be determined by the commission, not to exceed the maximum amount of \$3,000.

In the instant case the commission specifically found that as a result of said accident the claimant suffered loss of the hearing in his left ear. It seems quite clear to us that the loss of the hearing in the left ear is the loss of hearing as provided in the act, and that the claimant was entitled to the compensation provided for in the act, the amount thereof to be determined by the commission within the limitation fixed by the act. The commission determined the amount to which the claimant was entitled to be \$1,500. In these circumstances, we do not think that the amount as found by the commission was unreasonable, or that the commission acted arbitrarily in fixing the award in that sum.

The award of the commission is affirmed.

PITCHFORD, V. C. J., and MILLER, ELTING, and KENNAMER, JJ., concur.

GOOD v. STATE. (No. A-3788.)

(Criminal Court of Appeals of Oklahoma.
June 17, 1922.)

(Syllabus by the Court.)

1. Larceny \S 27—One who knowingly assists thief in disposal of stolen property held guilty of larceny.

One who joins with a thief and assists in the asportation and disposal of stolen property, knowing at the time he does so that the other acting with him is in the act of carrying away the property of another, is equally guilty of the larceny.

2. Criminal law \S 1172(1)—Judgment not reversed because of minor errors in instructions, where defendant's own testimony is sufficient for conviction.

A judgment of conviction will not be reversed, because of minor errors in the court's instructions, where upon the defendant's own testimony a conviction should have resulted.

Appeal from District Court, Canadian County; James I. Phelps, Judge.

John Good was convicted of grand larceny, and he appeals. Affirmed.

A. G. Morrison, of El Reno, for plaintiff in error.

George F. Short, Atty. Gen., and C. W. King, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Canadian county, wherein John Good was convicted of the crime of grand larceny and sentenced to serve a term of 18 months' imprisonment in the state penitentiary. A short statement of the facts follows:

Waverly Barrett, a farmer living about 10 miles east of the city of El Reno, Canadian county, Okla., was the owner of a Studebaker automobile. He kept this car stored, when not in use, in a garage on the farm, and the car was equipped with five 32x4 automobile casings. Four of these casings were on the wheels, these were Goodrich casings. The fifth, a new Ajax casing, was fastened to the rear end of the car on a holder. In the latter part of May, 1919, all these casings were stolen from the car during the night-time. Barrett last saw the casings on the car about 6 o'clock in the evening and when he went out to milk very early the next morning he noticed the casings were gone. It had been raining, and the ground was damp and muddy. Barrett discovered the shoeprints of two men leading up to and away from the garage, and tracked these men over to the public highway, where a car equipped with tires the size used on Fords was seen to have stood. Barrett and some of his neighbors followed the tracks of this car into the city of El Reno, where the tracks could not longer be followed because of the paved streets. The loss was reported to the police of El Reno, and a search was made in that city the next morning for a car having a peculiar tread tire of the kind that made the track which these parties had traced. This defendant was at that time operating a taxicab service in the city of El Reno. The car operated by him had a casing exactly like the one the parties had followed.

Some time later two of the casings stolen from Barrett were found on an automobile of a man by the name of Jobe in the city of El Reno, and upon investigation it was learned that Jobe had bought these tires from a man by the name of Griffith. A warrant of arrest was obtained for Griffith charging him with receiving stolen property. Griffith disappeared, was afterwards located in the state of Kansas, but returned to El Reno. After his return, John Good and a boy about 16 years old named Dean Halbert were jointly charged with this offense, on information apparently obtained from Griffith, as Griffith was a witness for the state in this trial, and testified that he and Milton Bruns had obtained these casings late at night from Halbert and Good in the southeast part of El Reno, that Halbert and Good had the casings in Good's automobile, that they said they had trouble with the engine, and had telephoned into the city to Bruns to come out and get the

casings, and Bruns had got Griffith to go out there with him. Bruns at that time was operating a motion picture machine in one of the theaters in El Reno, and part of these casings were taken back to that theater, and the others of them were taken by Griffith for use on an automobile that he owned, but when the casings would not fit his car he sold them to Jobe, and in that way the casings were traced back to the possession of Halbert and Good.

Good admits that Griffith and Bruns got the casings from his car at the place and time testified to by Griffith, but he says that he was employed by Halbert in his capacity as a taxi driver to make a trip into the country; that he (Good) had no knowledge of what Halbert intended to do; that they left El Reno about 8:30 one evening, and drove out east of town quite a distance, when Halbert told him to stop; that Halbert got out of the car and commenced to load these casings into the car from a patch of weeds which was located at the side of the road; that he never asked Halbert anything about the casings, but at his request hauled him back to El Reno, but that when they got to the southeast part of town the engine stopped, and Halbert went and called Bruns and Griffith out there; that Bruns and Griffith came out there and took the casings; that he never had anything to do with the larceny of the casings, and never received any of the money derived from their sale; that he merely accepted, as a taxi driver, the usual compensation for making a trip of this kind; that, although he knew all about the fact that Griffith and Bruns had received these casings from Halbert, he never told any of the officers anything about it; that his reason for not telling anything about it was that he thought it would hurt his business. There are other minor facts and circumstances which are unnecessary to relate.

[1] It is contended that this evidence is insufficient to sustain conviction. According to the testimony of the state's witnesses two parties stole these casings. The defendant admits that he and Halbert went out there and got them. Defendant would have the jury believe that they had already been taken and hid in a patch of weeds before they went out there, but defendant's story does not appear to be credible. Even under his own statement it must have been apparent to him that Halbert was committing a crime; that, when he loaded these casings into the defendant's car, he was stealing them. All the surrounding circumstances were of such a suspicious character that the defendant must have known that Halbert was in the act of stealing these casings. Knowing that fact, he assisted him in the asportation of them. We believe the jury was justified in returning a verdict of guilty

upon the defendant's own testimony. One who joins with a thief and assists in the asportation and disposal of stolen property, knowing at the time he does so that the other acting with him is in the act of carrying away the property of another is equally guilty of the larceny. *Brown v. State*, 7 Okl. Cr. 678, 126 Pac. 263. *Geo. Reed v. State* (No. A.-3769) 210 Pac. 311, decided February 25, 1922, not yet [officially] reported.

It is also contended that the trial court failed to instruct the jury fully on the ingredients of the crime of grand larceny. An examination of the instructions given leads us to conclude that the charge was sufficient, especially as counsel for the defendant requested no further instruction or instructions embracing the constituent elements of the crime.

[2] It is also contended that the trial court erred in refusing to give the defendant's requested instruction on circumstantial evidence. The trial court gave an instruction on circumstantial evidence which was a modification of the instruction requested. A judgment of conviction will not be reversed because of minor errors in the court's instructions, where, upon the defendant's own testimony, a conviction should have resulted. The judgment is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

McMASTERS v. STATE. (No. 3747.)

(Criminal Court of Appeals of Oklahoma.
June 13, 1922.)

(Syllabus by the Court.)

1. Constitutional law §81—Regulation or suppression of practice or profession of communicating with departed spirits through a "medium" while in a state of trance is within state's police power.

The regulation or suppression of the art, practice, or profession of communicating with departed spirits by a person known as a "medium" while in a state of trance, who imparts such communications for hire, whether it be done pursuant to a system of philosophy, religion, legerdemain, or metaphysical science, is within the police power of the state.

2. Constitutional law §84—The practice of communicating with departed spirits, if a part of an established religion, is not within the purview of federal and state Constitutions relating to free exercise of religion.

Assuming that the practice of communicating with departed spirits is a part of an established religion, such practice, if inimical to the good order and general welfare of the community or in conflict with the general penal laws, is not within the purview of the provisions of the federal and state Constitutions, relating

to the establishment of religion or the free exercise thereof.

3. Disorderly conduct §9—In a prosecution for fortune telling whether the practice of spiritualistic communication should be classified as religious held not ascertainable.

Whether the practice of spiritualistic communications should be classified as religious or philosophical, or is a kind of speculative psychic phenomenon or exercise, cannot be conclusively ascertained from this record.

4. Constitutional law §84—While statutes may not interfere with religious beliefs, they may with practices.

Laws are made for the government of actions, and, while they cannot interfere with mere religious beliefs, they may with practices.

(Additional Syllabus by Editorial Staff.)

5. Disorderly conduct §1—In prosecution for fortune telling defended as a religious exercise; "religion" defined.

In a prosecution for fortune telling through alleged communication with departed spirits, "religion" has reference to man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings, and in its broadest sense to include all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments (citing Words and Phrases, Second Series, Religion).

Appeal from County Court, Oklahoma County; W. R. Taylor, Judge.

Mrs. L. D. McMasters was convicted of fortune telling, and she appeals. Affirmed.

Gustave A. Erixon, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. This action is an outgrowth of an alleged spiritualistic "reading" by a "medium" in a state of trance, purporting to convey a message to one Bessie Jones from the spirit of Minnehaha, a legendary Indian girl as found in Longfellow's poem Hiawatha. Bessie Jones, an attaché of the county attorney's office, for the purpose of laying a foundation for this prosecution, went to the residence of the medium, Mrs. McMasters, in Oklahoma City, and there solicited the reading, which was given in consideration of the payment of \$1. The medium, after going into a trance, got into communication with the departed spirit of Minnehaha, and conveyed to Miss Jones a message, part of which was as follows:

"Q. What did she say? A. That I wasn't working at the present time, but that I was going to have a job offered me right away, a good job, and that I would take it; and then she said I was going to take a trip right away.

And she said I was going to meet a blond fellow—a blond-headed fellow—and also a black-headed fellow, and that this blond-headed fellow would come between me and the black-headed fellow, and that I was going to marry a wealthy man—

"Q. Did she make any charge for that information? A. Yes, sir; she did.

"Q. State what else she did when you got ready to leave. A. When I got ready to leave she gave me six calling cards.

"Q. Did she ask you to do anything with them? A. No, sir. She gave me six calling cards and asked or said for me to give them to my friends."

The statute under which this prosecution was brought (section 1, chapter 59, Session Laws of 1915) is as follows:

"It shall be unlawful for any person or persons, pretending or professing to tell fortunes by the use of any subtle craft, means or device whatsoever, either by palmistry, clairvoyancy or otherwise, plying his or her trade, art or profession within the state of Oklahoma, to make any charge therefor either directly or indirectly, or to receive any gift, donation or subscription by any means whatsoever for the same."

For a violation of this statute a minimum penalty is provided of a fine in any sum not less than \$50 and imprisonment for not less than 30 days. In this case the defendant was given the minimum punishment.

It is earnestly contended by defendant's attorney, in an exhaustive and well-written brief, that this sentence should be set aside on the constitutional ground that her arrest and conviction were unlawful, as an interference with the free exercise of her religious beliefs and practices; that for a number of years she had been a member of the National Spiritualist Association, incorporated under the laws of the state of Oklahoma, and that she was regularly licensed to give spiritual advice to others; that many of the tenets, beliefs and practices of this cult are religious in their nature, including the practice of communicating with departed spirits.

The declarations and principles, as contained in the constitution and by-laws of this association, are as follows:

(1) A belief in infinite intelligence.

(2) That the various manifestations of nature's laws, physical or spiritual, are the expression of this infinite intelligence.

(3) That a correct understanding of nature's laws and living in harmony therewith is enjoined upon its members.

(4) A belief in the continuity and individuality of existence after death and the possibility of communication with departed spirits.

(5) A belief in the Golden Rule.

(6) That each individual's happiness and moral responsibility is dependent upon obedience to nature's psychic laws.

(7) That the privilege of reformation is continuous here, as well as in the hereafter.

Other excerpts from the constitution are as follows:

"The objects of said association shall be the organization of the various spiritual societies of the United States into one general association for promoting mutual aid and co-operation in the benevolent, charitable, educational, literary, musical, scientific, religious and missionary purposes and enterprises germane to the phenomena, science, philosophy, and religion of Spiritualism."

"We recognize mediumship as the foundation of Spiritualism, as giving proofs of the continuity of life after so-called death, as furnishing advice and spiritual instruction for our guidance, moral development and physical well-being; and that, to insure the best results, our mediums need protection and encouragement, and, in cases of indigence, financial aid; therefore, special funds should be set aside for such purpose, under the supervision of the board of trustees."

"The ministry of Spiritualism shall consist of three classes, to wit: Pastors, licentiates and associate ministers."

Ever since the dawn of history there have been those who have believed in the influence of good and evil spirits. The devil himself was a fallen angel, cast out of heaven. If, then, both good and evil spirits communicate with men, the character of the spirit messages will necessarily vary accordingly. Women desiring information concerning their amours should consult the spirit of Ruth, of Delilah, or of Cleopatra; men might well inquire of the spirit of King Solomon, of Henry the Eighth, or of Aaron Burr.

The writings of Dante, of Shakespeare and of Milton, as well as of the modern poets, abound with examples of the belief in spirits.

"Aerial spirits, by great Jove designed
To be on earth the guardians of mankind;
Invisible to mortal eyes they go,
And make our actions good or bad below.
They can reward with glory or with gold—
A power they by divine permission hold."

—Hesiod.

"The spirits perverse, with easy intercourse,
Pass to and fro to tempt or punish mortals."

—Milton.

Since both the federal and state Constitutions forbid the abridging of the freedom of conscience and religious liberty, we are confronted with the question whether, as a matter of law, the beliefs and practices of Spiritualism, as shown by this record, constitute a religion within the meaning of the federal and state Constitutions; and whether, if it is a religion, the practice of communicating with departed spirits through a spiritualist medium is within the purview and protection of the Constitution.

[5] It has been held that "religion" has reference to man's relation to Divinity; to reverence, worship, obedience, and submission to the mandates and precepts of supernatural or superior beings. In its broadest

sense it includes all forms of belief in the existence of superior beings, exercising power over human beings, by volition, imposing rules of conduct with future rewards and punishments. *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; 4 Words and Phrases, Second Series, p. 253; *People v. Board of Education*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220; *State v. Amana Society*, 132 Iowa, 304, 109 N. W. 894, 9 L. R. A. (N. S.) 909, 11 Ann. Cas. 231.

[3] Applying these definitions and authorities to the facts shown by this record, we admit our inability to decide conclusively whether this is a religion, or whether it is a mere philosophy or a system of metaphysical speculation. We are inclined to lean toward the latter view, but we have not been sufficiently advised to decide that point. We do affirm that this record tends to show that, whether religious in its nature or not, it is a system of speculative philosophy, attended with superstitious credulity and in the instant case tinged with hypocrisy. This association prescribes no confession of religious faith; no rules of conduct, directing what its members shall do or refrain from doing, except as before stated. Its principles of philanthropy and its belief in the Golden Rule would apply to the Masonic Order, the Elks, the Rotary Club, or the Boy Scouts, and like organizations, none of which are considered religious organizations.

[2] But, assuming that it is a religion, religious liberty does not include the right to introduce and carry out every scheme or purpose which persons see fit to claim as a part of their religious system. No one can stretch his liberty so as to interfere with that of his neighbor, or violate police regulations or the penal laws of the land, enacted for the good order and general welfare of all the people. Liberty founded by the fathers was not license unrestrained by law. *Owens v. State*, 6 Okl. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218; *Davis v. Beason*, supra; *Frazee Case*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47; *State v. Neitzel*, 69 Wash. 567, 125 Pac. 939, 43 L. R. A. (N. S.) 203, Ann. Cas. 1914A, 899.

In the *Davis Case* Mr. Justice Field, quoting Mr. Justice Waite in an earlier case (*Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244), said:

"There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of their members. * * * Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs, * * * they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship,

would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

[1, 4] Even if the purposes of this organization are religious in their nature, it is difficult to see how the practice of giving "readings" or telling fortunes concerning the mating inclinations of men and women could be religious, in any sense. This medium, while in a trance and assuming to speak for Minnehaha, told Bessie Jones, whom she supposed to be a lovelorn girl, that she would soon meet an attractive blond boy, and that later a brunette would supplant him in her affections; that she would soon go on a long journey; that she would eventually marry a man of wealth, etc. All of which sounds very secular to this court. It seems very like a Gypsy fortune teller, or the reading of the palm by some wrinkled old hag, or the interpretations of a crystal gazer in a freak side show. Doubtless it was this species of hypocrisy and legerdemain that this statute was intended to suppress. An innocent practice or entertainment, whether of a religious nature or not, may be regulated or suppressed where the tendencies and temptations to pervert it into evil channels is manifest, and where the evil is likely to overbalance the good. Fantastic philosophers and religious zealots, like other people, must conform to wholesome police regulations. 6 R. C. L. Constitutional Law, § 237.

On the other hand, there have been and now are many persons of extraordinarily high mentality and intelligence who implicitly believe that communication can be had with departed spirits through a spiritualist medium. One of the most prominent adherents of this faith, A. Conan Doyle (who should not be confused with Thomas H. Doyle, presiding judge of this court) claims that departed souls are enveloped with a kind of external body, capable of being photographed, and that such photographs are in existence; also, that he has the physical writing of a letter written by a spirit friend. Maybe so—but, like Bessie, the stool pigeon, we are somewhat skeptical.

It is not for this court, however, to judge of the merits or demerits of philosophies, cults, or religions; we are expected to decide the

law so far as it relates to the concrete facts shown in this record. The legendary Minnehaha never existed in the flesh; hence a continuity of her spirit cannot exist in the spirit world. Unlike Conan Doyle, this medium produced no photograph of the spirit of Minnehaha. Her identity was not established. Some unknown, playful spirit may have deceived the medium, or she may have intended to deceive her client Bessie. Hiawatha and Minnehaha were creatures of the imagination of the poet Longfellow. It is a pretty, fascinating love poem, with a natural appeal to girls who long for romance in love. For example:

"As unto the bow the cord is,
So unto the man is woman,
Though she bends him, she obeys him,
Though she draws him, yet she follows—
Useless each without the other.
Thus the youthful Hiawatha,
Said within himself and pondered,
Much perplexed by various feelings;
Listless, longing, hoping, fearing,
Dreaming still of Minnehaha,
Of the lovely Laughing Water
In the land of the Dakotas."

If sure of her identity, it would be well worth a dollar of any girl's money to have the benefit of the advice of the sparkling, romantic spirit of Minnehaha.

But the unrestrained practice of this art, or whatever it may be, is susceptible of abuse within the power of the Legislature to suppress. Its mandates, within constitutional limitations, bind this court. Appeals to the spirit world might avail before the case reaches us, but here we have no jurisdiction over any spirits except those banned by the prohibitory law, such as "Bourbon," "Mountain Dew," "Forked Lightning," and like distillates—like those in the spirit world, some good and some bad.

The only practical appeal remaining is an appeal to the Governor for executive clemency. Since no one was injured, we feel that executive clemency would be proper, at least to the extent of setting aside the jail sentence. The sentence imposed was the minimum provided by law, so that this court, on affirmation, is powerless to modify it. This case, on the law and the facts, should be affirmed; and it is so ordered.

DOYLE, P. J., and MATSON, J., concur.

MATSON, J. (concurring). While A. Conan Doyle should not be confused "with Thomas H. Doyle, presiding judge of this court," neither should Bessie, the medium's patron, be confused with E. S. Bessey, Associate Judge of this court and writer of the opinion. I am reliably informed that there is no relationship either by affinity or consanguinity between either of the DoYLES or either of the Besseys.

Verily, the spirit of regulation is abroad in the land. For some time most of the

states have been regulating the mediums of communication between human beings such as the telephone and telegraph. Now this state proposes to regulate the mediums of communication with the spirit world. The maxim is, sic ad astra. Certainly, further than this we cannot go.

Again, is the statute in question merely regulatory or is it prohibitory? Any ex-saloon keeper can explain the difference between regulation and prohibition. Can the state constitutionally prohibit communication with the spirit world, with which, so far as I am advised, we are at peace? If it cannot, can it, under the Fourteenth Amendment, deny the mediums of such communication a reasonable compensation for the services rendered? These queries appear to me to be pertinent in the instant case.

However, assuming that the statute in question is not in contravention of the commerce clause of the federal Constitution, and that the state has power to regulate, I concur, because the medium in question had never filed her schedule of rates with the State Corporation Commission.

POWELL v. STATE. (No. A-3740.)

(Criminal Court of Appeals of Oklahoma.
June 19, 1922.)

(Syllabus by the Court.)

1. Information held sufficient.

Information examined, and held sufficient to charge the crime of receiving stolen property.

2. Indictment and information \S 122(1) — County attorney may file information charging crime according to facts in evidence at preliminary examination, where not waived.

Where preliminary examination is not waived and evidence is taken, the county attorney is authorized to file an information in the trial court charging the crime according to the facts in evidence at the preliminary examination.

3. Criminal law \S 510—Evidence held insufficient, there being no corroboration of accomplices' testimony connecting defendant with receipt of stolen property.

For reasons for holding the evidence insufficient to support the conviction; see body of opinion.

Appeal from Superior Court, Okmulgee County; R. E. Simpson, Judge.

Harve Powell was convicted of receiving stolen property, and he appeals. Reversed and remanded, with directions.

Morgan, Pinkston & Hepburn, of Henryetta, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the superior court of Okmulgee county, wherein Harve Powell was convicted of the crime of receiving stolen property, and sentenced to serve a term of 3 years and 6 months imprisonment in the state penitentiary.

[1] It is first contended that the information is insufficient. The question of the insufficiency of the information was first raised by general demurrer and secondly by objection to the introduction of evidence, upon the ground that the information was not sufficient to charge the crime of receiving stolen property or any other offense under the laws of this state. The information follows the form approved by this court in the case of Price v. State, 9 Okl. Cr. 359, 364, 131 Pac. 1102, and is sufficient.

[2] It is next contended that the trial court erred in overruling the defendant's plea in abatement on the ground that he had never been held to answer the particular offense of receiving stolen property. This assignment of error is purely technical. It is urged that because the transcript of the examining magistrate discloses that after the preliminary examination the defendant was held upon the charge of "receiving and aiding in the sale of stolen property," he was not held to answer to the charge of receiving stolen property. As the preliminary examination was not waived, the county attorney was authorized to file an information in the district or superior court charging the crime committed according to the facts in evidence at the preliminary examination. Williams et al. v. State, 6 Okl. Cr. 373, 118 Pac. 1006; Little v. State (Okl. Cr. App.) 204 Pac. 305 (opinion Feb. 13, 1922, not yet officially reported). Further, the indorsement of the examining magistrate in the language above set out was sufficient and not misleading.

It is next contended that the trial court erred in overruling the defendant's motion at the conclusion of the state's evidence for a directed verdict of "not guilty."

It is also contended that the evidence in this case is wholly insufficient to sustain the conviction, in that there is no sufficient corroboration of accomplice testimony to meet the requirements of the statute. These assignments of error involve a consideration of the entire evidence.

The defendant was jointly informed against with O. C. Hart and J. M. Cline with having—

"unlawfully, feloniously, and knowingly received and bought from some person to the county attorney unknown * * * one five-passenger Ford touring car of the value of \$500, the personal property of and taken from the possession of one Charles Cameron, the said Harve Powell and O. C. Hart and J. M. Cline well knowing the said property to have been stolen from the said Charles Cameron," etc.

The state took a severance and elected to try the defendant Powell first. On the trial the codefendants Hart and Cline voluntarily testified against this defendant, waiving all privileges and immunities.

If a conviction were justified in this state on the uncorroborated testimony of accomplices, this conviction should stand, as the testimony of Hart and Cline is sufficient, if believed, to authorize a verdict of guilty, but section 5884, Rev. Laws 1910, provides that—

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

Let us review the testimony of the various witnesses in the light of the requirements of the above statute.

Charles Cameron, the owner of the Ford touring car in question, merely testified to the theft thereof from his garage in the town of Haskell on the night of February 18, 1919, and also to the marks, etc., by which the car could be identified.

Roy Heaton testified that he lived at Haskell and was acquainted with the Ford touring car owned by Charles Cameron; that he went to Henryetta and saw the car in a building down by the fire department. This witness testified to nothing that tended to connect the defendant with the receipt of the car after its larceny.

J. E. Cline, codefendant, testified that—

He was a clerk in a grocery store at Henryetta, that he never bought a Ford car from this defendant, that on the morning of February 17, 1919, he went to the Miners' National Bank to make a deposit, that some one called him, and he looked back and saw Powell and Hart and a fellow that gave his name as Green standing there. "I turned to Powell because Powell knew I was on a trade to sell a Studebaker car. He asked me if I had bought the car yet. I said, 'No.' This fellow spoke up and said he had one to sell. I asked him what kind. He said five-passenger Ford, almost new. I asked him if he could make a bill of sale. He said, 'Yes.' I asked Powell if he would sign the bill of sale on this car. He said he thought it was all right—would sign the bill of sale. We went and got a bill of sale, and then went back to Powell's car, which was standing in front of the bank. We got in his car, drove down Main street to the Frisco Depot, went a block north, then turned west on Broadway one block, then four or five doors west on Trueman, and Green was standing on a porch there. He got in the car, and we drove west on Trueman until we reached Main street, and Green said he would make out the bill of sale. He made it out. I paid him \$250 for the car. I paid him in cash. The car at that time was just across the street from Hart's house and a little west of Powell's house. After that we started back to town in Powell's car, Powell, Green, and myself. I got out of

the car at Eighth and Main, and Hart drove the Cameron car over there. I got in the Cameron car with him, and we drove out south about a mile and a half, and Hart changed the numbers on the car by filing them off and putting new numbers on with a stencil. After that Hart came to me, and wanted to buy the car back, and I sold it to him for \$290. After that Powell came to me at the store and asked me if I had sold the car to Hart; said there was a car they were having trouble with down at the garage. He believed it was the same car. We drove down to the garage to see if it was the same car, and Powell looked at the car and said, 'Yes; that's the car.' A day or two later Hart told me they were having trouble over the car, and it looked like if I didn't take the car I would lose my money and the car too."

Cross-examination: Witness said that about three weeks before he bought this car he had told Harve Powell to be on the lookout for a car for him if he could find one cheap; that he did not understand Powell to be the owner of this car; that he understood Jim Green to be the owner of the car; that Hart and Powell did not sign the bill of sale in the same place Green signed it; that he thinks they signed it as witnesses; that Powell never told him that the car was his, or that he had an interest in it.

O. C. Hart testified: That he knew some things about the Cameron car. That he first saw the car back of Harve Powell's house about 7 or 8 o'clock in the morning of the day they sold the car to Cline. That the fellow Jim Green also went under the name of Cotton Wilder. Witness had seen Jim Green, or Wilder, two or three times before that, and had bought one car from him before that. Witness also corroborates Cline's statements as to the purchase of the car and the changing of the numbers. Witness also stated that he got the stencils to change the numbers with at Harve Powell's house, and got the file over at his own house. That two or three weeks after that he bought the car back from Cline, and took it to the Barfield garage and traded it to Fred White for a Ford roadster. That after he sold the car to Fred White he had a talk with Powell in regard to the car. That Powell came to his house two miles west of town, and said he would have to go down there and do something with the car; "It's in the garage and old dad's blowing his head off to everybody that comes in about its being a wet car, something wrong with it; that they would have to get out of there." Next morning witness went to town, and met Powell, and Powell then said that "Slim," this policeman, had found it was down there and had looked it over. He said he could square it with "Slim" for \$25. Later witness went to J. E. Cline, and Cline took the car back, and was in the possession of the car at the time witness was arrested. Witness further testi-

fied that he was not related to Harve Powell, but that Homer Hart was a brother of his. That Harve Powell introduced Jim Green to him under the name of Cotton Wilder. That witness had not seen Jim Green since the day they made the deal to J. E. Cline on the car.

Cross-examination: Witness testified that he was arrested on this charge the evening before Harve Powell was arrested. That the county attorney told him he could plead guilty and take 2 years, but never said anything about convicting Powell. That the county attorney never promised him that if they could stick Powell that they would turn him loose. That he did not get any of the money that Cline paid Jim Green. That on the morning the car was sold to Cline, about 7 or 8 o'clock, the witness took the car from Powell's house and drove it two blocks north over on Division street and got some springs and a mattress and brought them over to his house. Witness denied ever trying to sell the car. That the car was sold to Cline about 2 or 3 o'clock in the afternoon. Witness denied knowing that the car was a stolen car at the time it was sold to Cline. In other respects the witness' testimony on cross-examination was similar to that given in chief.

W. W. Melton testified that he was chief of police of Henryetta in March, 1919, and located the stolen car in a little garage in an alley back of Harrison's store in Henryetta, and took it to the fire station, where it was afterwards identified by Cameron and turned over to him. That defendant Powell was arrested the next evening after the car was found.

Fred White testified that he lived at Henryetta and was in the transfer business; that in March, 1919, he worked at Barfield's garage; that about that time he bought a Ford car from O. C. Hart, and about a week afterwards sold the car back to Hart; that during the time witness owned the car he kept it in Barfield's garage; noticed that numbers on the car were larger than witness had ever seen on other Ford cars; during time car was in Barfield's garage saw Harve Powell and J. E. Cline drive in there in a Ford, but didn't see "what they done." W. J. McGuffey was there at the time; he is commonly called "Dad."

W. J. McGuffey testified that he was working in Barfield's garage in March, 1919, as a mechanic; saw the car there, don't remember how long it was there; saw Powell and Cline drive up there once while car was there. Witness was busy in the office at the time, but got up and walked to the doorway, and heard Powell remark to Cline, "That's the car"; that was all witness heard said; he was looking at the car at the time; don't think Cline ever got out of the car he was riding in.

Mrs. Homer Hart testified that she lived in Henryetta and knew defendant Powell,

and remembered when he was arrested; that defendant came to her house about 6 o'clock of the day he was arrested, looking for her husband; that her husband wasn't there; that Powell said Broadus told him he had a warrant for him and Homer; he said O. C. Hart was telling everything; defendant hadn't been arrested at that time; that her husband left that night, and has been gone since then.

Cross-examination. Her husband is a brother of O. C. Hart; that Powell came to her house after her brother-in-law had been arrested, but witness don't know how long; that Harve Powell's wife was with him at the time.

Defendant's Evidence.

W. M. Jackson testified that he knew O. C. Hart; that in February, 1919, witness was working in Pounder and Waller's garage in Henryetta; that on the morning of the day this stolen car was sold to J. E. Cline witness saw Hart with the car; that was about 6 o'clock; that a stranger was with him; that they drove up in front of the garage; that Hart wanted to sell the car to witness.

Cross-examination. Don't know how many "wet" cars Hart has been mixed up in; never saw the boy before that time with Hart; don't know whether the car Hart tried to sell was the Cameron car or not.

Redirect. On the morning Hart tried to sell me this car witness took Harve Powell's car down to his house, asked him if he was going to town. Witness afterward drove Powell's car to town, ate breakfast, and came back to Powell's house, and Powell then came to town with witness in the car.

Recross: The fellow with Hart offered to sell the car for \$250; it was practically a new car; "I asked him, 'Why sell the car so cheap?' He said, 'Going out of business.' It was something like a couple of days after that that I heard Hart was arrested—might have been longer; could have been a week; can't fix the date. Hart said that if they didn't sell the car to me they were going to sell to a grocery man; understood afterwards that Cline bought the car; wasn't present, and don't know whether he did or not."

Cleland Shank testified that he was working for defendant driving a livery car; that in April, 1919, he had a conversation with O. C. Hart in front of post office in Henryetta in which Hart told witness that if they could stick Harve Powell they would turn him loose.

Cross-examination: Conversation occurred just a few days after the preliminary examination. Hart said that Mr. Wallace told him that if they could stick Powell they would turn him loose. Hart didn't say anything about an agreement with Mr. Eaton, the county attorney.

Mrs. Homer Hart testified that she was

at Harve Powell's house the day that O. C. Hart claims to have borrowed the stencils from Mrs. Powell; that she was there about 2 o'clock, and that O. C. Hart didn't come to the house that day. On cross-examination witness admitted she didn't tell this at the preliminary examination—said she wasn't asked anything about it.

Mrs. Harve Powell, wife of defendant, denied that O. C. Hart came to her house and got stencils to change numbers on car.

Harve Powell, defendant, testified:

That he was 33 years old, married; two children; had been in mining business, and was now operating a livery business; before coming to Henryetta had been manager of Midland Telephone at Porum, Okla. Had known O. C. Hart 2 or 3 years; remembered occasion of Cline purchasing car from Jim Green; left home about 9 o'clock that morning; rode to town with "Doc" Jackson; never went to Hart's house about 7 that morning. "Some time before that J. E. Cline had told me he wanted to buy a car, and if I saw one worth the money to let him know; first met Hart and Green in front of Miners National Bank; didn't know Green; he was not Cotton Wilder. Cline came across and went into bank, when he came out by I asked him if he wanted to buy a car. I told him Hart and this fellow 'over there' had one; Cline walked over to Hart, and went to talking with them; Cline came back, and said to me, 'Do you reckon it is all right?' I said, 'I don't know; I suppose it is.' Cline said, 'Let's go and get a bill of sale.' We got a bill of sale at the Citizens' Bank. When we got back this fellow was gone. Cline asked Hart where he was, and Hart told him, 'He has gone down the street.' I said, 'Get in my car; let's drive.' We drove down on East Trueman, and found this fellow called Jim Green—he got in the car. Hart said, 'Drive down Trueman to my house.' We drove west on Trueman to Tenth and Main, and they fixed up the bill of sale. I signed it as a witness, so did O. C. Hart; Jim Green made the bill of sale; then we drove to Hart's house. Hart got out in front of his house where the car was standing; that was the first time I had seen the car, the car had never been on my premises. When Hart got out I drove back towards town, and Cline got out at Eighth and Main, and Green got out at the post office; Green paid me \$2. I did not know they were dealing in a stolen car; I never told Hart to go to my house and get stencils to change the numbers on the car. I never knew they changed the numbers on the car; never examined them. About two weeks after Cline bought the car I went into Cline's grocery store to buy some groceries, and J. E. Cline said: 'They are having a little stir-up about that car. Chief Melton told me I better go out there and get my car or my money back. I wish you would drive me out there.' I drove him out there, and he paid me \$2 for the trip. I understood that before that Cline had sold the car back to Hart. After we got out to Hart's house Cline said: 'I want my money back.' I said, 'That's the best thing to do; if it is stirred up that way that is the best thing to do.' I never told Hart we would have to go to the garage

and do something about the car; never told Hart 'Slim' had found out this was a bad car, and that we could square it with 'Slim' for \$25. We were out to Hart's place about 15 minutes. Hart refused to give Cline his money back. It was a few evenings after that that I drove Cline down to Barfield's garage to look at the car down there. Cline wanted to see if the car there—the one they were having the trouble over—was the same car he had bought from Green. We drove down there. They had been washing the car; it was wet with water. I got out of my car and looked at it. I said, 'It looks like the same car.' I made no examination of the car. My brother Tom first told me they had a warrant for me and Homer Hart. I had then heard that O. C. Hart had been arrested. My wife said, 'Let's go down to Homer's and see.' We went down there, and saw Mrs. Homer Hart. I asked if Homer was there. She said he hadn't come from work. I told her, 'O. C. Hart was telling a bunch of lies, and I understood Jim Broadus had a warrant for me and Homer.' She said: 'I guess not.' That was all the conversation we had; I went back and went down town and found Jim Broadus, and asked him if he had a warrant for me, and he said he had, and put me in jail."

On cross-examination the testimony of the defendant was not materially different from that given on direct examination.

H. C. Diggins, a banker, C. P. Reynold, grocer, Jim Stormont, Chief of Police, P. G. Waller, garage owner, J. E. Whitenon, banker, George W. Bailey, hardware dealer, and J. W. Pippin, all residents of Henryetta, testified that the defendant's general reputation for honesty in that community was good.

Mrs. Harve Powell, recalled, testified to the visit made by herself and husband to Homer Hart's house on the evening her husband was arrested. Her testimony concerning what happened there at that time was the same as that given by her husband.

Harve Powell, recalled for further cross-examination, was asked if the trip made by him and Cline to O. C. Hart's house was made before or after Hart had been arrested, and replied, "I think he had; I don't know whether he had or not." Witness was then asked if Hart was not arrested after the car had been taken from Cline, and replied, "Jake [meaning Cline] had done lost the car at that time." The witness was then asked if the trip was necessary in order to locate the car over at the garage, and replied, "Let's see; I don't know whether it was before." He was then asked, "This trip out there was bound to have been before, wasn't it?" To which he replied, "If the car was found by Melton in this little garage." "I don't know whether Melton had taken the car or not, but Melton told him that he had better go out there and try and get his money back. I don't know whether Melton had the car at that time or not. I don't know whether Cline had been arrested or not." Witness

was then asked if he didn't look the car over in Barfield's garage before he made the trip to see O. C. Hart. To which he replied, "I don't think we did; I don't know." Witness was then asked, "Didn't you make another trip out there to Hart's that same night after bringing Cline to town? Didn't you go back to Hart's place about midnight and have a conversation with him?" To which the witness answered, "No sir." Witness was then asked, "Isn't it a fact you returned there along about midnight that same night and had a conversation with O. C. Hart in which you told him to stick to that bill of sale and say that this man Pete Wilder or Jim Green lived at Durant?" To which witness answered, "No, sir; I did not."

Rebuttal.

O. C. Hart was then produced as a witness for the state in rebuttal, and testified that he never had any conversation with Cleland Shank to the effect that Mr. Wallace told him that if he would help convict Harve Powell he would go free. Witness also testified that Harve Powell made a second trip to his house on the same night that he and Cline were out there about 12 o'clock, and asked him if he was going to stick to the bill of sale of Jim Green and say that this Jim Green lived at Durant.

On cross-examination witness said he did not state anything about the second trip of Harve Powell to his house on that night when called as a witness in chief, because "he wasn't asked about it, and it didn't come to his mind"; that he had told the county attorney about this second trip when the preliminary examination was had.

J. E. Cline, recalled for the state, testified that he did not know where the tools came from with which the numbers were changed on the car; that O. C. Hart changed the numbers; that he gave all the money for the car to Jim Green; that when he sold the car back to O. C. Hart, O. C. Hart gave him a check for \$290, "and I gave him back a check for \$390." Witness also stated that he had known Cotton Wilder about 5 years before that, when Wilder was from 17 to 20 years old, but would not say that Jim Green and Cotton Wilder were the same person.

The foregoing was substantially all the evidence introduced in the case.

[3] Is the evidence sufficient in law to sustain the conviction? We think not. The only evidence that directly tends to connect this defendant with the receipt of the stolen automobile is that which falls from the lips of the witness O. C. Hart, who is admittedly an accomplice. Hart testified that on the morning of the day after the car was stolen he saw it in the back yard of the defendant Powell's residence property; that at 6 o'clock that morning Powell came to his (Hart's) house and tried to sell him this stolen car.

Although it is disclosed by this record that Powell lived in a thickly settled part of town, not a single disinterested witness is brought by the state into court who testified to having seen Powell in possession of the car. Nor is any one produced who saw Powell at Hart's house trying to sell the car. True, the witness Cline testifies to facts which indicate that Powell was mixed up in the sale of this car to him, but Cline also testifies that several days before that he had asked Powell, who was then in the livery business at Henryetta, to "look out for a cheap car for him." There is nothing in Cline's testimony, independent of the testimony of Hart, which indicates that Powell had knowledge at the time Cline bought the car that the car was stolen; at least, there is nothing in Cline's testimony which indicates that Powell had any more knowledge that the car was stolen at that time than Cline himself had, and if both of them had knowledge that the car was stolen, then Cline also was an accomplice of Powell's, and a conviction would not lie even upon the testimony of both Cline and Hart. The county attorney evidently took the view that both Hart and Cline were accomplices of Powell's; that they all had guilty knowledge that they were dealing with a stolen automobile, because he jointly informed against all three of them for this offense, and permitted both Hart and Cline to turn state's evidence against Powell.

The court is of the opinion that the evidence of both Hart and Cline is that of accomplices, and if this conviction is allowed to stand there must be found in this record evidence independent of these two witnesses which tends to connect the defendant with the commission of the offense. Is there any such evidence? The state asserts that the evidence is sufficient, but nowhere in the brief filed in behalf of the state is there pointed out any evidence tending to corroborate the testimony of the accomplices. We fail to find any which we deem to be sufficient for that purpose. True, there is some evidence which would create a suspicion of the defendant's guilt, but not more, as we view it. The evidence of Mrs. Homer Hart and of W. J. McGuffey, if unexplained, might have that effect, but at most it only tends to prove that some time after the receipt of this stolen car the defendant Powell had then received information that the car was probably a stolen car.

This defendant bore a good reputation for honesty in that community, a number of the very best citizens and business men of Henryetta testified to that fact, and no effort was made to prove the contrary. He was a married man with a wife and two children, and had never been charged with crime before. Certainly his good reputation is entitled to great weight where there is so little evidence in the record independent of

the testimony of accomplices which could in the slightest degree support the verdict. The state only demands the punishment of its citizens when their guilt has been clearly established according to the forms of law and by the rules of evidence prescribed for ascertaining their guilt. The law forbidding a conviction on the uncorroborated testimony of an accomplice is positive and peremptory. It is not intended to shield the guilty, but to protect the innocent because of the temptation of those jointly charged with crime to materially benefit by turning state's evidence. Defendant is not only entitled to a fair trial according to the forms of law, but he is entitled to require that the state prove his guilt beyond a reasonable doubt according to the prescribed rules of evidence, and unless the state does so prove his guilt the conviction is not according to law.

The court is of the opinion that there is no evidence in this record, independent of that of the accomplices, which tends in any way to connect this defendant with the commission of the offense charged. Therefore it is our opinion that the evidence is legally insufficient to sustain the conviction, and that the judgment of conviction should be set aside on this ground; and it is so ordered.

For reasons stated, the judgment is reversed, and the cause remanded to the superior court of Okmulgee county for further proceedings consistent with this opinion.

DOYLE, P. J., and BESSEY, J., concur.

(28 N. M. 151)

DAUGHTRY v. B. F. COLLINS INV. CO.
(No. 2607.)

(Supreme Court of New Mexico. May 23, 1922.
Rehearing Filed May 11, 1922. Rehearing Denied July 1, 1922.)

(Syllabus by the Court.)

1. Pleading \S 381(2)—Letters not referred to in the complaint, but establishing, in connection with oral evidence, an agreement, admissible though not filed with complaint.

Section 4146, Code 1915, does not apply to an agreement deduced from correspondence and oral understanding, and not referred to in the pleadings.

(Additional Syllabus by Editorial Staff.)

2. Brokers \S 82(4)—Complaint for procuring loans is good without alleging exclusive agency, and such alleged agency need not be proved.

A complaint for commissions for procuring loans states a cause of action without alleging an exclusive agency, and it is not necessary to prove such agency to recover, since if the loans were procured by plaintiff, defendant is liable whether the agency was exclusive or not.

3. Brokers \S 86(7)—Evidence held not to show agent was to receive commissions from both parties.

Evidence held not to show that agent suing for procuring loans was to receive a commission from both parties.

4. Brokers \S 55(1)—Investment company held not entitled to deal with another in disregard of contract with agent without being liable for commissions on loans as to which he was procuring cause.

While an investment company as to future transactions might disregard an express agreement with an agent to pay a commission on loans found acceptable, and deal with another without giving notice of its intentions, it could not do so as to the past without remaining liable for commissions according to its agreement, at least on loans of which he was the procuring cause.

Appeal from District Court, Chaves County; Brice, Judge.

Action by J. R. Daughtry against the B. F. Collins Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. D. Bowers, of Roswell, and Pearson & Baird, of Oklahoma, Okl., for appellant.

Reid, Hervey & Iden and Tomlinson Fort, all of Roswell, for appellee.

DAVIS, J. The complaint in this case alleges, in effect, that in 1919 appellee was engaged in the business of negotiating loans and appellant in making loans in this state. They entered into a contract by which appellee agreed to procure applications for loans from persons in Lea county, and appellant agreed to make such of the loans as it approved, to pay appellee a commission of 4 per cent., and to give him the exclusive agency for that county. It alleged that appellee submitted to appellant a large number of applications for loans, which it accepted, and thereby appellee became entitled to the agreed commission.

Upon the trial it appeared that the contract claimed by appellee covering the submission of applications and payment of the commission was the result of a series of letters between the parties, while the understanding as to the exclusive agency for Lea county, as claimed, was oral. The contract as a whole was not contained in any written instrument, but was made up of correspondence and conversations.

[1] 1. Appellant assigns the admission of these letters as error, claiming that the originals or copies should have been filed with the complaint under section 4146, Code 1915. That section concerns written instruments upon which any action or defense is founded, and which are referred to in the pleadings. This action is not founded upon the letters, but upon agreements to be deduced

from the correspondence and oral understanding. The letters are not referred to in the complaint. The statute is not applicable.

[2] Appellee claimed commission upon two classes of loans: First, those to which he called appellant's attention by submitting applications from prospective borrowers; and, second, those with which he personally had no connection, but for which he claimed compensation because of his alleged exclusive agency for Lea county. The court was evidently of the opinion either that the exclusive agency was not proved, or that it was ineffective in law to create the right asserted; for, by the instructions to the jury, the right of recovery was limited to the first class. As to these the jury was instructed that there could be no recovery unless appellee was the procuring cause. The question of an exclusive agency then ceased to be of interest in the case. The instruction limiting the recovery was to the advantage of appellant.

Appellant nevertheless assigns as error the instruction which allowed recovery upon loans as to which appellee was the procuring cause. It says that the complaint proceeded upon the theory of an exclusive agency for Lea county, that appellant could recover only upon proof of such agency, and that only this issue should have been submitted to the jury. We do not so consider the complaint. While there was an allegation of such an agency, it had no bearing upon the liability of appellant for loans procured by appellee, for as to such loans it was liable whether the agency was exclusive or not. If the allegation regarding exclusive agency is eliminated, the complaint still states a cause of action. The assignments based upon this theory of appellant are not well taken.

[3] The principal contention of appellant, upon which several assignments of error are based, is that appellee was not entitled to recover at all because he was to receive a commission from both parties to the transaction, thus causing a situation which appellant claims is contrary to public policy.

Appellee testified that B. F. Thorne was one of his Lea county agents in obtaining loan applications. Appellee's original plan as to compensation was that he should have the 4 per cent. to be paid by appellant, and that Thorne should obtain his commission from the borrowers. This is the basis for appellant's present contention that appellee was representing both parties to the transaction. But the plan was never carried out. There is nothing to show that either appellee or Thorne ever represented the borrowers or received a penny from any one of them. Appellant was advised of the proposed plan, and questioned it to the extent that

it might cause the loans to bear usurious interest. On being assured by appellee that no charge would be made that would violate the usury law, it made no further objection. Thorne consistently denied that he was in any way an agent for appellee, and we might assume that the jury were of that opinion. Inasmuch as no compensation was received from the borrowers, and since the plan of receiving a commission from both parties was communicated to appellant, and not objected to if not usurious, and since Thorne may not have been appellee's agent, in which event no double agency could possibly arise, it is evident that appellant's argument falls for lack of supporting facts, whether or not it is a correct statement of the law.

[4] Under the evidence presented, the jury evidently believed that appellee furnished appellant with applications from prospective borrowers in Lea county under the express agreement that he should receive a commission upon such loans as were found acceptable. Appellant inspected the properties offered as security, and made a number of loans. Thorne, who was considered by appellee as his agent, denied any such agency, and appellant decided to transact its business direct with him, disregarding its agreements with appellee, and the services which he had already rendered, and giving no notice of its intentions. While it might do this as to future transactions, it could not do so as to the past without remaining liable to appellee for commissions according to its agreement, at least upon loans of which he was the procuring cause. Since recovery was limited to such loans, appellant has no complaint.

For the reasons stated, the judgment is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(28 N. M. 146)

WILLIAMS v. LUSK et ux. (No. 2578.)

(Supreme Court of New Mexico. April 19, 1922. Rehearing Filed May 5, 1922. Rehearing Denied July 1, 1922.)

(Syllabus by the Court.)

1. Public lands \S 224½, New, vol. 11A Key-No. Series.—The incorporation of Mesilla held without power to dispose of lands of the Mesilla grant not held in common.

Under chapter 37, Laws 1878, creating the incorporation of Mesilla, the incorporation has no power of disposition over lands of the Mesilla grant not held in common.

2. Quietting title \S 44(1)—Party claiming under deed from incorporation of Mesilla must show lands conveyed thereby were a part of those held in common.

As a prerequisite to the validity of a deed from the incorporation of Mesilla, the party

claiming under the deed must show that the lands which it purports to convey are a part of the lands of the grant held in common.

3. Quietting title \Rightarrow 10(2) — Possession under deed, fair on its face, with claim of ownership is sufficient as against one showing no better title.

Possession under a deed, fair on its face, with claim of ownership is sufficient to establish title in a suit to quiet title as against one showing no better title.

Appeal from District Court, Dona Ana County; M. C. Mechem, Judge.

Action by Nellie Hill Williams against L. O. Lusk and wife. Judgment in favor of plaintiff, and defendants appeal. Reversed and remanded, with instructions.

Frank Herron, N. C. Frenger, and R. L. Young, all of Las Cruces, for appellants.

J. H. Paxton, of Las Cruces, for appellee.

DAVIS, J. [3] Appellee, who was plaintiff below, commenced this suit to quiet her title to several tracts of land within the Mesilla Civil Colony grant. Appellants, who were among the defendants, claimed ownership of one tract. The issue was as to the title to this piece. Appellants and their predecessors in interest had been in possession of it for nearly ten years and still was in possession when this suit was commenced. Both parties fully presented their case, each claiming a title under the grant, and each also claiming by adverse possession. On the latter issue the court found that neither of them had held such possession for a sufficient period to cause the statute to run either as vesting title or as barring adversary proceedings. The evidence upon this feature was indefinite and to some extent conflicting. We are not disposed to interfere with the finding of the trial court in this respect, and will therefore decide the case, as that court did, upon the documentary title. Having failed in her proof of a title by possession, appellee must recover, if at all, upon the strength of her deeds, and, if that also fails, the decision must be against her, irrespective of the title of appellant, for certainly before she may quiet her title appellee must prove that she has one. *Abeyta v. Tafoya*, 26 N. M. 346, 192 Pac. 481; *New Mexico Realty Co. v. Security Irr. & D. Co.*, 27 N. M. —, 204 Pac. 984.

The Mesilla Civil Colony grant lies within what is known as the Gadsden Purchase and was based upon a decree promulgated by the President of Mexico and regulations of the state of Chihuahua. Under these regulations lands were assigned to the colony both for cultivation and for grazing purposes. As was customary under the laws of Mexico, allotments were made of numerous tracts of agricultural lands, of which the allottees be-

came the owners in severalty, and the unallotted land was designated for the common use of all of them for grazing and other purposes. In this particular colony some two leagues of land was allotted as agricultural, and the remainder left for common use. This agricultural land was from time to time divided among the settlers, an allotment of a specific tract being made to each of them. Cultivation of the lands near Picacho, where the tract here in question was situated, was apparently carried on for many years, but a change in the course of the river made further irrigation difficult or perhaps impossible, and cultivation was abandoned. The tract here in dispute lay within these agricultural lands.

[1] By chapter 37 of the laws of 1878, the Legislature of New Mexico created the "incorporation of Mesilla" composed of the owners of real estate resident within the limits of the Mesilla grant and gave it power "to take control of all real estate held in common." The commissioners who handled its affairs were authorized to sell or lease the common lands. The act made no attempt to grant any powers as to allotted lands, and, as these were held in severalty subject to the control of each individual owner, no legislative action regarding them was necessary.

On February 28, 1893, the incorporation of Mesilla presented to the Court of Private Land Claims a petition asking the confirmation of the Mesilla grant. The court acted upon this petition and confirmed the grant in two parcels, tract No. 1, consisting of the agricultural land, and tract No. 2, of pasture and woodland. The court found that all the agricultural land had been allotted and distributed among the settlers, and accordingly confirmed tract No. 1 to the corporation "in trust for the persons to whom the same was allotted." On the other hand, tract No. 2, the unallotted or common land, was confirmed to the corporation absolutely.

Following this decree, on November 15, 1909, a patent of the United States was issued to the corporation of Mesilla conveying tract No. 1—

"in trust for the persons constituting the colony known as the colony of Mesilla, and such other persons as were bona fide residents upon the same at the date of said treaty [the Gadsden Treaty], and the heirs and successors in interest of such persons."

[2] The land which is the subject of this litigation is a part of tract No. 1. Appellee based her claim of title to it disregarding the question of possession upon a deed from the incorporation of Mesilla dated May 11, 1918, signed by its president and secretary, and which in terms conveys the land to her. Since, under the findings of the trial court,

this instrument constitutes her only title, the determination of its effect must be decisive of this case. Title to allotted lands passed to the allottee. *U. S. v. Sandoval*, 167 U. S. 278, 17 Sup. Ct. 868, 42 L. Ed. 168; *Bond v. Barela*, 16 N. M. 660, 120 Pac. 707; *Id.*, 229 U. S. 488, 33 Sup. Ct. 809, 57 L. Ed. 1292. Unless, because of the breach of some condition, neither the government nor the grant authorities had any further right of disposition of, or control over, them. They had the same status as other lands held in private ownership. Both the New Mexico Legislature and the Court of Private Land Claims in dealing with the Mesilla grant recognized this situation. The Legislature gave no power over such lands to the corporation it created. The court confirmed them to the corporation only as trustee for the actual owners in whom title had already vested. If the corporation acquired any title at all under this decree or under the patent it was merely as a naked trustee with no duties to perform holding the mere legal title for the real owners. Confirmation to the corporation as trustee was only a convenient method of avoiding the inquiry into the title to each allotted tract within the grant which would have been necessary to a confirmation of the particular tracts to their individual owners. Certainly under general rules of law, such a trustee could have no power of disposition, and its deed is ineffectual as a conveyance of title. The act of the Legislature, which created this corporation and upon which its authority is wholly dependent, gives it no such authority. Its rights and powers as to effectual disposition are confined absolutely to the lands held in common. The validity of the deed given to the appellee depends therefore upon whether the tract it attempted to convey was in fact a part of the common lands. Since appellee relied upon this deed for her title it was incumbent upon her to prove the title and authority of her grantor by showing that the tract was in fact a part of the land held in common and owned by the incorporation. Since she failed to show this fact, it follows that the incorporation of Mesilla had no power of control over it and no right to dispose of it, and its deed is a nullity.

Counsel for appellee contends that the point we have discussed is not assigned as error. Appellant asked the trial court to make a conclusion of law to the effect that the act creating the incorporation of Mesilla vested in it no right to grant titles to land in tract No. 1, but gave it jurisdiction only over the common lands, and that the corporation had no power to convey the lands covered by the deed to appellee. The refusal of the trial court to do so is assigned as error here, and the point is therefore sufficiently raised.

Appellants attempted to show affirmatively that the land in dispute was actually al-

lotted, and to deraign title from the allottee. But the trial court found that the land described in the certificate of allotment was not the same land claimed by appellants and described in their later conveyances. Under the evidence in the case, we will not disturb that finding.

The proof on behalf of appellants was, however, sufficient to require a decree in their favor. On the 23d day of November, 1916, a deed was executed by Phœbus Freudenthal and wife to appellant L. C. Lusk for the lands involved in this proceeding. The court found that Freudenthal had been in the actual and adverse possession of this land since the month of January, 1909, and, that appellants continued this possession to the time of the bringing of this suit. In *Holthoff v. Freudenthal*, 22 N. M. 377, 162 Pac. 173, this court held that possession under a deed fair on its face, with a claim of ownership, is sufficient evidence to establish title in an action such as this as against a defendant not showing a better title. Appellee, as we have seen, proved no title to this land, and it follows that the possession of appellants under the deed mentioned was sufficient to require a decree in their favor.

The judgment of the lower court is therefore reversed, with instructions to enter a decree in favor of appellants; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(28 N. M. 138)

PICACHO CATTLE CO. v. ATCHISON, T. & S. F. RY. CO. (No. 2667.)

(Supreme Court of New Mexico. May 23, 1922.)

(Syllabus by the Court.)

1. Pleading \S 313, 316—Office of bill of particulars stated; ordering of bill of particulars discretionary with court.

The office of a bill of particulars is to furnish information necessary to a proper answer and preparation for defense, and ordering the bill is discretionary with the court.

(Additional Syllabus by Editorial Staff.)

2. Pleading \S 324—Bill of particulars as to place of conversion of cattle by carrier held insufficient.

In action against railroad for conversion of cattle, in which the complaint did not state the place of conversion, and plaintiff was ordered to furnish a bill of particulars as to the place thereof, a bill stating that plaintiff was "unable to furnish a statement of the place of the conversion more specific than that referred to in the correspondence of plaintiff with the defendant, now presumably in the possession of the defendant," without denying knowledge of the place of the conversion or setting out such correspondence, held insufficient.

Appeal from District Court, Chaves County; Brice, Judge.

Action by the Picacho Cattle Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment of dismissal, and plaintiff appeals. Affirmed.

R. D. Bowers, of Roswell, for appellant.
W. O. Reid, George S. Downer, and Earl C. Iden, all of Albuquerque, for appellee.

DAVIS, J. This is an action in damages for the conversion of five head of cattle. The complaint gave the time of the conversion as "on or about the 14th day of November, 1917." The place was not stated. On motion the court ordered the furnishing of a bill of particulars fixing the time and place of the conversion. Appellee answered this, stating that it was unable to be more specific as to the date, and was "unable to furnish a statement of the place of conversion more specific than that referred to in the correspondence of plaintiff with the defendant, now presumably in the possession of defendant." This bill of particulars was stricken out on motion, the court holding the statement of place insufficient. Appellant declined to do anything further in the matter, taking the ground that the court had no power to order the bill, and, if it did have the right to require it, the one furnished was sufficient. The court thereupon dismissed the action, and this appeal was then taken, appellant standing here upon its position in the lower court.

[1, 2] In attacking the power of the court to order the bill of particulars appellant argues that the place of conversion is immaterial, because the action is transitory and may be brought wherever jurisdiction of the parties is obtained. It may be granted that the allegation of place was not essential to show jurisdiction, and even that it was not necessary in the complaint at all. But the office of a bill of particulars is not to supply matters which should have been alleged in the complaint nor to evidence a jurisdiction not otherwise alleged. It is to furnish information necessary to a proper answer and preparation for defense. 3 Enc. P. & P. 518, 519. The ordering of a bill of particulars is discretionary with the court, and, since there is no indication whatever in the complaint as to the place of conversion, if not even being alleged that it occurred on the railroad of appellee, and any point in the entire world being therefore possible as a situs for the alleged conversion, it would seem that the court wisely exercised its discretion in requiring a more definite statement of it. In *Leonard v. Greenleaf*, 21 N. M. 180, 153 Pac. 807, we held that it was error for a court to order a bill of particulars to cover immaterial information. There the information sought was immaterial for every purpose. Here knowledge of the place of the claimed conversion might be both material and necessary in the preparation of pleadings and defense.

The statement in the bill of particulars

that appellant had knowledge of the place of conversion further than that referred to in the correspondence between the parties was not a compliance with the order. It did not deny knowledge, nor did it give information. The correspondence was not set out, so that a reference would include it, nor as a matter of fact was there an affirmative statement that any such correspondence was in existence. The reference to unidentified and undescribed correspondence added nothing.

Compliance with the order was not difficult. It would have been easy for appellant to state what knowledge he had, and nothing more was required.

The order of the court dismissing the action was correct, and the judgment therefore will be affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(28 N. M. 132)

SPENCE v. EL PASO & S. W. CO.
(No. 2590.)

(Supreme Court of New Mexico. May 10, 1922.)

(Syllabus by the Court.)

Carriers \Leftarrow 218(8)—Shipper who agrees to load live stock at his own risk cannot recover for losses due to overloading.

A shipper who agrees to load live stock at his own risk, and who overloads the cars, cannot recover against the carrier for losses which would not have occurred but for the overloading.

Appeal from District Court, Lincoln County; Hewitt, Judge pro tem.

Action by Clarence Spence against the El Paso & Southwestern Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded with instructions to enter judgment for defendant.

W. A. Hawkins and H. H. McElroy, both of El Paso, Tex., for appellant.

G. W. Prichard, of Santa Fé, for appellee.

DAVIS, J. This is an action to recover damages for injuries to a shipment of cattle made by appellee from El Paso, Tex., to Ancho, in this state. The material allegations of the complaint as to negligence are as follows:

"The defendant agreed to furnish plaintiff five certain cars, the character of which was agreed on by said parties, and to safely carry over its lines of railroad from said city of El Paso to Ancho, and to safely deliver to plaintiff at said Ancho Station 260 head of mixed cattle. * * * That while the defendant furnished certain cars for the use of the plaintiff, * * * it did not furnish the plaintiff the character of cars agreed on in said agreement, and did not safely carry and deliver said cattle to the plaintiff at said Ancho Station, pursuant to and in accordance with said agreement, but, on the contrary, neglected and failed to furnish cars with the capacity it had agreed on with plain-

tiff, and so negligently crowded said cattle in the cars furnished by it, and so negligently handled and cared for the said cattle as a common carrier over its line of railroad between the points named, that 10 head of said cattle were killed and died in said cars before they were removed therefrom at said Ancho Station, on or about the 2d day of January, 1916; and that on the account of the bruises and injuries received due to the careless and negligent manner in which the defendant handled and hauled said cattle in said cars between the points aforesaid, 35 of said cattle died after being removed from said cars."

While there is a controversy as to the effect of these allegations, we will construe them according to the theory of appellee, as charging three breaches of duty against the railroad company, namely, that it did not furnish the character of cars agreed upon, that it negligently crowded the cattle into the cars, and that it was negligent in hauling and handling the cattle during transportation. All of these charges were denied by the answer.

The evidence showed that appellee had 261 cattle in the stockyards at El Paso for shipment to Ancho, and that he ordered two 40-foot and three 36-foot cars. Five were furnished, but all were 36-foot cars, containing therefore a total space less than that contracted for.

For the purposes of this case we shall assume the truth of the special finding of the jury, that the order for the cars was given to the agent of appellant, and that the duty to furnish them rested upon appellant.

There is no dispute as to the overloading of the cars. Two hundred sixty head were put into five cars, an average of 52 to the car, which, according to all the testimony, was considerably in excess of the number that could properly be loaded. They were so crowded that it was necessary to leave one head at the yards. But while agreeing as to the fact of overloading, the parties are in wide disagreement as to the responsibility for it, each asserting that the loading was done by the other. A special interrogatory was directed to the jury upon this question, and answered to the effect that the cars were overloaded by appellee. There was evidence to support this finding.

The contract under which the cattle were shipped contained the following provision:

"That said second party, at his own risk and expense is to take care of, feed, water and attend to said stock while the same may be in the stockyards of the first party, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload, and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever."

By the terms of this contract the duty to load and unload rested upon appellee alone. Under the special finding of the jury he actu-

ally loaded the cattle. We must therefore consider it as established that he alone is responsible for the overloading.

Appellee attempts to attribute the overloading to the failure of appellant to furnish cars of the capacity ordered. The argument is not sound. Appellant breached its contract in this regard, and thus became liable for resulting damages. But that cannot include losses to cattle improperly crowded into the cars by appellee himself. As between these two acts, the overloading, not the failure to furnish the space ordered, caused the injuries. This is not a case of failure to furnish cars suitable for a particular purpose. The cars were fit for shipping cattle. The trouble arose, not from the character of the cars, but from loading them to more than their capacity.

The allegation of carelessness or negligence in the hauling of the train containing these cattle is based upon the testimony of a caretaker who traveled with them. He stated, in substance, as set out in appellee's brief, that several times the train was severely jerked so that many of the cattle fell down, and that the crowded condition of the cars made it impossible to get them up. The injuries to the cattle were not primarily caused by their falling. The fair inference from the testimony is that they were bruised, and in some instances killed, by being trampled while down by the other cattle. If the cars had been properly loaded, the men in charge could have gotten the down cattle onto their feet and prevented the injuries.

2. It was the duty of appellee to render such aid and assistance through the caretakers from time to time en route as would be helpful in protecting the cattle against injury, and this included the duty of getting up such cattle as were down in the cars. *A. T. & S. F. R. Co. v. Merchants' Live Stock Co. (C. C. A.) 273 Fed. 130.* Appellee by overloading the cars made impossible the performance of his duty in this respect.

It must therefore be taken as a fact that but for the negligence of appellee himself the injuries of which he complains would not have occurred. His own acts were the partial and contributing cause, if not, indeed, the principal cause, of the losses. May he recover under such circumstances damages for which he is at least in a large measure to blame, and thus shift to another's shoulders the loss which his own act caused? Legal reasoning clearly says he may not do so, and authorities so hold.

In *Illinois Central R. R. Co. v. Rogers*, 162 Ky. 535, 172 S. W. 948, L. R. A. 1915C, 1220, Ann. Cas. 1916E, 1201, the rule is stated as follows:

"It is well settled by the almost unanimous authorities that where the carrier furnishes a car to shipper for the purpose of shipping live stock therein, and the latter loads the live stock himself, and in doing so he overcrowds

the animals or places in one compartment animals of different kinds, the risk of loss or injury is upon the shipper, being caused by his own act; * * * the carrier not being liable for loss or injury due to * * * such causes."

In *Ficklin v. Wabash R. Co.*, 115 Mo. App. 633, 92 S. W. 347, the court said:

"Conceding the negligence of defendant in failing to furnish the kind of cars ordered, it was the negligence of plaintiffs in knowingly overloading the cars that was the proximate cause of the killing. Plaintiffs were experienced shippers, and knew before they began the loading that the cars were too small for the whole shipment. They knowingly and voluntarily took the risk of overcrowding, and cannot complain of the result, reasonably to have been anticipated, following their own want of due care."

In *T. & P. R. Co. v. Klepper* (Tex. Civ. App.) 24 S. W. 567, the court, in holding that evidence of overcrowding by plaintiff should have been admitted in an action based on defendant's negligence, said:

"It is no answer to say that appellee called for a 34-foot car, and was told he could only be furnished with one 33 feet long. He knew the size of the car before he undertook to load it, and if he knew he required the longer car to contain his horses, his negligence was the greater for crowding them in the shorter."

In *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746, 146 N. W. 986, the court said:

"The court, instead of telling the jury that plaintiffs would be guilty of contributory negligence if their overloading and crowding the horses into the car contributed in causing the injury, by substituting the word 'caused' told the jury, in effect, that the plaintiffs would not be guilty of contributory negligence, unless the overloading and crowding of the horses into the car caused the injury; in other words, that it was the sole cause of the injury. We think the instruction as modified was clearly prejudicial, and, being upon an important issue in the case, constituted reversible error. The most that the court should have done, if it decided to modify the instruction, would have been to have told the jury that, if 'such overloading and crowding of the horses into the car was the proximate cause of the injury,' plaintiffs would be guilty of contributory negligence."

Other cases stating generally the principles on which this opinion is based, are: *Diamond X Land & Cattle Co. v. Director General* (N. M.) 205 Pac. 287; *L. & N. R. Co. v. Woodford*, 152 Ky. 398, 153 S. W. 722; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 South. 649; *Hutchinson v. Chicago, etc., Co.*, 37 Minn. 524, 35 N. W. 433; *St. Louis, etc., Co. v. Law*, 68 Ark. 218, 57 S. W. 258; *Short v. Oregon, etc., Co.*, 190 Ill. App. 25; *Newby v. C., R. I. & P. R. Co.*, 19 Mo. App. 391, and cases cited

in note to *Illinois Central R. Co. v. Rogers*, Ann. Cas. 1916E, 1203.

This is not a case in which a carrier has attempted by contract to absolve itself from the consequences of its own negligence, and cases denying its right to do so are not applicable here. In our opinion it turns entirely upon the general legal principle that a plaintiff may not recover damages for an injury which results from his own negligent acts.

The case is reversed and remanded, with instructions to enter judgment for appellant; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(28 N. M. 141)

RAYNOLDS v. SWOPE, County Treasurer,
et al. (No. 2627.)

(Supreme Court of New Mexico. June 2,
1922.)

(Syllabus by the Court.)

Schools and school districts ~~§~~99 — County levy of taxes held not to violate principle that taxes levied in one district cannot be used in another, nor constitutional provisions as to levy of taxes.

Taxes levied in a county for school maintenance are county taxes, levied for a public purpose under constitutional authority, and violate neither the principle that the proceeds of taxes levied in one district cannot be used in another, nor section 4 of article 12 of the Constitution.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by J. M. Reynolds against E. B. Swope, as Treasurer of Bernalillo County, N. M., and the Bernalillo County Board of Education, and from a judgment on demurrer dismissing the complaint, plaintiff appeals. Affirmed.

A. B. McMillen and Lawrence F. Lee, both of Albuquerque, for appellant.

H. S. Bowman, Atty. Gen., for appellees.

DAVIS, J. By what is known as the County Unit Law (chapter 79, Laws 1915, and chapter 105, Laws 1917), the Legislature adopted a new method of collecting and distributing taxes for school purposes. This proceeding attacks section 43 of the 1917 law as being contrary to the principle that one district or class may not be taxed for the benefit of another district or class, which appellant says is a fundamental principle of taxation, and specifically because it is in conflict with section 4, of article 12, of the Constitution.

Under the system created by these acts

schools and school districts are divided into two classes, municipal and rural. The municipal schools are under the control and management of the municipal boards of education. The rural schools are conducted and managed by county boards of education and boards of directors in each school district. The municipal boards of education and the directors in the rural school districts each year prepare a budget, or estimate, of the financial needs of their district. The municipal estimates go direct to the county commissioners. The rural estimates are submitted for approval to the county superintendent of schools, who passes upon them, and, if approved, submits them also to the county commissioners. The commissioners, thus having before them the estimates of the amount of money necessary for all of the schools within the county, municipal and rural, pass upon them, and then levy a flat tax upon all of the property in the county sufficient, with other revenues not involved in this proceeding, to maintain the schools for the ensuing year in accordance with the approved estimates. The moneys derived from this tax are credited to the districts in accordance with these estimates. It will be observed that under this basis of distribution there is no relation between the tax collected in any one district and the revenue apportioned to it. Some districts receive more than the amount contributed from the taxable property within their boundaries and others less. Unless the funds are divided among the districts in accordance with the tax-paying property in each, this is the inevitable result. A distribution, for instance, according to the number of children of school age in each district, or according to enrollment or attendance, would create the same situation as that here complained of.

Appellant is a taxpayer within the municipal district of Albuquerque. He alleges that a large portion of the taxes collected from him and the other taxpayers within that district under the county levy will be distributed to other districts, and therefore in effect that he is taxed for the benefit of districts in which he has no interest. An injunction was asked restraining the county treasurer from paying to the county board of education any portion of the levy collected within the Albuquerque district, and the court was asked to declare section 43 of chapter 105, Laws 1917, unconstitutional. The complaint was dismissed on demurrer, and this appeal taken.

The contention of appellant, tersely stated, is that each school district must be a self-supporting unit, maintaining its schools exclusively from its own resources. The position is not based upon constitutional or statutory authority, but upon the general principles that one district may not be taxed for the benefit of another. Appellant's brief

cites decisions and text-writers to the effect that levies for the benefit of a city may not be made on property outside of the city, and, conversely, in one case, that town property may not be taxed for the benefit of persons not residing in it. The fallacy in the entire argument lies in the fact that we do not have here taxation of one district for the benefit of another. The tax is not a district tax. It is a county tax, levied equally and uniformly upon all the taxable property in the county. We are not dealing with a special tax levied against the property in one district, the proceeds of which are used in another. A levy by the county for the carrying on of education is certainly for a public purpose. It is difficult to see how a county tax, levied for a public purpose, under distinct legislative authority, imposed uniformly upon all the property assessed in the county, can be subject to attack. Indeed appellant does not question the validity of the tax, nor seek to restrain its collection. He complains of the distribution made of it after it has come into the county treasury. An injunction is asked restraining the treasurer from paying it out in accordance with the provisions of the law under which it was collected, but appellant's theory as to what is to be done with it is not disclosed. The standing of an individual taxpayer to litigate the distribution of this fund might well be doubted. But be this as it may, we know of no rule of law, and there is certainly neither statute nor constitutional provision, that requires money lawfully collected in one district to be expended in that district, nor any principle that necessitates the considering of education as a local matter peculiar to special districts. School affairs may be administered through districts as a matter of convenience, but the power to administer may be in one body and the power to tax in another. The conclusion that a district must support itself from its own funds does not follow from the premise of its creation nor its endowment with administrative powers. Assume that there were in any given year no municipal schools in the city of Albuquerque or in some outside district. That would not mean the illegality of levying a tax upon the property in that district for county educational purposes, any more than the fact that there is no public road or no bridge adjacent to the property of an individual would exempt it from a general county road and bridge tax.

"Wherever a system of public instruction is established by law, to be administered by local boards, who levy taxes, build schoolhouses, and employ teachers for the purpose, it can hardly be questioned that the state, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the state, even though a majority of the people of such township or district, deficient in proper appreciation of its

advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits. Possibly judicial proceedings might be available in some such cases, where a state law for the levy of local taxes for educational purposes had been disobeyed; but the Legislature would be at liberty to choose its own method for compelling the performance of the local duty. And here again the state has the same power to apportion the moneys raised for the general purpose that it has to apportion moneys raised for police purposes or for roads." 2 Cooley on Taxation (3d Ed.) p. 1299.

Just as in the case before us it happens that there is collected from the city of Albuquerque under this general tax more money than is there expended for education, and the surplus is used for educational purposes elsewhere in the county, so in some rural districts in the state it may happen that sums are collected from taxes upon property within their limits greatly in excess of the amount needed or expended on schools in them, and the surplus be used for the other schools including those in the municipalities. It is a general county tax, not levied by districts, but spread generally, over all taxable property. It is apportioned fairly and equitably to the various schools according to their needs, certainly a fair bases of distribution. There is no contention in this case that any district is apportioned more than its necessities require, nor that Albuquerque as a district is receiving less than its needs. The taxpayers of Albuquerque are not assessed as members of that district, but as citizens of the county, and they can have no complaint.

The asserted unconstitutionality of the law is predicated upon section 4 of article 12 of the Constitution, which is as follows:

"* * * The Legislature shall provide for the levy and collection of an annual tax upon all the taxable property in the state for the maintenance of the public schools, the proceeds of such tax levy to be added to the current school fund above provided for. The current school fund shall be distributed among the school districts of the state, * * * and shall provide for the levy and collection of additional local taxes for school purposes. * * *

"Before making the distribution above provided for, there shall be taken from the current school fund as above created, a sufficient reserve to be distributed among school districts in which the proceeds of the annual local tax, when levied to the limit allowed by law, plus the regular quota of current school funds al-

lotted to said district, shall not be sufficient for the maintaining of a school for the full period of five months. * * *

This section deals primarily with the current school fund of the state, its creation and distribution, in neither of which we are at present concerned, for we are dealing with a county, not a state fund, although we may mention in passing that this constitutional provision conflicts with appellant's idea of fundamental justice in taxation, since the proceeds of the state tax are distributed among the school districts in proportion to the number of children of school age, with the inevitable result that the districts do not receive apportionments in accordance with their contributions. The section further specifies that the Legislature "shall provide for the levy and collection of additional local taxes for school purposes." The word "local" is used to distinguish the tax from the state tax already provided for. We are now asked to construe this as meaning a tax to be levied in the various school districts, and to hold that this language precludes the Legislature from authorizing a general county tax levied uniformly upon property in all the districts. The argument is made that this construction is required by the last paragraph of the section, which allows an additional distribution to "districts in which the proceeds of the annual local tax, when levied to the limit allowed by law," plus its regular distribution from the state fund, "shall not be sufficient to maintain a school for five months." The additional distribution is dependent upon the amount received by the district from the proceeds of the local tax. That tax may be levied upon the district specially, or upon the county as a whole. As to this the Constitution is silent. In this respect it deals with the proceeds of the tax, not the territorial extent of its levy. We find in the section nothing which makes the word "local" synonymous with "district." The county tax with which we are dealing is a local tax within the meaning of this section, and there is no prohibition against its levy or the distribution of its proceeds in the manner provided in the acts under consideration.

For the reasons stated the judgment will be affirmed; and it is so ordered.

PARKER, J., and LEAHY, District Judge, concur.

(35 Idaho, 527)

KLINE et al. v. SHOUP et al. (No. 3869.)

(Supreme Court of Idaho. June 1, 1922.)

1. Courts \Leftarrow 202(5)—On appeal from probate court, notice of appeal must be served on executor and administrator and all interested parties.

On appeal from the probate to the district court in probate matters, the notice of appeal must be served on the executor or administrator, and upon all parties interested, who appeared upon the motion or proceeding which the appellant desires to have reviewed. C. S. § 7176.

2. Courts \Leftarrow 202(5)—On appeal from probate court, notice must be served on all parties appearing generally.

This means parties who made a general appearance, and does not include parties who merely made a special appearance to attack the jurisdiction of the court.

3. Courts \Leftarrow 202(5)—On appeal to Supreme Court from district court judgment on appeal from probate court, only those necessary to the first appeal are necessary parties.

On appeal to the Supreme Court from a judgment of the district court rendered on an appeal from the probate court in a probate matter, only those need be made parties to the appeal to this court who were necessary parties to the appeal from the probate court to the district court.

Appeal from District Court, Lemhi County; Ralph W. Adair, Judge.

Action by Frank J. Kline and others, heirs of John Tormey, deceased, against W. H. Shoup and others. From a judgment of the district court reversing an order of the probate court, which set aside a former order confirming an administrator's sale, the plaintiffs appeal. On motion to dismiss appeal. Motion denied.

John H. Padgham, of Salmon, and Richards & Haga, of Boise, for appellants.

Burleigh & Glennon, of Salmon, for respondents.

McCARTHY, J. On July 18, 1917, the probate court for Lemhi county made an order in the matter of the estate of John Tormey, deceased, authorizing respondent Shoup, administrator, to sell the mining property belonging to the estate, and on April 23, 1919, made an order confirming a sale of said property made in conformance with the first order. On September 13, 1920, appellants, being parties claiming an interest in said estate and property, filed a petition in said probate court, asking it to set aside the orders authorizing and confirming the sale, on the ground that the said administrator procured said orders fraudulently, that the notice of

application for the orders was not given as required by statute, and that the petition for the orders did not describe the property or give any reason for the sale. No such proceeding as this is provided by the statutes of this state relating to probate proceedings. However, we will not here pass upon the question whether the probate court had jurisdiction to entertain the petition, as that will more properly arise upon a consideration of the merits of the case. There is no statutory provision for service in such a proceeding. If it is recognized by our law, which we do not here decide, the requirement as to service should probably be the same as in proceedings for confirmation of the sale, in which case C. S. § 7632, provides that notice shall be given by posting the notice or publishing it for 10 days. It does not appear from the record whether any notice was given. However, on December 22, 1920, respondent Shoup filed an affidavit, which constituted both an answer to the petition and an attack on the jurisdiction of the court. On December 22, 1920, an answer was filed by respondent F. S. Wright, who purchased the property from the administrator on the sale, and subsequently, but before the filing of the petition, conveyed to Walter L. Thompson and S. A. Matthews each an undivided one-fourth interest. On the hearing in the probate court counsel appeared specially for said Thompson and Matthews, and moved the court to desist from taking any action upon the petition and to dismiss the same, which motion was denied, whereupon said Thompson and Matthews declined to further appear at the hearing. It is clear that their motion was an attack upon the jurisdiction of the court. Thereupon the matter was heard upon the petition, the answers of Shoup, administrator, and Wright, upon records and files in the action and certain depositions, and the court made an order setting aside its former orders authorizing and confirming the sale. Thereupon respondents Shoup and Wright appealed to the district court for Lemhi county. No service of the notice of appeal was made upon Thompson and Matthews, and they made no appearance in that court. The district court reversed the order of the probate court, which amounted to reinstating the original orders authorizing and confirming the sale. This judgment of the district court is therefore in the interest of Thompson and Matthews, who purchased from the purchaser on the administrator's sale. From this order, appellants, being parties claiming an interest in the estate and property in question, have appealed to this court. Thompson and Matthews are not made parties to the appeal, and no service of the notice of appeal was made upon them. They have moved to dismiss the appeal on the ground that they are necessary parties, and the notice of appeal was not ad-

dressed to, or served upon them or their attorneys.

Their position is based on these three propositions. On appeal from the district court, the notice of appeal must be served on the adverse party. C. S. § 7153. Adverse party means any party who would be prejudicially affected by a modification or reversal of the judgment or order appealed from. *Diamond Bank v. Van Meter*, 18 Idaho, 243, 108 Pac. 1042, 21 Ann. Cas. 1273; *Holt v. Empey*, 32 Idaho, 106, 109, 178 Pac. 703. Such a party must be served, even though judgment was entered against him by default. *Titiman v. Alamance Mining Co.*, 9 Idaho, 240, 74 Pac. 529; *Baker v. Drews*, 9 Idaho, 276, 74 Pac. 1130. These propositions are sound, generally speaking, but they do not apply to this case.

[1-3] It must be remembered that this is a probate proceeding originating in the probate court. The statutes in regard to appeals in probate matters govern. The appeal to the district court was authorized by C. S. § 7176, which provides that the notice of appeal must be served upon the executor, and upon all parties interested, who appeared upon the motion or proceeding which the appellant desires to have reviewed. *Thompson and Matthews* were not served with notice. Should they have been? This depends upon whether they had appeared upon the motion or proceeding in the probate court within the meaning of those words as used in section 7176. C. S. § 7202, provides that:

"A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. * * *

In other words, an appearance under our statute means a general appearance, and does not include a special appearance merely for attacking the jurisdiction of the court. Since *Thompson and Matthews* appeared specially merely for that purpose, and declined to appear further, we conclude that they were not parties who appeared on the proceeding in the probate court within the meaning of section 7176, and therefore were not necessary parties to the appeal to the district court. This would be so regardless of what had been the action of the probate court. If the district court had jurisdiction to proceed without them, then, on an appeal from the district court to this court, we conclude that they were not necessary parties to the appeal. The Legislature in passing the statute in regard to appeals could not have intended that one who was not a party to the action in the district court need be made a party on appeal to this court.

The motion to dismiss the appeal is denied.

RICE, C. J., and DUNN and LEE, JJ., concur.

PERKINS v. SWAIN.

(Supreme Court of Idaho. May 31, 1922.)

Limitation of actions \S 51(2)—Statute runs from default under contract with acceleration clause.

Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due, and the statute of limitations runs from such default.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by Dean Perkins against A. J. Swain to recover on a promissory note. From a judgment, of dismissal, plaintiff appeals. Affirmed.

Carl A. Burke and John J. Blake, both of Boise, for appellant.

Wood & Driscoll, of Boise, for respondent.

RICE, C. J. This is an action upon a promissory note, bearing date October 21, 1910, due on or before four years after date, which contained the following clause:

"With interest thereupon in like money from date until paid, at the rate of eight per cent. per annum, interest payable monthly, and, if not so paid, the whole sum of both principal and interest to become immediately due and collectible."

Interest payments were made at various dates, amounting in all to \$917.03, an amount sufficient to pay the interest until September, 1912. The action was commenced October 3, 1919. The note was given in connection with a contract for the purchase of certain real estate as evidencing the time and terms of payment. The contract contained the following provision:

"Time is agreed to be the essence of this contract and in case of default in any deferred payment as above set forth, the said party of the second part shall forfeit any rights he may have to said premises and he shall also forfeit all moneys heretofore paid by him to said parties of the first part to purchase said real estate."

By the terms of the contract, respondent also agreed to pay all taxes for the year 1911 and subsequent years. It was alleged in the complaint that he paid all taxes assessed and levied against the property described in the contract for the year 1911 and each successive year thereafter, including the year 1918.

The defense of the statute of limitations was interposed by respondent. These statutes read as follows:

C. S. § 6594: "Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have

accrued, except when, in special cases, a different limitation is prescribed by statute."

C. S. § 6607: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows: * * *

C. S. § 6609: "Within five years: An action upon any contract, obligation or liability founded upon an instrument in writing."

The statute of limitations begins to run in favor of the defendant at the time the cause of action accrues against him. *Rawleigh Medical Co. v. Atwater*, 33 Idaho, 399, 195 Pac. 545; *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S. W. 1075.

The acceleration clause above quoted is not optional, but positive in its terms. The case falls within the rule announced in the case of *Canadian Birkbeck, etc., Co. v. Williamson*, 32 Idaho, 624, 186 Pac. 916, as follows:

"Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due and the statute of limitations runs from such default."

The question has been re-examined in the light of the very complete citation of authorities furnished in the briefs of counsel for the respective parties. After such examination, the foregoing rule is believed to be correct and is reaffirmed.

In the case of *Moline Plow Co. v. Webb & Bro.*, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879, the Supreme Court, through Mr. Justice Harlan, said:

"As this action was brought within less than four years after November 1, 1885, the defense of limitation—although it was stipulated in each note that on default in the payment of interest at maturity the principal was to become due and collectible—is without foundation as to any of the notes, unless the principal of each note became due, without regard to the wishes of the payee or holder, either immediately upon default in paying interest, or after the expiration of ninety days from such default. Whether that view be sound or not depends upon the terms of the note and the deed of trust, and could not be affected by the testimony of witnesses."

In *Green v. Frick*, 25 S. D. 342, 126 N. W. 579, the court, in considering a question similar to the one at bar, said:

"No doubt exists where the contract is clearly optional on the part of the creditor. But to hold that a contract is optional which by its express terms is plainly absolute is unwarranted by any known rule governing the construction of contracts."

In *Snyder v. Miller*, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489, it is said:

"But a more fundamental consideration is that the parties made the contract, and courts

cannot make another to take its place. Its language excludes the idea that the creditor may or may not 'treat the debt as due.' It becomes due in fact. If an election were all that the parties intended, words appropriate to that purpose should have been used."

The rule announced in the case of *Canadian Birkbeck, etc., Co. v. Williamson*, supra, is supported by the following authorities: *City of Ft. Worth v. Rosen* (Tex. Com. App.) 228 S. W. 933; *Miles v. Hamilton*, 106 Kan. 804, 189 Pac. 926; *Id.*, 107 Kan. 187, 190 Pac. 430; *Buss v. Kemp Lbr. Co.*, 23 N. M. 567, 170 Pac. 54, L. R. A. 1918C, 1015; *City of Ft. Worth v. Rosen* (Tex. Civ. App.) 203 S. W. 84; *Boyd v. Buchanan*, supra; *Central Trust Co. v. Meridian L. & R. Co.*, 106 Miss. 431, 63 South. 575, 51 L. R. A. (N. S.) 151; *Green v. Frick*, supra; *Van Arsdale-Osborne Brokerage Co. v. Martin*, 81 Kan. 499, 106 Pac. 42; *Clause v. Columbia Savings & Loan Ass'n*, 16 Wyo. 450, 95 Pac. 54; *Snyder v. Miller*, supra; *Spesard v. Spesard*, 75 Kan. 87, 88 Pac. 576; *McFadden v. Brandon*, 8 Ont. L. R. 610; *San Antonio Real Estate Bldg. & Loan Ass'n v. Stewart*, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864; *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9; *Dodge v. Signor*, 18 Tex. Civ. App. 45, 44 S. W. 926; *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Harrison Machine Works v. Reigor*, 64 Tex. 89; *First Nat. Bank v. Peck*, 8 Kan. 660; *Hemp v. Garland*, 4 Q. B. 518; *Reeves v. Butcher*, L. R. 2 Q. B. 509.

We are referred to the following cases as holding that the accelerating clause contained in the note was for the benefit of the creditor, and that while not therein so expressed it is purely optional to declare the whole amount due, both principal and interest, and bring suit to collect the same: *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561; *Keene Five Cent Savings Bank v. Reid et al.*, 123 Fed. 221, 59 C. C. A. 225; *Belloc v. Davis*, 38 Cal. 242; *Watts v. Hoffman*, 77 Ill. App. 411; *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Batey v. Walter* (Tenn. Ch. App.) 46 S. W. 1024; *Doran v. O'Neal* (Tenn. Ch. App.) 37 S. W. 563; *Richardson v. Warner* (C. C.) 28 Fed. 343; *Nebraska City Bank v. Nebraska City Hydraulic, etc., Co.* (C. C.) 14 Fed. 763; *Blakeslee v. Hoit*, 116 Ill. App. 83; *Quackenbush v. Mapes*, 123 App. Div. 242, 107 N. Y. Supp. 1047; *Core v. Smith*, 23 Okl. 909, 102 Pac. 114; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956; *Scott v. Blades Lumber Co.*, 144 N. C. 44, 56 S. E. 548; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Richards v. Daley*, 116 Cal. 336, 48 Pac. 220. And see, also, *Wall v. Marsh*, 9 Baxt. (Tenn.) 438; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495; *Hall v. Jameson*, 151 Cal. 666, 91 Pac. 518, 12 L. R. A. (N. S.)

1190, 121 Am. St. Rep. 137; Twin Falls Oakley Land & Water Co. v. Martens et al. (C. C. A.) 271 Fed. 428.

According to some of the authorities cited by appellant an accelerating clause, such as the one in the case at bar, is regarded as being in the nature of a penalty or forfeiture which may be waived by the creditor. Such a construction is contrary to the weight of authority. *Mullen v. Gooding Imp. & Hdw. Co.*, 20 Idaho, 348, 118 Pac. 666; *San Antonio R. E. B. & L. Ass'n v. Stewart*, supra; 1 *Pomeroy, Equity Jurisprudence*, § 439.

In other cases it is held that an accelerating clause in a note or contract is for the benefit of the payee, and may be enforced or waived at his option. In our opinion to so hold would be, by construction, to read into the contract a provision not contained therein and result in making a contract to take the place of the one made by the parties. *Snyder v. Miller*, supra.

Other cases suggest certain inequitable results which might flow from an adherence to the rule as announced in *Canadian Birkbeck, etc., Co. v. Williamson*, supra, and conclude therefrom that the accelerating clause should not be construed in accordance with its terms. Such considerations are not convincing. The cases of supposed hardship are as likely to be contrary to the real facts as in accordance therewith. And in all proper cases, equity may afford relief. See *Sire v. Wightman*, 25 N. J. Eq. 102; *Adams v. Rutherford*, 13 Or. 78, 8 Pac. 896.

It is contended that since respondent paid the taxes levied against the premises continuously until the year 1918 he should not be permitted to take advantage of the statute of limitations. The payment of taxes alone would not toll the running of the statute. No representations in connection with the payment of taxes or other circumstances are shown which created an estoppel, or caused a modification of the contract.

The judgment is affirmed. Costs awarded to respondent.

BUDGE, DUNN, and LEE, JJ., concur.

McCARTHY, J., being disqualified, did not sit at the hearing or take part in the opinion.

(35 Idaho, 490)

STUDEBAKER BROS. CO. OF UTAH v. HARBERT. (No. 3448.)

(Supreme Court of Idaho. May 31, 1922.)

1. New trial §137 — Notice of motion must specify particulars in which evidence is insufficient to sustain verdict.

Notice of motion for a new trial must specify the particulars in which the evidence is in-

sufficient to sustain the verdict, but such specification is not necessary in the motion, which follows the notice, and may be oral or in writing.

2. Appeal and error §1001(1)—Verdict not supported by evidence should be set aside.

Where a verdict is without any substantial support in the evidence, it should be set aside.

Appeal from District Court, Jefferson County; James G. Gwinn, Judge.

Action by the Studebaker Brothers Company of Utah, a corporation, against Joe A. Harbert, on a promissory note. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions for new trial.

C. W. Morrison, of Rigby, for appellant.

C. A. Bandel, of Rigby, for respondent.

LEE, J. This action was commenced by appellant corporation to recover upon an installment note. The cause was tried to a jury which returned a verdict of no cause of action, and judgment was entered against appellant for costs. This appeal was taken from the judgment, and also from the order denying the motion for new trial. The appeal from the judgment having been dismissed, the cause is here considered upon the appeal from the order overruling the motion for new trial.

The complaint alleges that respondent executed to appellant his note, payable in installments, and further conditioned that if the payee should deem itself insecure before maturity it might declare the entire sum immediately due and payable, and that, respondent having failed to make payment of the first two installments, it deemed itself insecure, and declared the whole of said note due and payable. The complaint was not verified, and the answer is a general denial and an affirmative plea of part payment. After verdict and judgment for respondent, appellant filed and served its notice of intention to move for a new trial upon the ground of insufficiency of the evidence to justify the verdict, and that the same was against the law, specifying the particulars of such insufficiency.

At the trial, the note was received in evidence without objection, and showed two payments to have been made on the same, totaling less than the first installment. The witness Taylor was the general manager for the appellant company at Rigby, where the note was given, testified that the remainder of the November installment and all of the December installment was unpaid; that the respondent had called at the office of the company some time prior to the commencement of the action and declared that he would not pay the note; that if appellant got anything out of him, it would have to bring suit, and

otherwise by his demeanor and conversation made it clear that he would refuse to pay said note unless payment was enforced by suit. This testimony relative to the refusal of respondent to pay the remainder of this note, or any part of the same, until compelled to do so by suit, is corroborated by two other witnesses, and is not disputed by respondent, who testified in his own behalf, but confined his testimony in chief to the question of his having been given permission to dispose of a set of harness, which appears to have been one of the articles for which the note in question was given.

The court correctly instructed the jury that the action was to recover a balance which plaintiff claimed to be due on the note introduced in evidence; that by its terms appellant was privileged to declare the same due before maturity and sue upon the same if it deemed itself insecure; that as to whether it had reasonable ground for deeming itself insecure was a question of fact; and that plaintiff could not recover unless the jury found that it had reasonable grounds for deeming itself insecure, or unless some part of the note was due and unpaid at the time suit was commenced.

[1] The jury having returned a general verdict of no cause of action, it cannot be determined whether it intended thereby to find that appellant did not have reasonable ground for deeming itself insecure, and that therefore the bringing of the action to recover the entire balance on said note was premature, or whether it intended to find that none of the installments were past due. In either event, the verdict of the jury is without any substantial support in the evidence, and should have been set aside. The trial court appears also to have taken the view that the verdict was without any substantial support in the evidence, but denied the motion for a new trial for the reason that it failed to specify the particulars in which the evidence was insufficient. In this the court was in error, for while the motion for new trial does not specify the particulars in which the evidence is alleged to have been insufficient to support the verdict, the notice of intention to move for a new trial does so specify the particulars of insufficiency, and this court has held that:

"The specification of errors, therefore, because of the insufficiency of the evidence, must be specified in the notice of the motion for a new trial, but is not required to be set forth in any other part or at any other place in the record upon appeal; and under the provisions of section 4443 [now C. S. § 6892] heretofore referred to the notice of motion for a new trial is part of the files in the case, and is therefore a part of the record required to be furnished this court and to be used upon a hearing in this court." *Kelley v. Clark*, 21 Idaho, 231, 242, 121 Pac. 95, 99; *Times Printing, etc., Co. v. Babcock*, 81 Idaho, 770, 775, 176 Pac. 776.

The motion for a new trial follows after the notice, and may be oral or in writing, and is not required to be in any particular form, or to state the grounds upon which the same is made. *Kelley v. Clark*, supra.

[2] While the reasons given by the trial court for denying appellant's motion for new trial are not controlling, the ruling would still be upheld if the final conclusion reached in denying the motion for new trial could be justified upon any other ground. However, a careful inspection of the record shows that there was no substantial conflict in the evidence, and that it is insufficient to support the verdict, which is not only contrary to the evidence, but is contrary to the instruction of the court by which the jury were instructed to find for the plaintiff in either of two contingencies: First, if they found that appellant had reasonable ground for deeming itself insecure; or, second, if some part of the note was due and unpaid at the time suit was commenced. As to this last contingency, there can be no question upon this record that a part of the November and all of the December installments were due and unpaid. Where there is no substantial conflict in the evidence, and the evidence is insufficient to sustain the verdict, it will be set aside. *Quayle v. Ream*, 15 Idaho, 666, 99 Pac. 707.

The judgment is reversed, and a new trial granted, with costs to appellant.

RICE, C. J., and BUDGE and MCCARTHY, JJ., concur.

(35 Idaho, 496)

WERNER PIANO CO. v. BAKER. (No. 3443.)

(Supreme Court of Idaho. May 31, 1922.)

1. Dismissal and nonsuit \S 57—Unreasonable delay in serving summons is ground for dismissing action.

Unreasonable delay in serving the summons is ground for dismissing the action.

2. Appeal and error \S 973—Judgment dismissing action for lack of prosecution will not be reversed in absence of abuse of discretion.

A judgment of the district court dismissing an action for lack of prosecution should be reversed only for an abuse of discretion.

Appeal from District Court, Custer County; F. J. Cowen, Judge.

Action by the Werner Piano Company against Charles F. Baker. From a judgment of dismissal, plaintiff appeals. Affirmed.

Milton A. Brown, of Challis, for appellant.
George L. Ambrose, of Mackay, for respondent.

MCCARTHY, J. Appellant filed its complaint against respondent in the district

court on January 14, 1915. Summons was issued on January 14, 1916. Alias summons was issued on March 15, 1917. The alias summons was not served upon respondent until April 4, 1918. Respondent moved to quash the summons, strike the complaint, and dismiss the action, on the grounds: First that the alias summons was served more than one year after the issuance of either the original or alias; second that the action had not been prosecuted with diligence. The motion was supported by the affidavit of respondent's attorney stating that respondent had been a resident of the county in which the action was brought from the time the complaint was filed until the alias summons was served and had been within the county practically all of that time. No counter showing was made by appellant. The district court sustained the motion and entered judgment of dismissal.

[1] Our statute provides that summons may be issued at any time within one year after the filing of the complaint, C. S. § 8671; but does not provide within what time it must be served. Under a statute substantially the same the California Supreme Court held that an unreasonable delay in serving the summons is ground for dismissing the action. *Grigsby v. Napa County*, 38 Cal. 585, 95 Am. Dec. 213; *Carpentier v. Minturn*, 39 Cal. 450; *Eldridge v. Kay*, 45 Cal. 49; *Lander v. Flemming*, 47 Cal. 614. We are in accord with that view.

[2] A judgment of the district court dismissing an action for lack of prosecution should be reversed only for an abuse of discretion. *Grigsby v. Napa County*, supra; *Carpentier v. Minturn*, supra; *Eldridge v. Kay*, supra; *Lander v. Flemming*, supra. On the facts of this case we do not think the court abused its discretion. The delay in serving the alias summons, under the circumstances shown by the affidavit, made a prima facie case of lack of diligence, which was not met or overcome by any explanation or showing upon appellant's part. *Lander v. Flemming*, supra.

The judgment is affirmed, with costs to respondent.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

56 Idaho, 522)

PEOPLE ex rel. BROWN, Pros. Atty., v. BURNHAM. (No. 3450.)

(Supreme Court of Idaho. June 1, 1922.)

Jury 19(12)—In action for usurpation of office, defendant not entitled to have title to office determined by jury.

In an action for usurpation of office under C. S. § 7024, a defendant has no right to have the title to such office determined by a jury.

Appeal from District Court, Custer County; F. J. Cowen, Judge.

Action by the People of the State of Idaho, on the relation of Milton A. Brown, Prosecuting Attorney of Custer County, upon the complaint of Jennie E. Kelleher, against Margaret Burnham, for usurpation of office. From judgment for plaintiff, defendant appeals. Affirmed.

W. W. Adamson, of Challis, for appellant.
Milton A. Brown, Pros. Atty., of Challis, Chase A. Clark, of Mackay, W. A. Brodhead, of Halley, and Solon B. Clark, of Mackay, for respondent.

DUNN, J. This action was brought by the prosecuting attorney of Custer county for the purpose of trying the title of appellant to the office of superintendent of public instruction of said county. The complaint alleged:

That appellant "was not eligible to said office at the time of her nomination or election; that she did not at said time or times hold a state or state life certificate and was not a teacher of not less than two years' actual experience and service in the schools of Idaho, one of which years' experience being while holding a valid certificate of a grade not lower than a state certificate."

Appellant denied this charge of ineligibility, and the case was tried before a jury. Appellant offered in evidence in her behalf her certificate entitled "Specialist's State Certificate," which entitled her to teach primary grades in the public schools of Idaho for a period of eight years. The jury returned a verdict in favor of appellant. This verdict was clearly contrary to the law as given by the court in its instructions and contrary to the evidence. One or the other of the state certificates mentioned in the complaint was required to qualify appellant for the office. *People v. Kadletz*, 30 Idaho, 698, 167 Pac. 1161. Thereupon the court set aside the verdict of the jury, made findings of fact in which it set out all the proceedings up to and including the verdict of the jury, and found that appellant was not qualified to hold the office of county superintendent of public instruction for the reason that she was not at the time of her nomination and election a holder of a state or state life certificate as provided by law. Thereupon judgment was entered that appellant unlawfully held the office of county superintendent of public instruction in and for Custer county, Idaho, and that she be excluded therefrom and said office declared to be vacant. Appeal was taken from said judgment.

The second assignment of error made by appellant is that—

"The court erred in vacating and setting aside the verdict of the jury and entering

judgment for relator, thus denying the defendant the right of a trial by jury."

This action was brought under C. S. § 7024, which authorizes the prosecuting attorney to bring such an action "in the name of the people of the state against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this state, without authority of law." The procedure provided for by this section and several succeeding ones was enacted in substance by the first territorial Legislature of Idaho, as part of the Civil Practice act, which was entitled "An act to regulate proceedings in civil cases in the Courts of Justice of the territory of Idaho." (First Terr. Sess. Acts 1863-64, p. 77.) Said provisions of this territorial act have been carried down from that date to the present with no changes that affect the merits of this controversy. The original act provided that the action should be brought by the district attorney in the name of the people of the United States and of the territory of Idaho upon his own information or upon the complaint of a private party. First Territorial Session Acts, p. 138. In 1875 the Legislature amended this law slightly and enacted that—

"The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions under the provisions of this chapter," which was the chapter dealing with actions for the usurpation of office or franchise. Eighth Terr. Sess. Acts, p. 157, § 333.

It is not by any means clear that there was a right of trial by jury in quo warranto proceedings at common law in England. 22 R. C. L. p. 718, § 40. And it has been held that the weight of authority is against that contention. *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 959, 58 Am. St. Rep. 39.

This is not a quo warranto proceeding under the common law. It is usually called a proceeding in the nature of quo warranto, notwithstanding the territorial Legislature in 1875 abolished "proceedings by information in the nature of quo warranto." At the time Idaho became a state, C. S. § 6837, was a part of the territorial laws which were continued in force by the state Constitution. Const. art. 21, § 2. Said statute reads as follows:

"Sec. 6837. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where, in these cases, there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of

fact must be tried by the court subject to its power to order an issue to be referred to a referee, as provided in this code."

While the Constitution provides that "the right of trial by jury shall remain inviolate" (Const. art. 1, § 7), that constitutional provision has been held by this court simply to preserve the right of trial by jury as it existed at the adoption of the Constitution.

"The guaranty found in section 7, art. 1, of the Constitution that the right of trial by jury shall remain inviolate was not intended to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the Constitution." *Christensen v. Hollingsworth*, 6 Idaho, 87, 53 Pac. 211, 96 Am. St. Rep. 256.

It was evidently the purpose of the territorial Legislature to make this proceeding a civil action, but, if we concede that it is not such an action, it must be admitted that, so far as trying the title to an office is concerned, it is in the nature of a civil action. It is provided that in an action of this kind brought by the prosecuting attorney, in addition to the cause of action in behalf of the people of the state, the name of the party claiming to be entitled to the office may be set forth with a statement of his right thereto, and that judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled to the office, as the form of action and justice may require. It is also provided that, when several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise, and also that the person rightfully entitled to an office or franchise may bring an action in his own name against the alleged usurper. The only procedure adapted to such trial is that provided by the statute for civil actions. In this view of the case C. S. § 6837, would control the matter of trial by jury, and under said section appellant was not entitled to a jury trial. The court had a right to call a jury, but its verdict, being only advisory, was not binding on the court. Therefore there was no error in setting it aside.

The statute under which this proceeding was brought authorizes the court, in case the defendant is found guilty of usurping an office, in its discretion, to impose a fine not exceeding \$5,000. No fine having been imposed in this case, no question arises herein as to the validity of such a judgment in a proceeding of this kind.

The other errors assigned by appellant are without merit.

The judgment is affirmed, with costs to respondent.

RICE, C. J., and BUDGE, McCARATHY, and LEE, JJ., concur.

(71 Colo. 432)

BERSHENYI v. PEOPLE. (No. 10084.)

(Supreme Court of Colorado. June 2, 1922.)

1. Homicide §190(7)—Recent uncommunicated statements hostile to accused admissible.

Statements by deceased hostile to accused, made within a week before his alleged murder occurred, although not actually threats and uncommunicated to accused, are admissible to show deceased's state of mind toward accused.

2. Criminal law §390—Testimony of accused as to intent admissible.

Testimony of accused in a murder trial as to his intent in his striking of deceased from which death ensued is admissible.

3. Criminal law §823(6)—Homicide §300 (12)—Charge that no provocation justifies killing is error, and not cured by other instructions.

A charge in a murder trial that no provocation can justify or excuse a killing is error tending to deprive of the defense of self-defense, and not cured by instructions as to what will tend to reduce a killing from one grade of offense to another.

4. Criminal law §683(1)—Admission of testimony of improper conduct of accused introduced by state on rebuttal held error.

In a trial for murder, it was error on the state's rebuttal to admit testimony of deceased's wife as to improper conduct of accused toward her, concerning which no evidence had been introduced by the state; such testimony not being rebuttal.

Burke, J., dissenting in part.

Error to District Court, Garfield County; John T. Shumate, Judge.

Josef Bershenyi was convicted of murder in the first degree and brings error. Reversed.

C. W. Darrow and Noonan & Noonan, all of Glenwood Springs, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and Charles H. Sherrick; Asst. Atty. Gen., for the People.

TELLER, J. Plaintiff in error was convicted of murder in the first degree, and brings error. He will hereinafter be mentioned as defendant.

He was convicted of killing one Page in an altercation in the streets of Glenwood Springs, where defendant was delivering milk. Page had recently been in his employ, and on the day in question went into the street, where defendant stood by the side of his truck, and demanded a small balance of wages. The only witness testifying as to what was said was the defendant himself. Other witnesses testified to the fact that there was something of an altercation, and that the defendant struck Page with a club

taken from his truck, from which assault Page died some weeks later. Defendant claims that he acted in self-defense, testifying that during the conversation, in which Page recited a series of grievances against the defendant, Page had in his hand an open knife, that finally he lunged at defendant with the knife, and that the fatal blow was struck as a result of that attempt by Page to cut defendant.

There was testimony by a witness, who assisted in stopping the fight, to the effect that defendant at the time exclaimed that Page had tried to cut him.

[1] One of the errors assigned is that the court excluded the offered testimony of three witnesses to the effect that Page, between February 1st and February 8th, the date of the assault, had expressed great hostility to the defendant, and had stated that he would be justified in killing him if he wanted to. This testimony was excluded upon the theory that it was offered as a threat, and the fact that it had not been communicated to defendant was made the ground of its exclusion. Counsel for defendant explained in making the offers that the purpose of the testimony was to show a state of mind in Page which would tend to corroborate the testimony of the defendant that Page had assaulted him with a knife. The rejection of the testimony was error. Its admissibility is clear under the rule laid down in Davidson v. People, 4 Colo. 145, where the court quotes from Wharton's Criminal Law as follows:

"Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the quo animo of the defendant, but may be relevant to show that at the time of the meeting the deceased was seeking the defendant's life."

The fact that the statements made by deceased were not, strictly speaking, threats, is not material; the question being what was his attitude of mind. These statements, offered to be proved, had all been made within a week, and they therefore come within the rule that such evidence must concern the feeling of the party within a very recent time. The fact that he made hostile statements to three different persons during that week tends strongly to show how he felt toward the defendant.

[2] It is further assigned as error that the court sustained an objection to a question to the defendant as to his intent when he struck Page. Under the authorities, the exclusion of that testimony was error.

In Wharton's Criminal Evidence, § 431, it is said:

"Ordinarily, as shown elsewhere, a witness cannot be examined as to another person's motives, but as to the accused's own motives, when relevant, he may be examined in chief, or upon cross-examination. In proving self-defense, he is entitled to testify to the jury that at the time of the act charged, he believed himself to be in danger of his life. * * * While such answers are not conclusive, they cannot be ignored, but must be considered in connection with all other evidence in the case. Where an instruction requires the jury to ignore such statements it is error. The inference which the jury may draw from the accused's own statement may be strong enough to overcome the conclusion drawn from other acts and declarations."

The evidence was admissible under *B. & W. R. D. Co. v. L. C. D. & R. Co.*, 36 Colo. 455, 86 Pac. 101, where the question of the admissibility of evidence of intention was directly under consideration. That case was followed in *Minneapolis Steel Co. v. Yeggy*, 60 Colo. 313, 194 Pac. 362.

[3] The more serious objection, however, is to instruction No. 17 in which the jury was instructed that—

"The law in relation to provocation is that no provocation will justify a person in killing another, nor will it excuse him; hence killing upon provocation will be either murder or manslaughter according to the degree of provocation and its effect upon the person killing."

It is urged that the use of the word "provocation" is so broad as to eliminate all consideration of the defendant's defense that he acted because of the attack upon him by the deceased. That the statement was too general is clear from the case of *Murphy v. People*, 9 Colo. 435, 13 Pac. 528, in which provocation sufficient to free the party killing from the guilt of murder was discussed. It is there said:

"Provocations, unaccompanied by personal assault, were not infrequently recognized as sufficient."

Mr. Wharton was there quoted as follows:

"The line between those provocations which will and will not extenuate the offense cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial and from which a great degree of violence does not usually follow, may serve to mark the distinction."

To the defendant, relying upon his plea of self-defense, the question of provocation was vital. When, then, the jury was told that no provocation would justify a killing, nor excuse it, the effect was to withdraw his defense from consideration by the jury. The discussion in other parts of that instruction of what would, and what would not, reduce the killing from one grade of offense to an-

other, does not cure the error. This court has held that where inconsistent statements of the law are made it is impossible to tell which one the jury followed, and, inasmuch as it might follow the wrong one, such instructions are prejudicial error.

[4] It is also urged as error that Mrs. Page, on rebuttal, testified that when she was riding into Glenwood Springs with the defendant he attempted some familiarities with her. Objection is made that this is not rebuttal. The objection is good. The state had offered no evidence as to any improper conduct of the defendant toward Mrs. Page. Defendant had related a conversation between him and Page concerning such a charge, and the only thing which the state could do in rebuttal was to show that defendant's evidence as to that conversation was not true. After defendant's case was closed, to introduce evidence of misconduct on the part of the defendant was likely to prejudice the jury against him.

That Page was killed by the defendant in a fit of rage was clearly established. Whether or not the circumstances under which the killing occurred were such as to have to any extent excused the killing was the question to be determined. Upon that question the defendant was prejudiced by the rejection of evidence, and the admission of evidence as above stated, as well as by the instructions of the court. For these reasons the judgment should be reversed.

ALLEN, DENISON, and WHITFORD, JJ., concur.

BURKE concurs in the judgment of reversal on the sole ground that there is error in instruction No. 17.

(71 Colo. 451)

BENHAM et al. v. WILLMER et al.
(No. 10345.)

(Supreme Court of Colorado. June 5, 1922.)

1. Appeal and error \S 80(6)—Order as to payment of costs of survey in proceeding to establish boundaries reviewable on appeal.

In a proceeding under *Sess. Laws 1907*, p. 286, to establish disputed corners and boundaries of lands, an order that the parties should pay in advance a certain amount of money proportioned to the land each claimed to pay for the cost of surveying, and that execution might issue to collect the amount, and that it should be a lien upon the lands concerned is a final judgment as to one branch of the case, and is reviewable on appeal.

2. Appeal and error \S 78(7)—Order made respecting costs held not a reviewable final judgment.

Ordinarily in civil actions any order touching costs made before the entry of the final

judgment is an interlocutory order, and not a reviewable final judgment.

3. Costs ¶268—In action to establish boundaries requiring defendants to advance costs of survey held error.

In a proceeding under Sess. Laws 1907, p. 286, to establish disputed corners and boundaries of lands, an order, requiring all parties to the litigation to advance costs proportionate to their lands to pay the cost of surveying was error, since it required the parties defendant to advance part of probable costs which had not accrued, and payment could not be enforced by rule of court.

4. Costs ¶268—Requiring party to pay future costs in suit in equity held error.

In a proceeding under Sess. Laws 1907, p. 286, to establish disputed corners and boundaries of land, although under section 3, providing that the proceeding is a suit in equity, and courts of equity may give costs in intermediate stages of a cause without waiting for a final decree, requiring the parties to the suit to advance costs proportionate to the land they claim to pay the costs of surveying was error, since the power of equity to give costs in intermediate stages of a cause applies only to accrued costs and not to future costs.

5. Costs ¶268—Order for deposit of costs of survey by parties in suit to establish boundaries who might not ultimately be liable therefor held error.

In a proceeding under Sess. Laws 1907, p. 286, to establish disputed corners and boundaries of lands, an order entered before trial, requiring all parties to advance costs in proportion to the land they claim to pay for a survey, was error, since it affected those who might ultimately be found not liable for costs, or who might in the exercise of the court's discretion be taxed less than other parties litigant or a smaller amount than that designated in the order.

6. Costs ¶268—Necessity of money to establish survey no reason for taxing costs upon defendants in suit to establish boundaries.

In a proceeding under Sess. Laws 1907, p. 286, to establish disputed corners and boundaries of lands, the necessity of money for the expense of taking testimony concerning lost or disputed corners and boundaries does not make lawful an order entered before trial that all parties should pay money proportionate to the amount of their land to pay the expenses of taking testimony and making a survey.

Department 1.

Error to District Court, Adams County; Samuel W. Johnson, Judge.

Suit by Anton L. Willmer and others against Louise Benham and others. From an order requiring the parties to pay into court each a certain sum as a deposit for costs, defendants bring error. Reversed and remanded.

William A. Hill and E. H. Whitney, both of Denver, for plaintiffs in error.

O. H. Pierce, of Denver, for defendants in error.

ALLEN, J. This cause is before us on an application for a supersedeas to review or stay an order, claimed by the plaintiffs in error to be a final judgment in the sense that it may be reviewed by this court. The order in question will be more fully hereinafter set forth, but, briefly stated, it is one requiring the parties litigant herein to pay into court each a certain sum as a deposit for costs.

[1] The main case is a special proceeding, brought under chapter 126, p. 286, Session Laws of 1907, to establish alleged disputed corners and boundaries of lands. There are 49 plaintiffs, claiming to be the owners respectively of various tracts of land, the corners or boundaries of which are alleged to be lost, destroyed, or in dispute. The defendants number about 160, and are made parties, apparently, as owners of lands which would be affected by a determination of the corners and boundaries of lands owned by plaintiffs.

The complaint was filed November 7, 1921. A notice bearing the same date, and addressed to all the defendants, was prepared and afterwards filed. The defendants were therein notified that on November 19, 1921, the plaintiffs would apply to the court for the appointment of a commission of surveyors and for the assessment of preliminary costs to be prorated among plaintiffs and defendants. The application was heard by the court after about 75 of the defendants had been served with the notice. Various motions regarding the application were interposed and heard, and thereafter, and on March 7, 1922, the court made the order of which the plaintiffs in error now complain.

The material parts of the order read as follows:

"It is therefore ordered, adjudged and decreed, by the court, that the parties to this cause that have been served notice of this proceeding, the owners of land as set forth in the complaint, and each of them, in the said four townships described, to wit: [Here follows description of four townships] * * * shall advance sufficient money as costs not to exceed the sum of \$10,000 to secure the fees, expenses, and compensation of the officers of this court and such commissioners as may be appointed by the court and all other persons who may lawfully perform services or furnish material under the lawful orders of the court herein.

"It is further ordered, adjudged, and decreed that each of the parties litigant who are the owners and claimants of land in said four townships as set forth in the complaint herein shall pay on or before the 1st day of May, A. D. 1922, the sum of 10 cents per acre upon all lands owned or claimed by each of them, respectively, and that said money shall be paid in to the clerk of this court, and shall be paid out by him from time to time as may be ordered by the court."

Other provisions of the order will be hereinafter noted.

[2] The first question argued is whether the order is a final judgment in the sense that it may now be reviewed. Ordinarily, of course, in civil actions, costs enter into the final judgment rendered on the merits, and any order touching costs made before the entry of the final judgment is merely an interlocutory order and not a reviewable final judgment. In the instant proceeding, however, the order affects the parties litigant, including the plaintiffs in error here, precisely as a final judgment would. The order takes the form of a final judgment, and has the effect of such, as is apparent from further provisions of the same, reading as follows:

"It is further ordered that this judgment and order be and the same is hereby awarded against each and every of the parties to this litigation who are the owners or claimants of land in the said four townships in the sum hereinbefore named, and that execution may issue therefor.

"It is further ordered * * * that said sum shall be a lien upon all of the lands * * * in the amount hereinbefore specified upon each of the litigants' lands respectively, and that said lien may be foreclosed and said lands sold to pay the same."

It is apparent that it would impose a hardship on the plaintiffs in error to compel them to wait until the rendition of a final judgment regarding corners and boundaries before obtaining a review of this order. Their lands might be sold to enforce the lien before such final judgment is rendered, and in that event nothing the court could do in the taxation of costs after the conclusion of the main case would put the present owners of the lands in statu quo. The order in question disposes finally of a branch of the case. It meets the test of what is a final judgment in the sense that it is reviewable. It is a final judgment under the reasoning whereby this court has held a judgment or order for temporary alimony to be a final judgment. See *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Bagot v. Bagot*, 68 Colo. 562, 191 Pac. 96.

[3] The next and remaining question is whether it was error to make the order in question. The court in its order designated this assessment or taxation as being in the nature of a docket fee, and provided that upon the final determination of the proceeding the moneys advanced pursuant to the order would be treated and disposed of as moneys usually are when they are paid in or advanced as docket fees. This situation does not validate the order. There is no authority for compelling defendants to advance any part of the probable costs which are yet

to accrue in the litigation, nor was the court empowered to make, as it attempted to make in this case, a rule of court to that effect.

[4] It is claimed that this is, as the statute provides (section 3 of the act hereinbefore cited), a suit in equity, and that therefore the court could avail itself of the rule, stated in 15 C. J. 106, to the effect that courts of equity may "give costs in intermediate stages of a cause without waiting for a final decree." That rule, however, has been applied only to accrued costs, and not to future costs. For example, in *Hand v. Allen*, 294 Ill. 35, 128 N. E. 305, in a suit in which an accounting was awarded, it was held that an order for expenses of reference prior to the accounting was premature. In *Avery v. Willson* (C. C.) 20 Fed. 856, it was held that costs may be awarded or taxed where they have arisen about a matter completely disposed of.

[5] The order in question is erroneous for either one of two reasons: (1) There is a taxation of costs, or an assessment for costs, which have not yet accrued; and (2) the order affects those who may ultimately be found not liable for costs, or who might, in the exercise of the courts' discretion, be taxed less than some other parties litigant, or a smaller amount than that designated in the order in question.

In connection with the second reason above stated, it may be noted that the order affects all those owning or claiming land in the four townships named. Some of these defendants have filed an answer putting in issue the truth of plaintiffs' allegations concerning alleged lost or disputed corners and boundaries. If such defendants prevail in the suit they may not be liable for costs, or at least not for any part of costs incurred in ascertaining corners and boundaries of lands.

[6] The order is sought to be upheld on the ground that it is necessary to raise money forthwith for the expenses which will arise in connection with the taking of testimony concerning lost or disputed corners and boundaries. This situation, however, does not make it imperative that defendants be ordered to advance a part of the money required for such purpose.

The court was not authorized to assess the defendants any sum to be applied to future costs. It was error to grant the order complained of. The judgment or order is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

TELLER, J., sitting for SCOTT, O. J., and WHITFORD, J., concur

(71 Colo. 445)

JOHNSON et al. v. STOVER. (No. 10294.)

(Supreme Court of Colorado. June 5, 1922.)

1. Mechanics' liens \S 281(1)—Evidence held sufficient to show that contractor did not accept notes which matured after the statutory period for filing liens.

In an action to establish a mechanic's lien for plumbing done in a hotel, evidence held sufficient to warrant a finding that the plumbing contractor accepted notes, which would mature within the statutory period for filing liens, in part payment of the contract, but did not accept notes which would mature after the statutory period.

2. Mechanics' liens \S 78—Land upon which building was erected by person not the owner held subject to a lien in absence of notice of nonliability.

Under Rev. St. 1908, \S 4029, providing that any building constructed upon any land with the knowledge of the owner shall be held to have been constructed at his instance and request, so as to subject his interest to a lien unless he shall, within five days after obtaining notice of the construction, post a notice that his interest shall not be subject to any lien, it was not error to subject land upon which a hotel was being constructed by another to a lien for balances due on plumbing done in the hotel where the owner of the land failed to give the required notice.

Department 1.

Error to District Court, Phillips County; L. C. Stephenson, Judge.

Action by A. A. Stover, as receiver for the Haxtum Plumbing & Heating Company, against Henrietta E. Johnson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Avery T. Searle, of Haxtum, and T. E. Munson, of Sterling, for plaintiffs in error.

S. E. Naugle and M. C. Leh, both of Sterling, for defendant in error.

ALLEN, J. This is an action to foreclose a mechanic's lien. Judgment for plaintiff. Defendants have sued out this writ of error, and apply for a supersedeas.

On March 5, 1920, a contract was entered into between Mrs. H. E. Johnson, one of the defendants, and the Haxtum Plumbing & Heating Company, of which plaintiff is the receiver. The contract was, as the complaint alleges, "for the plumbing and heating of a certain hotel building then to be erected" upon two certain lots in the town of Haxtum, Colo., the work to be done by the company, and paid for by Mrs. H. E. Johnson in certain installments as the work progressed. The work was duly completed. The plaintiff, as receiver of the contracting company, filed a mechanic's lien statement.

The answer of the defendants alleges that on June 14, 1920, the contracting company

agreed to accept, and did thereafter accept, in part payment for the work done, five promissory notes of one Fred Johnson, each note to be and become due on June 14, 1922.

[1] A portion of the brief of plaintiffs in error assumes these allegations to be true and established, and contends that the mechanic's lien was waived or lost, relying on the rule stated in 18 R. C. L. 971, to the effect that—

"The acceptance of a note which will not reach maturity within the statutory period for enforcing a mechanic's lien is a waiver of the right to a lien."

However, the allegations of the answer in reference to this matter were denied in the replication. The issue was found in favor of the plaintiff, and we cannot hold that the finding is manifestly against the weight of the evidence or that it can be set aside for any other reason. It is not disputed that the five promissory notes were executed and delivered to an escrow holder, but there is testimony that the agreement on the part of the contracting company was to accept notes maturing in 1920, one on July 1st, one on August 1st, etc., and that there was no agreement to accept, nor was there any acceptance of, notes maturing in the year 1922. The evidence is sufficient to warrant the finding of the trial court which appears in the bill of exceptions in the following language:

" * * * There isn't a proof required in this case of an agreement between the company and the owner for modification of the building contract in respect to the payments to be made."

[2] Mrs. H. E. Johnson, the party who contracted for the installation of the plumbing and heating fixtures, was the owner of only one of the lots upon which the hotel building was constructed, in which building the fixtures were placed. The other lot was owned by the defendant Charles J. Johnson. The judgment subjects both lots to the mechanics' lien, and it is contended that it was error to subject the lot of Charles J. Johnson to the lien.

Section 4029, R. S. 1908 (section 4584, M. A. S. 1912), provides, among other things, as follows:

"Any building, * * * and every structure or other improvement mentioned in the preceding sections of this act, constructed * * * upon or in any land, with the knowledge of the owner * * * of such land, * * * shall be held to have been erected, constructed, * * * or done at the instance and request of such owner or person, but so far only as to subject his interest to a lien therefor as in this section provided; and such interest so owned * * * shall be subject to any lien given by the provisions of this act, unless such owner or person, shall, within five days after he shall have obtained notice of the erection, construction, * * * or other improvement, aforesaid, give notice that his interests shall not be

subject to any lien for the same, by serving a written or printed notice to that effect, personally, upon all persons performing labor or furnishing skill, materials, machinery or other fixtures therefor, or shall, within five days after he shall have obtained the notice aforesaid, or notice of the intended erection, construction, * * * or other improvement aforesaid, give such notice as aforesaid by posting and keeping posted a written or printed notice to the effect aforesaid, in some conspicuous place upon said land or upon the building or other improvement situate thereon. * * *

The defendant Charles J. Johnson, nor any other party, neither pleaded nor proved that he gave or attempted to give the notice provided by the statute above quoted. He was in possession of his lot, and at all times knew of the proposed construction, and the construction of the hotel building and the installation of the fixtures therein. The statute fastens the lien on his land by his knowingly permitting the property to be improved. *Stewart v. Talbott*, 58 Colo. 563, 580, 146 Pac. 771, Ann. Cas. 1916C, 1116. The reason for the statute is that it would be inequitable to relieve his property from a lien for improvements erected thereon with his seeming or real acquiescence. *Grimm v. Yates*, 58 Colo. 268, 278, 145 Pac. 696. See, also, section 1251, Jones on Liens (2d Ed.).

There is no error in the record. The application for a supersedeas is denied, and the judgment is affirmed.

TELLER, J., sitting for SCOTT, C. J., and WHITFORD, J., concur.

(71 Colo. 420)

JONES v. JONES et al. (No. 9947.)

(Supreme Court of Colorado. June 5, 1922.)

1. Divorce \Leftrightarrow 150(2)—Findings of court adopting verdict of the jury sufficient.

In a divorce action on the ground of desertion, in which defendant by cross-complaint charged cruelty, adultery, and nonsupport, findings for plaintiff by the court, express as to desertion, but merely adopting the jury's verdict as to other issues, are valid.

2. Divorce \Leftrightarrow 152—Decree not void for not reciting jurisdictional facts admitted by pleadings.

Jurisdictional facts relating to marriage and residence of the parties in a divorce action being admitted in the pleadings, a divorce decree is not void for failing to recite them.

3. Divorce \Leftrightarrow 179—Findings of fact cannot be complained of by party not moving to set aside.

Defendant in a divorce action, not having moved to set aside findings of fact, cannot complain of defects therein on appeal.

4. Appeal and error \Leftrightarrow 664(1)—Original record conclusive as to time of filing of court's findings.

The original record imports absolute verity as to the fact that the court's findings were filed within 48 hours after return of a verdict as against a printed abstract prepared on appeal.

5. Divorce \Leftrightarrow 54—Condoned adultery no bar.

Condoned adultery, not being a ground for divorce, is not a bar to divorce.

6. Divorce \Leftrightarrow 54—Condoned adultery not a bar under statute denying divorce to party guilty of a cause thereby.

While the Divorce Act (Gen. Laws, 1877, §§ 917-924) denied a divorce where both parties had been guilty of adultery, as condoned adultery is not a cause for divorce, it does not bar a divorce under Sess. Laws 1917, p. 182, § 6, providing that, if both parties are "guilty of any one or more" causes for divorce, a divorce shall not be granted.

Department 1.

Error to District Court, City and County of Denver; C. J. Morley, Judge.

Action by Daniel M. Jones against Emma W. Jones, in which defendant filed a cross-complaint against plaintiff and Laura Lyle Jones and the Palsgrove Furniture Company. From judgment for plaintiff, defendant Jones brings error. Affirmed.

John M. Glover, of Denver, for plaintiff in error.

George A. Chase, of Denver, for defendants in error.

ALLEN, J. This is an action for divorce. The complaint charges desertion. The defendant filed a cross-complaint charging cruelty, adultery, and nonsupport. A trial to a jury resulted in verdicts for plaintiff on all of the issues. Thereafter, and at the proper time, judgment was entered for plaintiff. Defendant brings the cause here for review.

[1] The plaintiff in error contends that the decree is void, and should be reversed, because the findings of the court are silent as to the issues raised by the cross-complaint. The court in making its findings of fact, pursuant to the statute, alleges that it "adopts and approves the findings and verdict of the jury," and then expressly makes a finding upon the issue of desertion. The findings are sufficient to support the decree.

[2] Other contentions are, in effect, that the decree is void for failing to recite jurisdictional facts relating to the marriage and the residence of the parties. The jurisdictional facts are admitted in the pleadings, and the decree is not void for failing to recite them. 19 C. J. 160; 23 Cyc. 848.

[3] The record shows no motion to set aside the findings of fact, at any time, and

plaintiff in error is in no position to complain of any alleged defects in the findings. The decree is consistent with the findings as they are.

[4] A contention is also predicated on the assertion that the court's findings were filed after 48 hours had elapsed since the return of the verdict, which is true according to the printed abstract prepared by plaintiff in error, but it is not true according to the original record. The latter imports absolute verity.

[5, 6] The plaintiff in error complains of an instruction relating to the condonation of adultery. It is claimed that the instruction is wrong in assuming that a party may obtain a divorce even if it appear that he himself has been guilty of adultery, provided the adultery was condoned. Such assumption, however, would be correct. Condoned adultery is not a bar to a divorce, because it is not a ground for divorce. Section 6 of the Divorce Act of 1917 (chapter 85, S. L. 1917) provides that—

"If upon the trial * * * both parties shall be found guilty of any one or more of the causes for divorce, then a divorce shall not be granted to either of said parties."

In the instant case only one party was found guilty of any cause for divorce. The argument of plaintiff in error appears to be aided by a quotation from *Redington v. Redington*, 2 Colo. App. 8, 29 Pac. 811, but that case is no longer authority on the point herein mentioned, since it was decided under the divorce act appearing in the General Laws of 1877 (Gen. Laws 1877, §§ 917-924), which denied a divorce if it should appear that both parties have been guilty of adultery.

What is designated as a bill of exceptions in this case is not a bill of exceptions, and has not been settled and signed by any judge. There is no reversible error in the record.

The judgment is affirmed.

TELLER, J., sitting for SCOTT, C. J., and DENISON, J., concur.

(60 Utah, 208)

STATE v. CERAR.

(Supreme Court of Utah. May 31, 1922.)

1. Criminal law § 854(2)—Permitting jury to separate in capital case held discretionary and not error.

Under Comp. Laws 1917, § 9001, where there was no objection to the separation of the jury in a murder case, and no showing of prejudice, it was within the court's discretion, and not error, to permit them to separate.¹

¹ *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49.

2. Criminal law § 1187(3)—Charge in language of requested instruction ordinarily invited error.

A charge taken from an instruction requested by defendant would ordinarily, if erroneous, be regarded as invited error of which defendant could not complain.

3. Criminal law § 822(1)—Charge considered as whole.

A charge must be considered as a whole in determining whether error was committed in giving a particular excerpt therefrom.

4. Homicide § 294(2)—Charge on intoxication in general language held not error.

Where the evidence of intoxication at the time a murder was committed was meager and unsatisfactory, and the jury would have been justified in finding that it was not of that character affording any excuse, an instruction on intoxication, though couched in general terms, was sufficient.²

5. Homicide § 341—Failure to give more specific instruction on deliberation and premeditation not prejudicial.

Where an instruction on deliberation and premeditation on a trial for murder, though somewhat general in terms, was sufficient, the failure to give a more specific instruction was not prejudicial.³

6. Criminal law § 561(3)—Jury must consider all the evidence, and not that of good character alone.

While evidence of good character may alone be sufficient to create a reasonable doubt, the jury should not consider such evidence by itself, and from that alone determine guilt or innocence, but in determining such question, which necessarily includes the question of reasonable doubt, should consider all the evidence submitted.⁴

7. Criminal law § 776(5)—Instruction as to evidence of good character not erroneous.

An instruction that, if defendant's good character for peace and quietness was proved to the satisfaction of the jury, such fact should be kept in view and be considered in connection with all the other facts, and that, if after a consideration of all the evidence, including that bearing on good character, the jury entertained a reasonable doubt of defendant's guilt, it was their duty to acquit him, but that, if the evidence still convinced them beyond a reasonable doubt of defendant's guilt, it was their duty to find him guilty, was not erroneous.

8. Criminal law § 805(3)—Instruction that jury "can," instead of "must," convict of lesser degree in case of doubt, not erroneous.

An instruction that, if it appears that defendant has committed an offense, and there is a reasonable doubt of which of two or more

² Distinguishing *State v. Dewey*, 41 Utah, 533, 127 Pac. 275; *State v. Anselmo*, 46 Utah, 137, 143 Pac. 1071.

³ *State v. Anselmo*, 46 Utah, 137, 143 Pac. 1071; *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49.

⁴ *State v. Brown*, 39 Utah, 159-170, 115 Pac. 1002-1008; *State v. Harris* (Utah), 129 Pac. 145.

degrees he is guilty, the jury "can" convict him of the lowest of such degrees only, is not erroneous or misleading because of the use of the word "can" instead of "must," used in Comp. Laws 1917, § 8979.

9. Criminal law §829(1)—Refusal of instructions covered by charge given not prejudicial.

Where the substance of requested instructions was sufficiently covered by the court's charge, their refusal was not prejudicial error.

10. Witnesses §367(2) — Cross-examination as to contributions to expenses of defense properly permitted.

It was not error to require witnesses for defendant to answer questions of the district attorney as to whether they had contributed money to defray the expenses incident to defendant's trial for the purpose of showing their interest.

11. Witnesses §363(1)—Interest in case may always be shown.

The interest of a witness in any particular case in which he becomes a witness may always be shown.

12. Criminal law §742(3)—Effect of interest of witness is for jury.

The effect, if any, of the interest of a witness on the weight of his testimony is always a question for the jury.

13. Criminal law §448(10, 11)—Testimony as to defendant's mental condition and appearance properly admitted.

On a trial for murder, a witness testifying on behalf of the state was properly permitted to testify concerning defendant's mental condition and appearance on the morning of the homicide.

14. Criminal law §393(3)—Testimony as to sanity based on examination does not require defendant to give evidence against himself.

Defendant was not compelled to give evidence against himself in violation of his constitutional right by admitting testimony of a doctor concerning his mental condition based on an examination made by him after the homicide and before the trial.

15. Homicide §253(1)—Evidence held to support conviction for murder in first degree.

Evidence held to make a question for the jury as to defendant's guilt of murder in the first degree, and to support its verdict finding him guilty.

16. Homicide §329—Whether life imprisonment should have been recommended not reviewable.

Whether the jury should have recommended life imprisonment in finding one guilty of murder in the first degree is a question which the Supreme Court has no power to determine.

Appeal from District Court, Carbon County; F. H. Woods, Judge.

John Cerar was convicted of murder in the first degree, and he appeals. Affirmed.

O. K. Clay and O. C. Dalby, both of Price, for appellant.

Harvey H. Cluff, Atty. Gen., and W. Hal Farr, Asst. Atty. Gen., for the State.

FRICK, J. The defendant, hereinafter called appellant, was convicted in the district court of Carbon county, Utah, of the crime of murder in the first degree, was sentenced to be executed, and appeals from the judgment.

The evidence relating to the acts constituting the alleged murder is singularly free from conflict and is quite brief. The evidence, in substance, shows that appellant and one Masser, both Austrians, came to this country more than 30 years prior to the alleged murder. They first met in the state of New York, and from thence went to Cleveland, Ohio, and from thence came to Utah. At the time of the homicide, and for a number of years prior thereto, they were both employed in the coal mines of Carbon county. The evidence shows that during all of the years of their acquaintance they were friends, and at the time of the alleged murder, and for about 10 days prior to that time, they were boarding at the same house and slept with several others in the same room, but not in the same bed. On Sunday preceding the homicide the appellant and Masser attended a wedding of one of their countrymen at Sunnyside, Utah, where the mines in which they were employed are located. The evidence is also to the effect that the appellant in all probability drank intoxicating liquors during Sunday and Sunday night. It does not appear, however, how much he drank, nor whether he became intoxicated, and, if so, to what extent. The evidence is also quite unsatisfactory with respect to whether he or Masser slept any during Sunday night, but the inference therefrom is that they did not go to bed at all during that night. They were first seen together on Monday morning, March 7, 1921, the day of the homicide, in their boarding house by the woman with whom they were boarding (also an Austrian) at about 5 o'clock. They were then seated at or near the dining table in the dining room talking to each other. Some hours later, between 9 and 10 o'clock, they were seen a short distance from the boarding house by one Marshall, who had known both of them for several years. When Marshall saw them the appellant seemed to be angry and in bad humor, and they were talking in their own language in what appeared to Marshall to be a somewhat angry mood. They remained outside of the house only a brief space of time, when both of them, Masser leading, went back into the boarding house. Just what occurred during the next few minutes is left to inference merely. The evidence of their landlady, however, is that

Masser wanted to go out again, but that the appellant said that they better go to bed. They accordingly retired to their bedroom. In a very brief space of time thereafter the landlady says she heard some noise and heard the appellant say, "I guess you got enough; they can do with me what they please," and that immediately thereafter he opened the door, which was closed, and left the house. Immediately after appellant had made the foregoing statement and had left the house the landlady went into the bedroom and found Masser's trunk open and found him lying face downward on the open tray of his trunk, while appellant's trunk was also open, and a bloody axe was lying near the door on the floor. Masser was apparently unconscious, and the landlady, in attempting to lift him from the trunk, saw the blood streaming from his wounds and became excited and scared, and let him fall on his back on the floor of the bedroom and near the trunk. In entering the bedroom she had stepped on the axe, and, to prevent her small children from seeing or handling it she took it up at once and placed it under some furniture. She immediately called the witness Marshall aforesaid, who was only a short distance from the house, and he immediately came to the house and found Masser lying in the bedroom in the condition just stated. It was testified to that Masser had two wounds, one near the base of the brain about three or four inches in length and several inches deep and the other on top of his head practically of the same character. The doctor's testimony was to the effect that the wounds were fatal. Indeed, Masser never recovered consciousness after he was found in the condition before stated. The appellant, on leaving the boarding house, went directly to the office of the coal company, his employer, which was a half mile distant from the boarding house, and there in an excited manner stated to the chief clerk and to the deputy sheriff that he had just struck his best friend Leo with an axe. Appellant was taken into custody by the deputy sheriff, and later in the day was by the sheriff, with whom he was quite well acquainted, taken to the county seat of Carbon county. He voluntarily told the sheriff what he had done, and, pointing to his breast, he said, "Something in here told me to do it." He also said that he and Masser had been gambling, and that he had lost all of his money by gambling with Masser, and that Masser did not want to play with him any further on the morning of and preceding the homicide. It appears in evidence that Masser had told him that the reason he did not want to play further was because the latter became angry when he lost, and Masser would rather not play with him. It also was made to appear that a short time before the homicide the appellant had received about \$200 as pay-

ment for some household goods he had sold; that Masser had won all of that money; that appellant had borrowed a considerable sum of money from two friends which Masser had also won; and that during the preceding year Masser had won about \$1,000 of appellant's money. It also appeared that at the office of the coal company appellant told the chief clerk to pay the amounts he had borrowed to the two persons from whom he had obtained the money borrowed. While on their way to the county seat a snowstorm overtook the sheriff and appellant, and the latter told the sheriff that snowstorms would not bother him any more thereafter, since "they" would "take care of me." The appellant at the trial testified in his own behalf, but, according to his statements, he did not have a distinct recollection of what had occurred on the morning of the homicide or how it occurred. Many other facts and circumstances he also seemed to have forgotten. There is also considerable evidence respecting appellant's conduct during the years preceding the homicide, his habits and those of his father and mother, that one of his brothers was in an insane asylum, and respecting appellant's mental condition. It is not necessary to now state that evidence in detail nor that with respect to his general reputation for peaceableness, etc. That evidence, so far as deemed material, will be referred to in the course of the opinion in connection with the errors discussed.

Many errors are assigned by counsel for appellant. In considering them it is more convenient for us not to follow the order in which the errors are assigned, and we shall therefore not do so.

[1] It is insisted that, in view that appellant was charged with and tried for a capital offense, the "district court abused its discretion in allowing the jury to separate" during the trial. Comp. Laws Utah 1917, § 9001, so far as material here, provides:

"The jurors sworn to try a criminal action may, at any time before the submission of the case to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer."

We have carefully examined the record and have found nothing from which it could be surmised, much less asserted, that the court's action in permitting the jury to separate was not thoroughly satisfactory to both the appellant and his counsel. Moreover, nothing is shown from which any one could infer that the appellant was in any way or to any extent prejudiced by the court's action in permitting the jury to separate. Had the appellant or his counsel objected to the separation of the jury, or if a request had been made to place the jury in charge of an officer and some misconduct on their part were made to appear, then the question of abuse of discretion might have arisen. Under the

circumstances, however, as was held in *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49, the matter of permitting the jury to separate during the trial and before the submission of the case was within the discretion of the court.

The district court therefore committed no error in permitting the jury to separate during the trial.

[2, 3] Appellant's counsel also urges that the court erred in charging the jury upon appellant's plea of insanity. The particular language excepted to is as follows:

"All that he [appellant] is required to do is to produce sufficient evidence of want of sanity, which evidence, when considered with all the other evidence in the case, will create a reasonable doubt in the mind of the jury. * * *

The excerpt quoted is taken from appellant's request No. 1. The district court therefore merely adopted counsel's own language. That being so, the alleged error, if it were conceded to be such, would ordinarily come within the doctrine of "invited error," and the party offering the request would not be permitted to complain of the error. If, however, in view that this is a capital case, we should disregard the general rule, yet, when the charge is considered as a whole, as it must be, no error was committed.

[4] It is further contended that the court's instruction on intoxication was erroneous in that it was not sufficiently specific in certain particulars, and further, that it did not conform to what is said upon that subject by this court in *State v. Dewey*, 41 Utah, 538, 127 Pac. 275, and *State v. Anselmo*, 46 Utah, 137, 148 Pac. 1071. In *State v. Dewey*, supra, the court's charge on the effect of intoxication in a criminal case was held to be narrower than the statute, and for that reason was held erroneous. True, it was there also held that the charge on the effect of intoxication in capital cases should be explicit and in such language as to aid the jury in arriving at a correct conclusion upon the elements of premeditation and deliberation, which are always present in such cases. To the same effect is the case of *State v. Anselmo*, supra. A mere cursory reading of those cases, however, will disclose that they are exceptional and peculiar with respect to the facts and circumstances there involved. In the *Dewey* Case the intoxication of the accused was of such an extreme and protracted nature that it had developed into delirium tremens, while in the *Anselmo* Case the evidence was to the effect that the accused from childhood had been afflicted with epilepsy, and that his relatives and ancestors had been so afflicted, and that the use of intoxicating liquors had an unusual and extraordinary effect upon his mind. These cases are therefore clearly distinguishable from ordinary cases of intoxication. While we adhere to the rule laid down in the two cases just referred

to, yet, where the evidence of intoxication is of that meager and unsatisfactory character, which it is in this case, and where the jury would have been justified in finding that the intoxication of appellant, if under the influence of liquor at the time the alleged offense was committed was nevertheless, not of that character which would afford any excuse whatever, the case is quite different. We are of the opinion, therefore, that although the instruction upon the question of intoxication was couched in general terms merely, it was nevertheless, sufficient in view of all the facts and circumstances in this case, and that the jury were not misled. To reverse the judgment in this case upon the ground that the charge upon intoxication constituted prejudicial error would require us to assume prejudice where, in view of the whole record, none is made apparent. Indeed, it would be, in one view, a travesty of justice.

It is further insisted that the court erred in its charge on second degree murder. The court followed the statutory as well as the usual and generally adopted definition of second degree murder and we can discover no error in the charge upon that subject.

[5] It is also contended that the court erred in its charge to the jury in which premeditation and deliberation, and especially premeditation, are defined. Here again counsel refers to and relies on what is said in *State v. Anselmo*, supra. While no doubt it would have been better if the district court had strictly followed the suggestions in the *Anselmo* Case, yet the mere fact that it did not does not necessarily constitute prejudicial error in every case. While the definition of premeditation which is excepted to is somewhat general in its terms, yet, in substance and effect, it is one that has often been used by the trial courts in murder cases. A definition of premeditation less specific than the one in question here was held sufficient in *People v. Callaghan*, 4 Utah, 49, 6 Pac. 49. Similar definitions are found in 2 *Brickwood's Sackett, Instructions*, §§ 3080, 3081. Here again, while we adhere to what was said in the *Anselmo* Case upon this subject, and are still of the opinion that it were better if the trial courts, in charging juries upon deliberation and premeditation, followed the suggestions in that case, yet the instruction in the case at bar, although somewhat general in terms, nevertheless was sufficient and has frequently been held so by many of the courts of last resort. We are clearly of the opinion that, in view of the facts and circumstances of this case, appellant was not prejudiced in any substantial right.

[6, 7] It is also asserted that the court erred in its charge upon the question of good character. It is contended that the instruction is contrary to the rule laid down upon that subject in the case of *State v. Brown*,

39 Utah, 159-176, 115 Pac. 1002-1008, Ann. Cas. 1913E, 1, and in State v. Harris (Utah) 199 Pac. 145. The instruction excepted to reads as follows:

"The defendant introduced evidence tending to show his good character for peace and quietness. If in the present case the good character of the defendant for peace and quietness is proven to your satisfaction, then such fact should be kept in view by you in all your deliberations, and it is to be considered by you in connection with all the other facts in the case, and if after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him, but, if the evidence still convinces you beyond a reasonable doubt of the defendant's guilt, then it is your duty to find him guilty."

It is insisted that that part of the instruction which we have italicized is clearly erroneous in that it practically destroyed the legal effect of the evidence of appellant's good character. In other words, counsel contends that the court in the instruction in effect told the jury that, if the evidence convinced them beyond a reasonable doubt of appellant's guilt, then they should disregard the effect of good character. It is insisted that the law in this jurisdiction is that, if the evidence of good character, standing alone, creates a reasonable doubt in the minds of the jurors, the accused is entitled to an acquittal at their hands, and that such is the effect of the decision in State v. Brown, supra. It is quite true, as stated in the Brown Case, that under certain circumstances evidence of good character may alone be sufficient to create a reasonable doubt in the minds of the jurors so as to entitle the accused to a verdict of acquittal at their hands. That does not mean, however, that in arriving at the question of the guilt of the accused the jurors should consider only the evidence of good character, and from that alone determine his guilt or innocence. If such were the law, then one might commit the most atrocious murder, and, when put on trial for the offense, might establish his previous good character and ask that all the incriminating evidence should be disregarded, and his guilt or innocence determined alone from the evidence submitted upon the question of his good character. In determining the question of the guilt or innocence of the accused, which necessarily includes the question of reasonable doubt, the jurors must consider all the evidence submitted to them and base their verdict upon all of the evidence. Such clearly is the effect of the Brown Case. See 39 Utah, 160, where the writer states the rule which is repeated by Mr. Justice McCarty at page 176. It follows, therefore, that the district court did not depart from the rule stated in the majority opinion in the Brown Case, and hence committed no error in this regard.

It is next argued that the district court erred in instructing the jury upon the question respecting their right to recommend imprisonment for life in their verdict. There is no merit in this contention, and it is not necessary to pursue it.

[8] It is also insisted that the court erred in instructing the jury with respect to their duty to find the appellant guilty of a lower degree in case they entertained a reasonable doubt respecting his guilt of a higher degree. Comp. Laws Utah 1917, § 8979, provides:

"When it shall appear that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he must be convicted of the lowest of such degrees only."

Upon that question the court charged the jury:

"If it should appear to you from the evidence beyond a reasonable doubt that the defendant has committed an offense included in the charge as explained in these instructions, and there is in your minds a reasonable doubt of which of two or more degrees he is guilty, you can convict him of the lowest of such degrees only; and in case of a conviction of murder in the first degree the jury has a right to recommend to the court that he be punished by life imprisonment, if they so desire." (Italics ours.)

The last clause of the foregoing instruction has already been considered as a part of another instruction.

It is somewhat vigorously contended that the court erred in using the word "can" instead of the term "must," which latter term is used in the statute. A mere cursory reading of the instruction excepted to will disclose that, if the district court had used the term "must," counsel in all probability would be here complaining that the court had in effect directed the jury to find the appellant guilty of some degree, and in such event there would at least be some reason for the contention. By using the term "must" in the instruction referred to a very awkward expression would have resulted which might have been construed to mean that the jury was required to find appellant guilty of some lower degree. The instruction as it stands, in our judgment, clearly reflects the true intent and purpose of the statute, and any juror with sufficient intelligence to sit in any case could not have been misled by what the court said.

[9] The refusal of appellant's requests to charge is also assigned as error. Counsel offered seven separate requests, and it is insisted that the court erred in refusing six of them. We have carefully examined all of the requests, and, while the court might well have given the request on good character, yet, as hereinbefore pointed out, that subject was sufficiently covered by the court's charge. Upon the other hand, at least two of the requests did not state the law correctly, while all of the others contained some expressions

which were faulty. Moreover, the substance of the requests was sufficiently covered by the court's charge. After carefully considering all that was contained in the requests, and after comparing them with the court's charge, we are convinced that no prejudicial error resulted from the court's refusal to charge in the language of the requests. This assignment must therefore also fail.

[10-12] It is also argued that the court erred in requiring two of appellant's witnesses to answer the questions of the district attorney as to whether they had not contributed some money to defray the expenses incident to the trial in this case. Both witnesses answered the questions in the affirmative, and counsel excepted. The court committed no error in that regard. The interest of a witness in any particular case in which he becomes a witness may always be shown, and the effect, if any, of such interest upon the weight of the testimony, is always a question for the jury.

[13] It is further contended that the court erred in permitting the witness Marshall, who testified on behalf of the state, to answer certain questions concerning appellant's mental condition and appearance on the morning of the homicide. There is no merit in this contention.

[14] It is next insisted that the district court erred in admitting in evidence the statements of Dr. Hyde, who testified on behalf of the state as an expert alienist, with respect to what he had learned from making an examination of appellant some months after the homicide and about six weeks before the trial. The statements of the doctor respecting appellant's mental condition were full, fair, and explicit in every particular. We hardly grasp the force of counsel's contention that in permitting the doctor to testify concerning appellant's mental condition, both past and present, some constitutional right was invaded because in stating the result of the doctor's examination appellant was compelled to give evidence against himself. It certainly would be strange doctrine to permit one charged with a public offense to put in issue his want of mental capacity to commit the offense, and in order to make his plea of want of capacity invulnerable prevent all inquiry into his mental state or condition. The doctor frankly stated that in determining appellant's mental state at the time he is alleged to have committed the offense the doctor took into consideration only the facts stated in the hypothetical question. He, however, also said that appellant's physical and mental condition at the time the doctor made the examination were important and necessary factors in determining whether appellant at the time of the alleged offense was committed was in truth and in fact afflicted with the peculiar mental infirmity

claimed by his counsel and which had been testified to by the doctor who testified as a witness on behalf of the defendant. No one disputed the statements of the state's witness, the doctor aforesaid. We are clearly of the opinion that the court committed no error in admitting the doctor's statements in evidence.

[15, 16] Finally, it is contended that the evidence is insufficient to justify a finding of murder in the first degree. That question, while always within the exclusive province of the jury, in view of all the facts and circumstances, was peculiarly so in this case. From all that occurred between the appellant and the deceased as disclosed by the uncontradicted evidence, when viewed in the light of the surrounding circumstances, the jury were amply justified in finding the appellant guilty of first-degree murder. True, the writer would have been better satisfied if the jury had recommended life imprisonment in their verdict and that such would have been the court's sentence; yet that is not a question that this court has the power to determine. A careful review of the whole record convinces that the appellant had a full, fair, and impartial trial, that he was very ably defended, and that there is nothing in the record which authorizes us to interfere with the verdict or judgment.

The judgment therefore should be, and it accordingly is, affirmed.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(104 Or. 334)

STATE v. TURNER.

(Supreme Court of Oregon. June 20, 1922.)

Indictment and information \S 16—Criminal charge after dismissal following returned indictment indorsed, "Not a true bill," cannot be reconsidered without consent of court.

Under express provisions of Or. L. \S 1432, 1433, after a criminal charge has been dismissed following the return of an indictment indorsed, "Not a true bill," its revival or subsequent investigation is in the exclusive control of the court, and consent of the court is a condition precedent to the authority of the same or subsequent grand jury to inquire of the charge.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

R. R. Turner was convicted of assault with intent to kill, and he appeals. Reversed and remanded, with directions.

J. A. Burleigh, of Enterprise, for appellant.
A. W. Schaupp, of Joseph (W. S. Burleigh, Dist. Atty., of Enterprise, on the brief), for the State.

MCCOURT, J. The defendant was charged by an indictment with the crime of assault with intent to kill, committed in Wallowa county on the 22d day of September, 1920, by pointing a loaded pistol towards and shooting at one Crawford Hunter. A trial was had, resulting in a verdict and judgment of conviction. Defendant appeals.

The criminal charge in the indictment upon which defendant was tried was made the basis of an information filed with the justice of the peace for Enterprise district, Wallowa county, Or., shortly after September 22, 1920; defendant was held to answer upon the charge in the information. Thereafter the grand jury for the county of Wallowa, then in session at the regular November term of the circuit court for that county, investigated and inquired of the criminal charge against the defendant, and on the 9th day of November, 1920, returned to the circuit court an indictment indorsed, "Not a true bill," which was by order of the court duly placed on file by the clerk of said court, and the court thereupon made an order exonerating the bond of the defendant, and discharged him from custody; the grand jury at the May term of the circuit court of the state of Oregon for Wallowa county, without any order of the court resubmitting the above-mentioned criminal charge to them, investigated and inquired of said charge, and on May 13, 1921, found and returned to the circuit court the indictment indorsed, "A true bill," upon which defendant was tried, and containing the criminal charge against the defendant, upon which as above stated, an indictment indorsed, "Not a true bill," was returned by the grand jury at the previous term of that court held in November, 1920.

The defendant seasonably interposed a motion to quash the indictment, upon the grounds that the court had not made any order resubmitting the criminal charge against the defendant to the grand jury, or authorizing them to inquire of said criminal charge, and that without such an order the grand jury was without authority to inquire of the same. The court overruled defendant's motion, which action of the court presents the only question upon this appeal.

The decision of that question is controlled by statute in this state.

"When a person has been held to answer a criminal charge, and the indictment in relation thereto is not found 'A true bill,' as provided in section 1428, it must be indorsed 'Not a true bill,' which indorsement must be signed by the foreman, and presented to the court and filed with the clerk, and remain a public record." Or. L. § 1432.

"When an indictment, indorsed 'Not a true bill,' has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury, unless the court so order." Or. L. § 1433.

The rule at common law, and the one that prevails in most of the states, is that, when a person is held to answer upon a criminal charge, the return by the grand jury of an indictment upon such charge, indorsed, "Not a true bill," does not deprive the same or a subsequent grand jury of authority or power to inquire of and return a true bill of indictment upon the same criminal charge. 22 Cyc. 208; 2 Wharton's Criminal Procedure (10th Ed.) § 1376; Joyce on Indictments, § 120; 1 Bishop's New Criminal Procedure (4th Ed.) § 870; United States v. Martin (D. C.) 50 Fed. 918. But in those jurisdictions the prosecuting attorney cannot, if "Not a true bill" of indictment has been returned, submit to the grand jury another indictment for the same offense, without leave of the court, which leave is granted sparingly, and only upon an adequate showing that the bill was ignored in consequence of oversight, mistake, or fraud, or that grave emergency or urgent public need require that the charge be recommitted to the grand jury. 22 Cyc. 208; Commonwealth v. Allen, 14 Pa. C. C. Rep. 546; Commonwealth v. Priestly, 10 Pa. Dist. Rep. 217; Commonwealth v. Andruchek, 26 Pa. Dist. Rep. 923; Commonwealth v. Snyder, 13 Pa. Dist. Rep. 27; People v. Neidhart, 35 Misc. Rep. 191, 71 N. Y. Supp. 591.

"If a man be committed for a crime, and a bill preferred against him is ignored by the grand jury, he is still liable to be indicted for the same offense on new evidence, or even on the same evidence, though the sending up a second bill after an ignoramus, is an extreme act of prerogative, subject to the revision of the court." 2 Wharton's Criminal Procedure (10th Ed.) § 1376.

In another section the same author states:

"In England, if the grand jury at the assizes or sessions has ignored a bill, they cannot find another bill against the same person for the same offense at the same assizes; and if such other bill is sent them, it has been said that they should take no notice of it. But the better view is that a bill may be sent up if the emergency require, after an ignoramus, at the discretion of the court." Section 1301.

The substance of the rule above stated has been adopted by statute in New York, Iowa, Kentucky, Arkansas, Nevada, and perhaps other states. In a case in New York arising under such a statute the court said:

"While the court has power to permit the charges to be again submitted to the grand jury, * * * such power should be sparingly and discriminatingly used. It is a practice that ought not to be encouraged, nor granted pro forma. The court should act judicially, and permit such resubmission only when facts are presented which justify such action." People v. Neidhart, 35 Misc. Rep. 191, 71 N. Y. Supp. 591.

In Iowa the statutory provision is as follows:

"Such dismissal of the charge does not prevent the same from being again submitted to a grand jury as often as the court may direct; but without such direction, it cannot again be submitted." Section 4290, Laws of Iowa.

The Supreme Court of that state, discussing that statute, said:

"But the power of the grand jury in the premises is not dependent upon the order or direction of the court; its powers and duties are prescribed by other provisions of statute."

* * * The general nature of the powers and duties imposed upon the grand jury by these provisions is in no manner qualified or limited by section 4290." *State v. Collis*, 73 Iowa, 542, 35 N. W. 625.

Originally the common-law rule which denied the right to resubmit to the grand jury, without leave of the court, a criminal charge which had been ignored by the grand jury, apparently extended that restriction only to the grand jury that ignored the bill and recognized the right of a subsequent grand jury to inquire of the same criminal charge without the formality of an order of court. 4 Bl. Com. 305; *State v. Brown*, 81 N. C. 568; 2 Wharton's Criminal Procedure (10th Ed.) § 1301.

The rule in question and the statutes declaratory thereof in other states do not in express terms purport to deprive the grand jury of authority to inquire of a charge upon which "Not a true bill" of indictment has been found and the defendant dismissed. But the restrictions of the rule are directed against the prosecuting attorney, whose duty it is to submit matters to the grand jury, and clothe the court with authority to quash an indictment returned in violation of the rule.

Neither the common-law rule nor any of the statutes mentioned are as broad as the Oregon statute. In that enactment, not only is resubmission of the charge to the grand jury prohibited without an order of the court, but the authority of the grand jury to inquire of such a criminal charge is denied in the absence of an order by the court resubmitting the charge and authorizing the grand jury to inquire of the same. In that feature our statute differs from the common-law rule and from the statutes of other states, to which our attention has been directed, and takes from the grand jury the power which it otherwise has to exercise its authority in respect to the charge. The effect of the provision last mentioned is to deprive the grand jury of all authority and power to inquire of and return an indictment upon a criminal charge upon which an indictment indorsed, "Not a true bill," has been returned, unless authorized so to do by an order of the court.

The attorney for the state contends, however, that the restrictions created by the statute apply only to the grand jury which returned the indictment indorsed, "Not a true bill," and that the succeeding grand jury was free to act in respect to the charge as though the statute had not been passed.

The evident design of the provision was to make effectual the direction of the statute that, "when an indictment indorsed, 'Not a true bill,' has been presented in court and filed, the effect thereof is to dismiss the charge," and to prevent the revival of the charge and its subsequent investigation by a grand jury, unless authorized by an order of the court made upon a showing that adequate reason exists, requiring that the charge be reconsidered in the interest of justice. That design and purpose would not be accomplished if the express restriction of the statute applied only to the grand jury which returned an indictment indorsed, "Not a true bill," and subsequent grand juries were at liberty to examine the same charge.

After a criminal charge has been dismissed following the return of an indictment indorsed, "Not a true bill," the statute places its revival or subsequent investigation in the exclusive control of the court, and the consent of the court is a condition precedent to the authority of the same or a subsequent grand jury to inquire of the charge.

The motion to quash should have been allowed; and it follows that the judgment of the circuit court is reversed, and the cause remanded, with directions to grant the motion and discharge the defendant.

(104 Or. 472)

BEEM v. BEEM.*

(Supreme Court of Oregon. June 27, 1922.)

Divorce \Leftrightarrow 29—To wife warranted for personal abuse and indignities.

Personal abuse and indignities imposed on the wife by the husband held to entitle her to a divorce on the ground of cruel and inhuman treatment.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit for divorce by Edythe Beem against Jonathan Beem. From a decree dismissing the suit, plaintiff appeals. Remanded, with directions to enter a decree granting divorce, and to fix amount to be paid for support of child.

This is a suit for divorce brought by Edythe Beem against Jonathan Beem, her husband. The complaint charges that the defendant was guilty of cruel and inhuman treatment,

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 207 Pac. 1094.

and that he subjected the plaintiff to personal indignities rendering her life burdensome. The defendant answered by denying the charges made against him, and by alleging that—

"Whatever acts, if any, done by the defendant to plaintiff, were caused and provoked by the conduct of the plaintiff, and plaintiff is not without fault as alleged in the complaint."

The defendant did not ask for any affirmative relief, but contented himself by merely praying for a dismissal of the suit. A girl child is the fruit of the marriage. The trial occurred on April 27, 1921, and it terminated in a decree of dismissal. The plaintiff appealed.

L. Denham, of Elgin, for appellant.

R. J. Green, of La Grande, for respondent.

HARRIS, J. (after stating the facts as above). It is our conclusion that the plaintiff is entitled to a divorce. The parties were married on August 31, 1918, at Elgin, Or., where they had previously resided. At the time of the marriage she was about 18 and he was about 20 years of age; both come from excellent families, and, as we understand the record, neither party challenges the reputation or standing of the other. Indeed, at the time of the trial the plaintiff was an officer in a lodge, thus indicating that at that time she had the confidence and esteem of those who knew her best. The defendant testified that the marriage occurred two weeks after the engagement. The defendant says that he knew that the plaintiff was at that time engaged to a young man, whom we shall designate as A., who was then in France with the American army. The plaintiff denies that she was engaged to A., although she admits that she had been corresponding with him since he had entered the service. The defendant admitted that he was of a jealous disposition.

On September 4, four days after the marriage, the plaintiff received a letter from A. The evidence does not show when this letter was written, but it is probable that it was written before the plaintiff and defendant were engaged. The plaintiff says that when she received the letter the defendant applied to her a profane epithet because she had received the letter, and at the same time made a dire threat against A. The defendant gives a somewhat different version of this incident, but, in view of his confession of jealousy, and his admission that he knew that A. had been a fiancé of the plaintiff, we are inclined to think that when his wife received the letter he spoke more forcibly and inelegantly than he is now willing to admit. At any rate this incident throws light upon subsequent occurrences.

From time to time the plaintiff and the defendant attended lodges and dances. The plaintiff says that frequently, after they re-

turned home from lodge meetings or dances, he upbraided her for having been too familiar with other men, when she had done nothing except to talk with some men in the lodge room or to dance with some man at the dance. These happenings, standing alone, do not seem to us to possess the importance which the plaintiff attaches to them; and yet they tend to explain the general conduct of the defendant.

The plaintiff charges that the defendant stayed out late at nights, frequented pool halls, and thus neglected her and their child. Although the defendant has asseverated thus: "Every man should have a little rights, and I don't think he ought to be set plumb down on"—still he claimed that he did not loaf around the pool halls a great deal. It is our view that the evidence does not support this accusation of neglect.

The plaintiff also avers that the defendant failed to support her and the child. If we read the record aright, the defendant supplied his wife and child with sufficient food and proper clothing, although it is true that the grandmother, just as most grandmothers do, did provide some clothing for the child. In truth, the evidence indicates that, all things considered, the defendant provided well in respect of food and clothing. After A. was discharged from the army he returned to Elgin and was married. The date of his marriage is not given in the record. The plaintiff on different occasions met A. on the streets of Elgin, in view of the public, and talked with him. Apparently all those meetings were casual, and not prearranged; but whenever the defendant heard of them he complained to his wife about them.

If the foregoing narrative included the entire story of the married life of the parties, and if there were no additional facts, we should without hesitation say that the plaintiff is not entitled to a divorce. But there are additional facts, important facts, to be considered.

The plaintiff and the defendant lived in a house in Elgin, and the plaintiff's mother, Mrs. Dora Hill, lived in or near Elgin. According to the testimony of the plaintiff, the defendant told her "to stay away from" her mother, and "he said he didn't want me to be around her, and to keep away from her." Mrs. Dora Hill says that about a month prior to the separation she told the defendant that she had not made a certain statement which he, in a conversation with the plaintiff, had attributed to his mother-in-law. Evidently the explanation attempted to be made by Mrs. Hill did not satisfy the defendant, for, according to the testimony of Mrs. Hill, "he told me to never step my foot in his house again." This incident serves to explain the temper subsequently betrayed by the defendant. On March 19, 1920, the defendant returned to Elgin from a logging camp where

he had been at work, and upon his return he learned that his wife and child were staying at the home of his mother-in-law. At that time the plaintiff was very much reduced in weight; she then weighed 108 pounds, although her normal weight was about 130 pounds. Dr. Kirby, the attending physician, testified that she was in "a run down condition," and that "I just gave her something for her nervous condition; she was all to pieces and up in the air." The baby was also sick. Dr. Kirby explained that "the child at first had tonsillitis, with a temperature of 101 or 102—a sore throat, * * * and then later it developed into bronchial pneumonia; a pretty sick little child for a few days." The doctor also stated that "the mother was nervous and sick, and she wasn't able to take care of the baby; at least she did none of it; her mother took care of the baby;" and, furthermore, Dr. Kirby told the plaintiff's mother to take care of the baby. According to the testimony of the plaintiff, the defendant "came down, and wanted me to leave mamma right then, and I had orders to stay there with her. Dr. Kirby had ordered me not to move her (the baby). * * * She had bronchial pneumonia and tonsillitis; she was very sick." In other words, the plaintiff went to her mother's home with her child; the plaintiff was not well, and her child was very sick, and because of the condition of the child the plaintiff explained to the defendant that she could not take her child and leave her mother's home; and all this put him in an ill humor.

The climax came on April 4, 1920. On that day the defendant appeared at the Hill home in company with his brother, Lloyd Beem. The plaintiff testified that the defendant came to the Hill home and told her that he had sold to his brother the furniture, cow, pigs, and chickens; that he had "turned the house over to" his brother; that he told her "to keep out" of the house which had been his and her home; "that he was through with me, and he would never live with me again;" that he cursed her; that he told her mother that the latter ought to kick her out; that while she was crying her mother remonstrated with the defendant because of the abuse he was heaping upon the plaintiff, and thereupon the defendant informed her mother that "he would smash her if she was a man." Mrs. W. O. Hill, a sister of the plaintiff's mother, had been "invited down there for dinner," and she arrived upon the scene when the storm was at its height, and she says that when she "got up to the house" the plaintiff was crying and the defendant "was using awful language." Mrs. W. C. Hill fully corroborated the story told by the plaintiff. Mrs. Dora Hill likewise completely corroborated the plaintiff. Mrs. Dora Hill says that when the defendant stated that he

had "turned everything over to" his brother, the plaintiff protested that some of the things belonged to her, and thereupon Mrs. Dora Hill "spoke up and told him that the bedding—the feather bed and everything else in the bed line—was hers; that I had give it to her;" that the defendant then made a remark about the feather bed. Without repeating the remark, it is enough to say that "she slammed the door" in his face, just as any self-respecting woman would have done; but notwithstanding this the defendant forced his way into the house, and, in the language of one witness, the plaintiff "was on the davenport crying, and he stood there bemeaning her about everything."

It is true that the defendant did not admit that he was guilty of this inexcusable conduct, although he was willing to concede: "I may have said some little thing, that didn't amount to nothing when I was mad." It is also true that Lloyd Beem declared that the bill of sale was not exhibited upon that occasion; but it is a significant fact that Lloyd Beem admitted that the bill of sale "had been made out about that time," and that, in his language, "I think I did" have the bill of sale at that time. And it is likewise significant that this witness admitted that there was some discussion about the furniture. Viewed in the light of all the circumstances, and of what naturally could be expected of one whose mental attitude was like that of the defendant it seems to us that the weak denials of the defendant in respect of the occurrences of April 4 are simply overwhelmed by the testimony of the plaintiff, Mrs. Dora Hill, and Mrs. W. O. Hill. During the interval between March 19 and April 4 the defendant called at different times to see the baby, and upon every occasion, according to the testimony of Mrs. Dora Hill, his visit ended in a row with plaintiff, and with the defendant doing the rowing "principally." The plaintiff said, when a witness: "I have stood it just as long as I can." The record narrates numerous facts besides those to which attention has been directed; but it will not be necessary to detail any additional circumstances.

Since April 4, 1920, the parties have been separated. The plaintiff with her baby has lived with her mother, and the defendant has made no pretense of furnishing food or clothing for his wife or child. If the plaintiff is entitled to a divorce, it is because of what happened on or before April 4, 1920; and we think that the facts warrant the court in granting a decree of divorce as prayed for by the plaintiff. However, we are not persuaded that it would be just to require the defendant to pay alimony, but we do conclude that the plaintiff is entitled to the custody of the child, and that the defendant ought to be required to contribute to the maintenance of the child. The record does not

contain sufficient information to enable us to determine with any degree of satisfaction what would be a proper amount to be contributed by the defendant for the maintenance of the child; and therefore the cause will be remanded to the circuit court, with directions to enter a decree divorcing the parties and granting to the plaintiff the custody of the child, reserving, of course, to the defendant the right to visit the child, and, after hearing any evidence that the parties may wish to offer, to fix as the amount to be contributed by the defendant towards the maintenance of the child such sum or sums as may appear to be just.

(120 Wash. 372)

HAYES v. CITY OF SEATTLE et al.
(No. 17004.)

(Supreme Court of Washington. June 8, 1922.)

1. Municipal corporations \S 955(1) — Bondholder may require city to perform terms of its bond.

Any bondholder may require a city to live up to the terms of its bond.

2. Municipal corporations \S 921(3) — City not permitted to substantially change specific plan extending municipal street car system after sale of bonds.

Under ordinance pursuant to Rem. Code 1915, $\S\S$ 8005-8008, adopting a system for the betterment and extension of its street car system, and providing that city could modify the details of the plan where not substantially changing the purposes specified, the city could not, after issuance and sale of bonds, abandon the extension of improvements as provided in original plan, and extend it on different street in another direction.

3. Municipal corporations \S 63(1) — Power to change street car improvement plan after issue of bonds reviewable.

In passing on the question of whether a municipality has power under ordinance to substantially change a specific plan for extension of its street car system, appellate court does not undertake to review a discretionary power which the city has a right to exercise, but passes upon the power of city.

4. Municipal corporations \S 955(1) — Bondholder must show injury to maintain action against city for change in improvement system.

A bondholder cannot maintain an action against city for a substantial change in proposed improvement in its street car system without showing that he will be injured by the change.

Department 1.

Appeal from Superior Court, King County; Walter M. French, Judge.

Action by G. E. Hayes against the City of Seattle and others. From the judgment, de-

fendants appeal, and plaintiff files cross-appeal. Affirmed.

Walter F. Meier, Edwin C. Ewing, and Charles T. Donworth, all of Seattle, for appellants.

J. L. Corrigan, of Seattle, for respondent.

BRIDGES, J. In 1919 the city of Seattle, being desirous of making betterments and extensions to its municipal street car system, passed Ordinance No. 39492, pursuant to sections 8005-8008, Rem. Code. Section 3 of that ordinance adopted a certain plan or system for such betterments and extensions. The system so adopted contemplated some 24 extensions and betterments. Among the other extensions was one to construct a single track "on East Fifty-Fifth street, between Twenty-Ninth Avenue Northeast and Thirty-Fifth Avenue Northeast, together with a wye near the intersection of East Fifty-Fifth street and Thirty-Fifth Avenue Northeast." The ordinance further provided that bonds in the sum of \$790,000 should be issued and sold for the purpose of making such contemplated improvements, and that all moneys received from the sale of such bonds should be placed in a designated fund, and that all bonds should be paid only from that fund, and that the bonds did not create any general indebtedness against the city. After many of the bonds had been sold and some of the contemplated work done, the city decided not to extend its line east on Fifty-Fifth street, as provided in the original plan, but instead to extend it north on Thirtieth Avenue Northeast. The plaintiff instituted this action to enjoin the construction of the extension on Thirtieth Avenue Northeast, and to require the construction on East Fifty-Fifth street, as designated by the original ordinance. The trial court enjoined the city from making the extension on Thirtieth Avenue Northeast, but refused to command the city to build such extension on East Fifty-Fifth. Both parties have appealed.

[1] The plaintiff sought to maintain his action as a taxpayer, property owner, and bondholder. It is not necessary for us to determine whether he can maintain the action as an owner of property or as a taxpayer, because we are of the opinion that he can maintain it as the holder of one or more of the bonds issued by the city under the original ordinance. It is true the plaintiff bought his bond only a few days before he instituted this action, and after the city had passed its ordinance undertaking to change this extension of the street railway from East Fifty-Fifth street to Thirtieth Avenue Northeast; but these facts cannot alter the situation. The time of purchasing the bond has nothing to do with the right to maintain

the action. The bonds themselves expressly provide that—

The city "covenants with the holder of this bond that it will keep and perform all of the covenants and promises in said ordinances contained, to be by it kept and performed."

Any bondholder has the right to maintain an action to require the city to live up to the terms of his bond. If one bondholder cannot do this, then the holders of all the bonds could not do it, and thus the city might, with impunity, violate the covenants of its bonds.

[2] The more difficult question is: Can the city at this time make the change proposed by it—can it extend north on Thirtieth Avenue Northeast, instead of east on Fifty-Fifth street, as provided by the original plan upon which the bonds were issued and sold? The city claims this right by virtue of a portion of section 3 of the original ordinance reading as follows:

"The city of Seattle may modify details in the foregoing plan or system where necessary or advisable in the judgment of the city council, and where not substantially changing the purposes specified; the city shall also effect such, other construction, reconstruction, repair, moving, removing, changing and connecting as may be incidental to carrying out any or all of the foregoing purposes."

Is the change here proposed one which merely modifies the "details of the foregoing plan or system," and "one not substantially changing the purposes specified"? It seems to us that it is not. By the issuance and sale of these bonds, the city contracted with the bond purchasers to make the extensions and betterments as set out in the original ordinance, except where it was necessary or advisable to modify the details in carrying out such betterments and extensions. The city may make minor changes, but it has no right, in our judgment, to make the radical change here contemplated. If it can make this change, then it can make like changes in all other extensions provided by the original ordinance, and thus the total of the changes would make it impossible to recognize the proposed system as the one actually constructed. The change proposed does not deal with the details of the original plan; it is an entire departure from that plan in so far as this extension is concerned. There was some testimony tending to show the proposed extension would have a better grade, and that it would serve a greater population. We do not think, however, that these are questions which can be considered in this action. The question is one of construction of contract, and that contract is expressed in the original ordinance. If the terms of that instrument do not permit the proposed change, then it cannot be made, regardless of the advantages which might re-

sult. We realize that these ordinances should be reasonably construed with the view of accomplishing the purpose contemplated, but we cannot hold that such a construction will give the city the power it is here trying to exercise.

[3] Appellant quotes from a number of our cases where we have held that we will not, in the absence of fraud or arbitrary action, review proceedings taken by municipal authorities under a discretion lawfully given. We are not here reviewing a discretionary action which the city council has a right to exercise; we are holding that it has no power to exercise this discretion it is here undertaking to exercise—it is not a question of abuse of discretion, but one of power.

[4] What we have said, we think, will answer the contention of the city that the plaintiff cannot maintain this action as a bondholder without showing that he will be injured by the change which the city contemplates making.

By his cross-appeal, the plaintiff contends that the lower court erred in not issuing a mandate to the city requiring it to build this extension along East Fifty-Fifth street, as provided in the original ordinance. We think the action of the lower court in this respect was correct. It may be that the city will not have money sufficient out of the sale of the bonds to make all of the contemplated improvements, and on that account it may be that it will prefer to expend the money on some other of the proposed extensions or betterments. Whether an extension shall be made rests largely in the discretion of the city council, and we do not feel that we are justified in commanding the city to construct this extension.

The judgment is affirmed.

PARKER, C. J., and MITCHELL and TOLMAN, JJ., concur.

(120 Wash. 452)

COOLEY v. TACOMA RY. & POWER CO. (No. 16788.)

(Supreme Court of Washington. June 17, 1922.)

1. Street railroads §99(10) — Automobile driver held negligent in failing to look.

An automobile driver held guilty of contributory negligence, it appearing that in going at a very slow speed across the tracks at a street intersection he either did not look, or, if he did look, he did not have his mind upon the duty to observe the approaching street car.

2. Street railroads §103(3)—Doctrine of last clear chance inapplicable.

Where defendant's street car was stopped as soon as possible after plaintiff, driving an automobile, started to cross the track, the doctrine of last clear chance had no application.

En Banc.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by J. R. Cooley against the Tacoma Railway & Power Company. From judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss.

F. D. Oakley, of Tacoma, for appellant.

Guy E. Kelly and Thomas MacMahon, both of Tacoma, for respondent.

HOVEY, J. Respondent sued the appellant for injuries caused to himself and his automobile through collision with a street car. From a judgment upon the verdict in respondent's favor amounting to \$645 this appeal is prosecuted.

[1] The place where the accident occurred presents an unusual situation. Jefferson avenue at this point is a main north and south thoroughfare of the city of Tacoma. Twenty-Fifth street approaches Jefferson avenue from the east, and its actual intersection occupies only a portion of the eastern side of Jefferson, the approach on Twenty-Fifth street being upon a grade of 15 per cent. and the eastern portion of Jefferson being sloped down at each side of Twenty-Fifth street so that the travelers upon entering Jefferson must turn either to the right or left and resume a grade of $4\frac{3}{10}$ per cent. for a distance of about 125 feet from the center of Twenty-Fifth street before getting upon the level of Jefferson avenue proper. The rule of travel is to turn to the right upon entering Jefferson avenue and a traveler, desiring to go south upon that avenue, cannot cross to reach its west side until reaching its ordinary level, as a concrete abutment is erected across what is the physical terminus of Twenty-Fifth street and to a height of about 3 feet above the ordinary level of Jefferson. This abutment is about 250 feet in length, and forms the western boundary of the approaches from Twenty-Fifth street. It is undisputed that there is an uninterrupted view to the south from the place of accident of 500 or 600 feet.

The testimony of respondent is that on March 19, 1920, at the hour of 5:50 p. m. he drove a Ford coupé up Twenty-Fifth street to its intersection with Jefferson avenue, and as he made the turn to the north he looked over his shoulder to observe any traffic approaching from the south, and then turned to his right and continued up the grade to the north end of the concrete wall, where he again looked over his shoulder to the left, and saw no street car in that direction, but did observe the street car to his right on the south-bound track, but without ever stopping his car started to cross the north-bound street car track, which at this point runs quite close to the abutment, and before he had succeeded in crossing the track he was struck by a north-bound street car and rendered

unconscious; that he was familiar with the situation, and traveled this route at least five times a week and that it was not raining at the time of the accident, but had been. Other testimony produced by the respondent is to the effect that the automobile was pushed in front of the street car a considerable distance until it came to the south-bound street car, which caught the radiator of the auto, and the result was a bad wreck of the automobile, with some slight injuries to the respondent.

Upon the west side of Jefferson avenue and in front of the space immediately north of the north end of the concrete abutment is situated a garage, in the door of which several men were standing, who witnessed the accident and testified on behalf of the respondent. Their testimony varies as to the distance of the north-bound street car from the automobile at the time respondent attempted to cross, one witness placing it at 15 or 20 feet and another at about 200 feet, but they all agreed that the situation indicated to each of them that the accident was inevitable. The testimony of some of these witnesses was to the effect that the street car was going at an unlawful rate of speed the highest estimate being 35 miles per hour.

There was sufficient testimony for the jury to find that appellant was negligent in the operation of its street car.

In its answer appellant pleaded contributory negligence of the respondent, and by appropriate motions this defense was presented to the trial court as a bar to respondent's recovery.

In our opinion the case falls well within the law as defined by several of our decisions. In the case of *Benedict v. Hines*, 110 Wash. 338, 188 Pac. 512, we said:

"Upon appellants' contention, the controlling question in this case is whether the evidence shows contributory negligence as a matter of law. A traveler on a public highway approaching a railway crossing cannot impose upon the railway company all the caution needed to prevent accidents. With knowledge that the railway has the right of way and cannot so readily stop its trains, the well-settled rule imposes upon the traveler the duty to use all means a reasonably prudent person would, under the existing circumstances, to avoid a collision."

We consider the following from *Herrett v. Puget Sound T. L. & P. Co.*, 103 Wash. 101, 173 Pac. 1024, applicable to the facts in this case:

"Must not all say that the appellant either did not look for the approaching car, or his mind was so intent upon other things that the fact of its approach, physically open and apparent as it was and must have been, made no impression upon him? * * * A driver of an automobile may not deliberately drive upon the street car track which is open and apparent, and excuse himself by saying that he looked and

did not see that which no one could avoid seeing if he had looked; or that he was giving his attention to his machine, when common prudence demanded that he give some part of his attention to his own safety. We think all of the testimony in this case, coupled with the physical facts which cannot be denied, bring it strictly within the rule as to contributory negligence laid down by this court."

And we there cite many of our previous cases upon similar facts.

In this case respondent by his own testimony never stopped his car, although he was going at a very slow speed and could have done so easily. We are forced to the conclusion that respondent either did not look or, if he did look, he did not have his mind upon the duty which was then upon him to observe the approaching street car, and, as we said in *Mouso v. Bellingham & Northern R. R. Co.*, 106 Wash. 299, 179 Pac. 848:

"While this court has often held that the question of contributory negligence would not be taken from the jury and decided as a matter of law unless the commission or omission of the acts as shown were so palpably negligent as to preclude the possibility that reasonable men might differ concerning them, yet, in a case like this, where the physical facts are uncontroverted and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts, and therefore cannot differ."

[2] Upon the oral argument the doctrine of last clear chance was suggested by counsel for respondent, but we think it can have no application here, as it is undisputed that the street car was stopped as soon as possible after respondent started to cross its track.

The judgment is reversed, with directions to dismiss the action.

PARKER, C. J., and MITCHELL, MAIN, MACKINTOSH, BRIDGES, and TOLMAN, JJ., concur.

(120 Wash. 389)

HULET v. HULET. (No. 17049.)

(Supreme Court of Washington. June 12, 1922.)

Appeal and error §843(3)—No review of ruling on admission of evidence where other evidence sufficient to sustain decree.

Alleged error in the admission of evidence will not be reviewed, where, on the hearing de novo in the appellate court, there appears sufficient other evidence in the record to justify the trial court's decree.

Department 2.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Divorce proceeding by Maggie E. Hulet against Charles Hulet. Decree for plaintiff, and defendant appeals. Decree modified.

E. B. Boner, of Aberdeen, for appellant. Gus L. Thacker, of Chehalis, for respondent.

MACKINTOSH, J. This is a divorce action between parties who have been married many, many years. There can be no purpose in a recitation of the melancholy situation revealed by the testimony. The facts established entitled the respondent to a divorce, and, in the absence of any error of law, the decree in her favor must be sustained.

The errors of law assigned by the appellant refer principally to the admission of evidence which the appellant claims went beyond the allegations of the complaint. It may be that some of the incidents testified to as acts of cruelty on the part of appellant were not specifically set out in the complaint; but, at most, they were mere amplifications of the allegations of that document, and were it conceded that we could not sustain the admission of some of this testimony, still, upon the hearing de novo here, there appears to us sufficient other evidence in the record to justify the lower court in granting the divorce.

We cannot entirely agree, however, with the decree in regard to the distribution of the property and feel called upon to modify it to some extent, for the reason that the testimony is indicative of a disposition on respondent's part to fritter away her substance. The setting aside to the respondent of the home property in Centralia will be modified so that she will have the right to use that property during her lifetime, or until such time as she remarries; the legal title to remain in the appellant. The equal division of the cash on hand after the payments directed by the trial court to be made therefrom will stand, with this modification: That the appellant pay one-half of the amount awarded to the respondent in cash, and that the remaining one-half shall be deposited in some place to be designated by the trial court to abide the result of the controversy which the respondent is having with the United States government, in regard to the second policy of insurance upon the life of her deceased son. In the event that controversy results in her favor, the money deposited by appellant shall be returned to him; if she is unsuccessful in that controversy, the money is to be paid to her.

The lower court is directed to modify the decree in accordance with these suggestions.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 485)

KUINDERS v. KUINDERS. (No. 17281.)

(Supreme Court of Washington. June 22, 1922.)

Divorce \S 240(5)—Divorce judgment requiring husband to pay monthly sum for support of wife and child modified.

A judgment granting the wife a divorce, awarding her all the property in which the husband had any interest, and ordering him to pay \$60 per month for the support of the wife and their child until further order of the court, was modified on appeal to require him to pay \$30 per month where both parties had earning capacity, and neither had other property.

Department 1.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Ferdinand C. Kuinders against Kathryn B. Kuinders, wherein both parties sought a divorce. From a judgment entered for defendant, plaintiff appeals. Remanded, with directions to modify.

H. A. Martin, of Seattle, for appellant.

Erven H. Palmer and Van C. Griffin, both of Seattle, for respondent.

MITCHELL, J. Upon the trial of this case, wherein each party sought a divorce, judgment was entered for the defendant. It gave their child, 8 years of age, into the custody of the defendant. It awarded to her all of the property in which he had any interest, consisting of a residence worth about \$5,000 and household furniture worth about \$1,000. It provided he should pay \$60 per month for the support of her and the child until the further order of the court. An additional amount was allowed to finish paying \$200 on behalf of her attorney's fees, and he was further required to pay all outstanding community debts, the amount of which was not definitely ascertained, but was clearly of a substantial sum. From the judgment he has appealed.

The home property was in process of being accumulated by him at the date of the marriage, 1908. It is arranged so as to readily accommodate more than one family, and a portion of it has been let so as to produce regularly a monthly income of \$35. It is unincumbered. She has no other means; he has nothing left. He has a position at a moderate salary; she has earning capacity, having been employed in mercantile and restaurant pursuits prior to and for a short time after marriage. The grounds of the divorce were personal indignities rendering life burdensome. A careful examination of the evidence satisfies us that the faults which led to the divorce were not all his, by any means. The trial court so found.

Upon due consideration of the record in the case, together with the law applicable, we are not disposed to disturb the judgment except in one particular. That portion of the judgment requiring the appellant to pay \$60 per month for the support of the respondent and the minor child until the further order of the court should be modified so as to provide only for the payment by the appellant of \$30 per month, until the further order of the court, for the support of the minor child, from the date of the judgment.

Remanded, with directions to the superior court to modify the judgment accordingly. Neither party will recover costs of the appeal.

PARKER, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(24 Ariz. 155)

McCLINTOCK v. CITY OF PHOENIX.
(No. 2057.)

(Supreme Court of Arizona. June 9, 1922.)

1. Municipal corporations \S 223—City charter held not to authorize purchase of site for state armory.

The charter of the city of Phoenix, adopted under Const. art. 13, which authorized it to exercise all powers previously possessed or exercised by the city council, and to acquire and hold real, personal, or mixed property, thereby giving it the power granted to cities by Laws 1881, No. 58, art. 13, § 1, subd. 1, to erect, purchase, or hire necessary buildings for the use of the corporation, did not authorize the purchase of a site and erection of a building for an armory for the use of the National Guard, the title to which was to be taken in the name of the state.

2. Municipal corporations \S 57—Cannot exercise powers not given by charter.

Municipal corporations are creatures of state and possess only such powers as the state confers upon them, subject to addition or diminution at the state's discretion.

3. Statutes \S 5—Call of special session to consider changes in governmental machinery does not authorize validation of municipal bonds.

A subject for the consideration of the Legislature, stated by the Governor in his call for special session as required by Const. art. 4, § 3, subd. 2, to consider governmental machinery with a view to more closely co-ordinating, or abolishing certain agencies and activities, did not comprehend or relate to the power of a city to issue or sell bonds for any purpose whatever.

4. Statutes \S 5—Call of special session to consider amendments to public improvements act does not authorize validating municipal bonds.

A statement in the Governor's call that the special session was to consider and enact

amendments to the Improvement Act of 1912, with the object of restoring competitive bidding and eliminating any legal doubt or question as to the validity of bonds issued thereunder, did not include validation of proceedings of the city of Phoenix in voting bonds for the acquisition of an armory for the National Guard, as was attempted by the Fifth Leg., Sp. Sess., Senate Bill No. 57.

5. Statutes —5—Prohibition against enactment of statutes not included in call for special session is mandatory.

The provision of Const. art. 4, § 3, subd. 2, that no law shall be considered at a special session, except such as relate to the subject mentioned in the call by the Governor, is mandatory and cannot be disregarded by the Legislature.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by James H. McClintock against the City of Phoenix to restrain the city from issuing and selling its negotiable coupon bonds to aid in purchasing a site and building for the National Guard of the State. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Henry W. Miller, of Phoenix, for appellant.

R. W. Kramer, City Atty., of Phoenix, for appellee.

PER CURIAM. This is what may be termed a "friendly suit" brought to test the power of the city of Phoenix to issue and sell its negotiable coupon bonds to aid in purchasing a site and building thereon, to be located in said city, the title to be taken in the name of the state, and to be used and possessed by the state as an armory for the National Guard; the city to have no right or title or interest in the premises or in the use or possession thereof.

At a regular election in May, 1921, held in the city, the city was authorized to issue bonds for said purpose in the sum of \$70,000, and it is proceeding to exercise such authority, by issuing and selling said bonds, and will do so unless restrained.

The plaintiff asserts in his complaint:

"That the said bond issue is unlawful and void for the reason that it is prohibited by the provisions of sections 1 and 7, art. IX, of the Constitution of the State, and for the reason that the said armory is a state institution and is not a public improvement of the defendant, and for the further reason that the said defendant was without authority to issue said bonds for the aforesaid purpose, and that Senate Bill No. 57 of the First Special Session of the Fifth Legislature is invalid for the reason that such legislation was not within the call of the Governor of the State of Arizona pursuant to which the First Special Session of the Fifth Legislature was called and for the reason that it attempts to amend the charter of the city of Phoenix."

An injunction was asked for, restraining the defendant, its officers, agents, and employees, from selling said bonds. The defendant demurred to the complaint for want of sufficient facts. From an order sustaining the demurrer and a judgment denying any relief, the plaintiff appeals and assigns four errors, only two of which we need consider. These are:

"(1) That the charter of the city of Phoenix does not authorize the city to invest its funds in the purchase of property the title whereof does not and is not intended to vest in the city.

"(2) That Senate Bill No. 57 of the First Special Session of the Fifth Legislature of the State is invalid for the reason that it is not within the specifications in the governor's call of such special session. * * *

We will consider these two assignments in the order given.

[1] The city of Phoenix was first incorporated by a special act of the territorial Legislature in 1881, found at page 105 of the Laws of 1881. In article 13, subd. 1, § 1, thereof, the common council of the city was given power "to erect purchase or hire necessary buildings for the use of the corporation." In 1913 the city, acting under the authority of article 13 of the State Constitution, adopted a new charter which became its organic law and superseded the charter theretofore existing, as well as all amendments thereto. By the terms of section 1, c. 2, of the new charter, it is provided, among other things:

"(a) That the city of Phoenix shall * * * exercise and enjoy * * * all * * * powers * * * belonging to, possessed or exercised by the municipal corporation known as the common council of the city of Phoenix."

And—

"(c) It may * * * acquire and hold real, personal or mixed property for the purposes for which it is incorporated. * * *

Section 2 of the new charter particularizes the purposes for which the city may acquire property as: (a) For libraries, reading rooms, art galleries, etc.; (b) for waterworks, gasworks, electric light plant, etc.; (c) for telephone and telegraphic systems, etc.; and (e) for any public utility, etc.

[2] We cannot find in the general laws, concerning cities and towns, any extension of powers, beyond those above set forth. If, then, neither the original act of incorporation nor the present charter of the city empowers it to issue and sell its bonds to purchase, or build an armory for the National Guard of the state, and no such power is found in the general law affecting municipal corporations, what the city undertook to do by ordinance, not being for a corporate use or purpose, is without any legal sanction.

"Being a creature of the state and continuing its existence under the sovereign will and

pleasure, a municipal corporation possesses such powers and such only as the state confers upon it, subject to addition or diminution at its supreme discretion." 28 Cyc. 258.

In *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682, the power of the city of San Francisco to purchase a piece of land for a smallpox site was involved. The court, after quoting at considerable extent from Mr. Dillon's work on *Municipal Corporations*, said:

"As the power of raising money by taxation is conferred for the purpose of defraying the public expenditures, and is to be exercised only for the purpose of meeting such expenditures, the limitation upon this power is effected by limiting the objects for which the moneys may be expended. This power of taxation is one of the highest attributes of sovereignty, and, as a municipality seeking to exercise it must find express authority from the Legislature, so its power to disburse the public moneys, being correlative to the power of taxation, must equally find express authority for its exercise. The purchase of real estate, by itself considered, is not the exercise of any governmental function, and such purchase by a municipality can be sustained only by the production of an express authority from the Legislature therefor, or upon its being shown that it is necessarily incidental to the exercise of some express function of government with which the municipality is charged."

It is clear the proposed bond issue is not for any purpose of the city nor in aid of any municipal function, and since at the time it voted in favor of the bond issue and directed the sale of the bonds, the state had not empowered the city to do so, it acted without authority of law.

It only remains to be seen if the defect of power in the city was cured by the validating act of the First Special Session of the Fifth Legislature introduced as Senate Bill No. 57, and to be published as chapter 13 of the Laws of the Special Session. This special, or extraordinary, session of the Legislature was convened upon the call of the Governor in the exercise of his constitutional right as expressed in section 3 of subdivision 2, art. 4, which reads, in part, as follows:

"The Governor may call a special session, whenever in his judgment it is advisable. In calling such special session, the Governor shall specify the subjects to be considered at such session, and at such session no law shall be enacted except such as relate to the subjects mentioned in such call."

The Governor in his call specified ten subjects to be considered by the special session, and none of the specifications referred to the power of municipalities of the state to issue bonds and invest the proceeds thereof in property owned by the state, nor do they or any of them in the slightest degree relate to such subject. Eight of the subjects mention-

ed in the call are so foreign to the validating legislation in question that we pass them with the statement that by no possible construction could they be held to cover the matter. The other two are as follows:

"(5) To consider governmental machinery, state, county and municipal, with a view to more closely coordinating, or abolishing certain agencies and activities, and revising expenditures in connection therewith."

"(7) To consider and enact amendments to the improvement act of 1912 and acts amendatory or supplementary thereto with the object of restoring competitive bidding and eliminating any legal doubt or question as to the validity of bonds issued thereunder."

[3] It is apparent that the subject numbered 5 had in view some changes in the officers, commissions, or agents charged with the duties of carrying on the state, county, or city government and the expenses in connection therewith, and that these in no way comprehend or relate to the power of the state or county or city to issue or sell bonds for any purpose whatever.

[4] Subject 7 refers to the public improvement act (Laws 1912, c. 55) or the law authorizing cities and towns to improve their streets by special assessments, and to issue bonds in payment thereof when the property owner so desires, and was included in the Governor's call that legislation concerning such public improvements might be enacted and improvement bonds theretofore issued thereunder validated if the Legislature so pleased. The subject-matter therein is entirely unrelated to the validation of the proceedings of the defendant city in voting the bonds in question or the ordinance passed by the city directing the issuance and sale of said bonds.

[5] The provision of our Constitution requiring the Governor in his call of a special session to set forth the subjects of legislation, and prohibiting the Legislature from enacting any law not comprehended in the call or related to the subjects named therein, is mandatory (section 32, art. 2) 25 R. C. L. 806, § 56. It is a limitation on the power of the Legislature that must be observed. *Wells v. Missouri Pacific R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847. It was put into the Constitution by the people themselves, and to allow the Legislature to disregard it, and enact laws generally, as may be done at a regular session, would permit the exercise of a power by that body expressly withheld from it by the organic law of the state. We are constrained to hold that the legislative attempt to validate the city's bonds was ineffective because it is legislation foreign to any subject specified in the Governor's call.

The judgment of the lower court is reversed, and the cause remanded, with directions that the restraining order as prayed for be granted.

(24 Ariz. 163)

in re AUXILIARY EASTERN CANAL IRR. DIST.**JOHNSON v. CHANDLER et al. (No. 2073.)**

(Supreme Court of Arizona. June 14, 1922.)

1. Waters and water courses §216—Statutes for organizing irrigation districts held constitutional.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for the organization of irrigation districts, are constitutional and valid.

2. Constitutional law §63(3)—Statutes for creating irrigating districts not unconstitutional as conferring upon a board legislative powers in the creation of corporations.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for the organization of irrigation districts and giving the county board of supervisors power to hold elections concerning the organization of irrigation districts, are not unconstitutional as giving the board legislative powers in the creation of corporations.

3. Taxation §56—Statutes organizing irrigation districts held not unconstitutional as permitting unlimited levy of taxes on real estate.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for organization of irrigation districts and for the levy and collection of taxes for district purposes, are not unconstitutional as authorizing the levy of taxes upon real estate without limitation.

4. Taxation §41—Statutes creating irrigation districts not unconstitutional as providing system of taxation excluding from its operation all personal property.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for the organization of irrigation districts and for the levy of and collection of taxes for district purposes, are not invalid as providing a system of taxation which excludes from its operation all personal property within the district contrary to Const. art. 9, § 1.

5. Taxation §40(1)—Statute for organizing irrigation districts not unconstitutional as authorizing a levy of taxes which is not uniform.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for the organization of irrigation districts and levying and collecting taxes for district purposes, are not unconstitutional as authorizing the levy in the district of taxes which are not uniform, contrary to Const. art. 9, § 1.

6. Eminent domain §13—Statutes for organizing irrigation districts and taxation by district not unconstitutional as authorizing appropriation of private property to private use.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for the organization of irrigation districts and for taxation for district purposes are not unconstitutional as authorizing the appropriation of private property without the owner's consent to a private use.

7. Constitutional law §283—Statutes for organizing irrigation districts and taxation by district not unconstitutional as authorizing appropriation of property of nonresidents without due process of law.

Laws 2d Sp. Sess. 1915, c. 8, and Laws 1921, c. 149, providing for the organization of irrigation districts, and taxation by districts, are not unconstitutional as authorizing the appropriation of the property of nonresidents without due process of law, contrary to Const. U. S. Amend. 14, § 1.

8. Waters and water courses §228—Irrigation district held to have power to buy share in dam.

Under Laws 1921, c. 149, § 12, authorizing an irrigation district to sell its bonds to raise money for the purpose for which they were voted, section 5, giving the board of directors power to purchase or acquire water rights, real estate, personal property, etc., to use in irrigation, and section 11, making it the duty of such a district when organized to adopt some general plan of irrigation, where one of the purposes for which bonds were voted was to construct and install a pumping plant or to acquire an interest in such a plant, the board has power to purchase a power site and water rights to build a dam in order to carry out the scheme of irrigation.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

In the matter of the application of the Auxiliary Eastern Canal Irrigation District for a determination as to the validity of the First Series of bonds of said district. Action by H. L. Chandler against John Johnson. From judgment that proceedings in the organization of an irrigation district were valid, defendant appeals. Affirmed.

Fred Blair Townsend, of Phoenix, for appellant.

Richard E. Sloan, of Phoenix, and Arthur E. Price, of Chandler, for appellees.

ROSS, C. J. The statement of the case, by the appellant, and his assignments of error, are as follows:

"This is a proceeding brought by the board of directors of the Auxiliary Eastern Canal Irrigation District under the provisions of section 28 of chapter 149, Laws of 1921, to obtain a judicial determination as to the legality of the organization of the district and the regularity and legality of the proceedings of the board of directors of said district providing for and authorizing the issue and sale of the first series of \$2,000,000 of 7 per cent. bonds of said district.

"An answer was filed to the petition by John Johnson, appellant herein, which raised the issue, as provided in the said act, by general demurrer, first, as to the constitutionality of the act known as chapter 8, Laws of 1915, under which the district was organized, and of the act approved March 19, 1921, under which the proceedings for the issue of said bonds were had; and, second, as to the regularity of the

proceedings relating to the issue of said bonds.

"The respondent also raised, by way of answer, an issue as to the authority of the board of directors of the district to enter into a contract with the Salt River Valley Water Users' Association under which certain of the proceeds of the sale of said bonds is proposed to be used in the acquisition of certain power rights.

"The petition set forth in extenso the various proceedings leading to the organization of the district and to the proceedings leading to the issue of said bonds by the district. The pleading of John Johnson also set forth the facts relating to the proposed contract with the Salt River Valley Water Users' Association. The facts so set forth were admitted by the petitioners in a reply made to the answer filed by respondent.

"The court heard the case upon the agreement and stipulation of counsel that the facts as contained in the petition and in the answer of John Johnson were true and correct and upon certain documentary evidence as to the powers of the Salt River Valley Water Users' Association with relation to the proposed contract.

"The trial court entered its judgment based upon findings of fact and conclusions of law.

"First, sustaining the constitutionality of the acts above mentioned;

"Second, affirming and approving the proceedings of the district with respect to the issue of said bonds and confirming and approving the legality of said bonds; and

"Third, confirming the authority of the district and of the Salt River Valley Water Users' Association to enter into the contract above mentioned.

"From this judgment the respondent John Johnson has appealed to this court.

"Assignments of Error.

"I. The court erred in holding that the act known as chapter 8 of the Laws of 1915, Second Special Session, is constitutional and a valid act of the Legislature:

"First, because the act attempts to create a class of public corporations not authorized by the Constitution of the state.

"Second, because said act confers upon the board of supervisors of a county legislative powers in the creation of corporations;

"Third, because it authorizes the levy by irrigation districts of taxes upon real estate without limitation;

"Fourth, because it violates the provisions of section 1 of article 9 of the Constitution of the state by providing a system of taxation which excludes from its operation all personal property within the district;

"Fifth, because it violates the provisions of section 1 of article 9 of the state Constitution in that the taxes authorized to be levied in the district are not uniform;

"Sixth, because said act conflicts with the Constitution of the United States by authorizing the appropriation of private property, without the owner's consent, to a mere private use;

"Seventh, because it conflicts with section 1 of the Fourteenth Amendment of the Constitution of the United States by authorizing the appropriation of the property of nonresidents without due process of law.

"II. The court erred in holding that chapter 149 of the Laws of 1921, being the act approved March 19, 1921, is constitutional and a valid act of the Legislature of the state of Arizona, for the reasons enumerated and set forth in the foregoing assignment.

"III. The court erred in entering its judgment and decree in that the findings of the court do not sustain said judgment:

"First, because the facts found do not sustain the conclusion of law that the district was duly and regularly organized;

"Second, in that they do not sustain the conclusion of law that the proceedings with respect to the issuance of bonds were regular and in accordance with law;

"Third, that the facts found do not sustain the conclusion of law that the board of directors of the district has authority to enter into the proposed contract with the Salt River Valley Water Users' Association because the contract proposed does not contemplate the ownership by the district of the works for the construction of which the contribution is to be made by the district under its terms."

There is no controversy whatever about the facts, or that the proceedings in the organization of Auxiliary Eastern Canal Irrigation District and the proceedings concerning the proposed bond issue were entirely regular and in exact conformity with the statute, the only questions presented for our consideration being questions involving the constitutionality of chapters 8 and 149 referred to in the statement of facts, as applied to those facts. It may be stated preliminarily that all of the Pacific Coast states, and two states of the middle west (Nebraska and Kansas), have enacted laws providing for the organization of irrigation districts for the purpose of reclaiming their arid lands. The pioneer in such legislation was California, when in 1887 it enacted what is known as the Wright Irrigation Law. Other states adopting similar laws are Idaho, Oregon, Utah, Colorado, Nevada, Washington, Montana, Kansas, and Nebraska. The enactments by the Legislature of Arizona, in 1915 and in 1921, as we understand, are in all essential features like the Wright Law as amended from time to time, and the laws of the other named states. In fact, it is certain such laws were used as a guide in the drafting of ours. We are fortunate in that respect, as the Wright Law and its prototypes have many times been before the highest courts of the states adopting it, and once before the Supreme Court of the United States, and in all of these courts the law has been upheld as constitutional. We are cited to no case, and in our research we have found none, taking a contrary view, except the case of *Bradley v. Fallbrook Irr. Dist.* (C. C.) 68 Fed. 948, which later, upon appeal to the Supreme Court of the United States, was reversed in 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. So that it may be truthfully said that the courts, national and state,

where the Wright Irrigation Law, and others of a similar character, have been brought into review, have all been in accord in upholding the power of the Legislature to enact such laws. We will not undertake to discuss each of the assignments separately, and indicate our rulings thereon, but suffice it to say that all of the objections raised herein, by the appellant, have many times been presented and passed upon by the courts of the states having the Wright Act, or acts similar thereto, and we shall content ourselves by stating in the language of Kinney on Irrigation and Water Rights, vol. 3, § 1406, the objections made to the act and the rulings of the courts thereon:

"It was therefore contended that the statute, in violation of the Constitution of the United States and of the state, attempted to authorize the assessment and the taking of private property for a private use, and that a district formed under the act was a private and not a public corporation. It has been repeatedly held by the courts that this contention was not well taken, and that: 'The formation of one of these districts amounts to the creation of a public corporation, and their officers are public officers.' It is therefore held by the courts that an irrigation district formed under these laws is a public corporation, and its object is the promotion of the general welfare, and the assessment of the property under the provisions of the law is not the 'taking' of property for a private, but for a public, use. It therefore also follows that property may be taken by a district by virtue of the power of eminent domain. It is also held that the fact that the use of the water under the law is limited to the landowner, and is not given to every resident of the district, does not prevent the use being public; but that land which can be beneficially used without irrigation may be so much improved by the use of it upon other lands in the district, that such land may be properly within a district, and assessed for its benefit as a public improvement, and such use of the water is a public use.

"It was also contended that the law was unconstitutional because it authorized the taking of private property without due process of law. There were a number of phases of this branch of the question presented in the various cases, but the courts invariably held against them all, and held the law to be constitutional. It being held that, whenever a state law imposes a tax, assessment, servitude, or other burden upon property for a public use, either of the whole of the state or a limited portion thereof, and such law provides a mode of confirming or contesting such charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law. The adoption of a method of assessment, according to the value of all the real property within a district, or an ad valorem method, for the expenses of the improvements of the district, is not the taking of property without due process of law. Again, these district laws are not unconstitutional on the ground that the power thereby conferred upon districts to levy taxes is without limitation. And, again, the

fact that the statute makes no provision for notice to the landowner that on a particular day the board of directors will assess benefits to the lands within the district will not render such statute unconstitutional, upon the ground of taking property without due process of law, where the statute does provide for notice to be given of the proceedings to organize such district, and notice for the hearing for the confirmation of the organization and the proceedings of such district, at which hearing the court is required to examine all proceedings for the organization of such district including the assessment of benefits.

"That the law was unconstitutional was also urged, upon the ground that it was a delegation to others of the legislative power to create a public corporation. But, as said in the Fallbrook Case: 'We do not think that there is any validity to the argument. The Legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act.'

The cases cited by the learned author sustaining the propositions of law set forth are, among others: *In re Madera Irr. Dist.*, 92 Cal. 298, 28 Pac. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Lincoln & Dawson County Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N. W. 847; *Board of Directors v. Collins*, 46 Neb. 411, 64 N. W. 1086; *Fallbrook Irr. Dist. v. Bradley*, supra; *Imperial Water Co. No. 1 v. the Board of Supervisors*, 162 Cal. 14, 120 Pac. 780; *O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. 283; *People v. Cardiff Irr. Dist.* (Cal. App.) 197 Pac. 384; *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379; *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. 313; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho, 217, 101 Pac. 81; *Lundberg v. Green River Irr. Dist.* (Utah) 119 Pac. 1039; *Herrett v. Warm Springs Irr. Dist.*, 86 Or. 343, 168 Pac. 609. In the case of *Board of Directors v. Collins*, supra, practically the same objections were made to the Nebraska law as are made by the appellant here, and the court there summarized its rulings in the following language:

"The conclusions we reach from an examination of the foregoing authorities are, First, that the term 'due process of law' relates primarily to the remedy or means of redress where property rights are invaded rather than to matters of substantive law, and that the provision of our statute for a hearing, upon notice, of all questions pertaining to the organization of irrigation districts and the imposition by them of taxes and assessments fully satisfies the requirements of the state and federal Constitution; second, the end and purpose of said act is, in a constitutional sense, public, and, therefore, resting in the wisdom and discretion of the Legislature. The reasoning based upon the decision in *Bradley v. Irrigation Dist.* (68 Fed. 948) must accordingly be rejected.

"The objection to said act on the ground that it authorizes the creation by county boards of municipal corporations in violation of section

1 of article 3 of the Constitution, is fully met by the California cases cited holding that irrigation districts are public and not, strictly speaking, municipal corporations, and that their officers are agents of the state.

"To the proposition that the authority conferred upon irrigation districts to levy taxes, without limitation upon the property within their boundaries, is an invasion of the provisions of the state Constitution, it may be answered: First—that the power of taxation is an attribute of sovereignty, having its source in the necessities of organized society. That power has, by the people, been committed to the discretion of the Legislature, and the limits within which it may be exercised depend, in the absence of express limitation upon such power, upon the exigencies of the public, and for an abuse of the trust thus imposed the remedy is an appeal to the people themselves in the manner ordained by the Constitution. Second—the power of taxation so conferred is not, as counsel assume, unlimited, but is restricted to revenue sufficient to meet the obligations voluntarily assumed by the taxpayers themselves. Third—although ample provision is made for resisting the issuance of bonds, by taxpayers and others interested, the record contains no suggestion of an abuse in this instance of the taxing power; nor does said act conflict with section 1 of article 9 [our section 1, article 9] of the Constitution, requiring taxation to be equal and uniform. That provision relates to the revenue required for the general purpose of government, state and municipal, and has no application to taxes or assessments levied for local improvements."

[1-7] We are satisfied that the objections to chapter 8, Laws of 1915, and chapter 149, Laws of 1921, are without merit, and that the proceedings in the organization of Auxiliary Eastern Canal Irrigation District, from and including the petition for the organization thereof, and all other proceedings affecting the legality and validity of the proposed bond issue, were legal and valid and should be approved and affirmed.

[8] Appellant's last assignment of error questions the validity of a proposed contract between the Auxiliary Eastern Canal Irrigation District and the Salt River Valley Water Users' Association, wherein and whereby the district is to acquire, by purchase and lease, from the Salt River Valley Water Users' Association, at a cost estimated at about \$500,000, certain rights or easements, in a dam proposed to be built by the latter company at Mormon Flats on Salt river for the purpose of storing, for the district, flood and surplus waters, and a hydroelectric plant in connection therewith, and in existing canals to be enlarged and improved by the district for carrying purposes, and for the installation of pumping plants for irrigation purposes. Section 12 of chapter 149 authorizes an irrigation district organized under the laws of the state to sell its bonds from time to time to raise money for the purposes for which they are voted. One of the purposes for which the series of bonds in ques-

tion were voted, according to the court's finding, was—

"The construction and installation of a pumping plant on the Salt river, or elsewhere, or the acquisition of an interest in any such plant by which power for the operation of pumping plants and the furnishing of power for domestic purposes may be secured for the benefit of the lands included within the district."

Section 55 of chapter 149 provides that—

The board of directors of an irrigation district shall possess the power "to purchase or acquire, water rights, acquire or lease real estate and personal property, when necessary for its purposes, * * * to construct, acquire, purchase, any and all canals, ditches, reservoirs, reservoir sites, water, water rights, rights of way, or other property by it deemed necessary for the use of the district, and power to acquire the right to enlarge any ditch, canal or reservoir, already constructed or partially constructed; also power to provide for the construction, operation, leasing and control * * * and lease of electrical energy. * * *"

Section 11 of said act makes it the duty of an irrigation district when organized, to adopt some general plan for the purpose of procuring necessary irrigation water, water and water rights, developing electrical energy, and acquiring the necessary property in connection therewith, and otherwise carrying out the provisions of the act. The board of directors of the district, in pursuance of the authority given, and the duty imposed by section 11, did adopt a general plan which provided for a large pumping plant, sufficient to divert at least 350 second feet of water from one of the main canals of the Salt River Valley Water Users' Association into the distributing system of the district under and by virtue of the contract heretofore referred to between it and the Salt River Valley Water Users' Association, and also the construction and installation of power plants for the purpose of furnishing power for the operation of said pumping plant, and also provided for the furnishing of power to landowners within the district for pumping and domestic purposes, and also the construction of substations and transmission lines and the installation of motors for the operation of pumps for the purpose of developing the under-ground waters within the district.

From the findings of fact it appears that one, and perhaps the chief, source of water to irrigate the lands in the district, and the only source for electric power, is from the Salt and Verde rivers, and that because of rights already acquired by, and vested in, the Salt River Valley Water Users' Association, in the waters of said rivers, and power sites thereon, it is necessary that the district, by mutual and satisfactory arrangements, with the Salt River Valley Water Users' Association, avail itself of the present and future equipment and facilities of the association, in order to obtain water and power for

its purposes. This arrangement is incorporated into the general plans of the district and is so essential that without it the undertaking would most likely be a failure. We have no doubt but that the contractual arrangement is one the district, under the law, may legally make; it being necessary to effectually carry out the purposes for which the district was organized. Chapter 149 gives such authority and power to the district, and we can think of no reason why it may not exercise the power so granted.

The judgment of the lower court is affirmed.

McalISTER and FLANIGAN, JJ., concur.

(63 Mont. 451)

ROSENOW v. MILLER et al. (No. 4763.)

(Supreme Court of Montana, May 24, 1922.)

1. Dower §29—Inchoate right of dower constitutes incumbrance on husband's title.

A wife's inchoate right of dower, whether treated as a bare expectancy or as a contingent interest, is such a valuable right or interest as constitutes an incumbrance on her husband's title.

2. Specific performance §21—Court cannot compel wife to release or convey right of dower in lands husband has contracted to sell.

A court cannot compel a wife to release or convey her inchoate right of dower in lands her husband has agreed to sell by a contract to which she is not a party.

3. Specific performance §10(2)—Purchaser, under contract to which vendor's wife is not party, may have partial performance, or damages for breach of contract.

If a purchaser of land, under a contract to which vendor's wife is not a party, is willing to pay the entire contract price and accept therefor such title as the husband alone can convey, a court of equity may grant him specific performance thereof, or he may seek damages in a court of law for the breach of contract.

4. Specific performance §10(1)—Bona fide vendee may enforce performance to extent of vendor's ability and recover compensation for difference.

A vendor, whose estate is less than he agreed to convey, or who cannot give the exact subject-matter contracted for, cannot plead his inability as a defense; but vendee may enforce performance to extent of vendor's ability, and have compensation for the difference, unless at the time of entering into the contract he knew of the vendor's inability, or there is no basis for ascertaining the amount of compensation with any reasonable degree of certainty.

5. Specific performance §114(1)—Complaint in action for partial performance, with compensation to extent of value of wife's dower rights, held defective.

In an action to compel a vendor to convey all his title and interest in property at the

price stipulated, in a contract to which vendor's wife was not a party, less the determined value of the latter's dower right, the complaint held defective, in that it did not allege that plaintiff contracted in ignorance of the fact that defendant was a married man, or that his wife was or ever had been in the state, as, under Rev. Codes 1921, § 5818, she had no dower interest in the property, if she was never in the state.

6. Specific performance §10(2)—Partial performance of vendor's contract, to which his wife is not party, held not enforceable, with compensation to extent of value of dower.

In view of Rev. Codes 1921, §§ 5813, 5819, 5821, relative to the wife's dower rights in her husband's property, and right to elect to take under his will, or, in case of his death without heirs, to take half of his realty, in lieu of dower, a vendee cannot enforce performance of a contract, to which vendor's wife is not a party, to the extent of his ability to perform, and recover compensation for the value of the wife's dower rights; it being impossible to determine in advance of the husband's death just what the extent of his widow's rights will be.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Action by A. C. Rosenow against George Miller and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Wm. V. Beers and M. J. Lamb, both of Billings, for appellant.

Grimstad & Brown and William Gallagher, both of Billings, for respondents.

HOLLOWAY, J. In 1916 John Horne and Mabel Horne contracted to sell to George Miller 80 acres of land in Yellowstone county, together with 14 shares of the capital stock of the Big Ditch Company, for \$10,000, payable \$1,000 in cash and the balance in annual installments. In 1919 Miller contracted to sell the same land to A. C. Rosenow for \$15,500. Rosenow paid \$5 cash, agreed to pay \$9,495 on or before January 1, 1920, and agreed to assume and pay the balance (\$6,000) due to Horne and wife, according to the terms of the 1916 contract. Miller acknowledged the receipt of \$5, and agreed that, upon the payment of \$9,495 within the time mentioned, he would convey the premises to Rosenow by a good and sufficient deed, "clear of all incumbrances" except the outstanding interest of Horne and wife.

This action was instituted by Rosenow to secure reformation of the 1919 contract and for its specific performance thereafter. The contract does not mention the 14 shares of stock in the ditch company, and it is for the purpose of having that property included that reformation is sought. It is alleged that, at the time the 1919 contract was entered into, Miller was married and living upon the

land in question; but Mrs. Miller was not a party to the contract, and she has refused to join her husband in a deed, or otherwise relinquish her dower right. The complaint sets forth all the facts in detail, including the refusal of Miller to convey the land according to the terms of the contract, and prays that the contract be reformed to include the ditch company stock, that the court determine the value of Mrs. Miller's inchoate right of dower, and that Miller be required to convey all his right, title, and interest in the property for the agreed price, less the determined value of the dower right. A general demurrer to the complaint was sustained, and plaintiff, refusing to plead further, suffered a judgment of dismissal to be rendered and entered against him, and appealed.

As preliminary to the discussion of the principal question involved in this controversy, it may be said that the following propositions are settled by the authorities generally:

[1] (1) Whether the inchoate right of dower be treated as a bare expectancy or as a contingent interest, it is such a valuable right or interest as constitutes an incumbrance upon the husband's title.

[2] (2) A court has not the authority to compel a wife to release or convey her inchoate right of dower in lands which her husband has contracted to sell, but to which contract the wife is not a party.

[3] (3) If the purchaser is willing to pay the entire contract price, and accept therefore such title as the husband alone can convey, a court of equity may grant him the relief sought, or he may go into a court of law and seek redress by way of damages for the husband's breach of contract.

It is doubtful, however, whether any other question has vexed the courts to a greater extent than the one which is here presented, viz.: Will a court of equity decree specific performance of the contract as against the husband, and allow to the purchaser compensation or abatement from the contract price, proportioned to the value of the outstanding inchoate dower right? In each of the following cases the inquiry is answered in the affirmative: *Hirschman v. Forehand*, 114 Ark. 436, 170 S. W. 98; *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Williams v. Wessels*, 94 Kan. 71, 145 Pac. 856; *Woodbury v. Luddy*, 14 Allen (Mass.) 1, 92 Am. Dec. 731; *Walker v. Kelly*, 91 Mich. 212, 51 N. W. 934; *Sanborn v. Nockin*, 20 Minn. 178 (Gil. 163); *Tebeau v. Ridge*, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367; *Bethell v. McKinney*, 164 N. C. 71, 80 S. E. 162; *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453. In Maine the same conclusion is required by special statute (*Handy v. Rice*, 98 Me. 504, 57 Atl. 847), while in Iowa

and Alabama substantially the same result is reached by permitting the purchaser to retain one-third of the contract price until the wife dies or relinquishes her dower right; the ultimate payment of the retained portion being secured by a lien upon the property. *Noecker v. Wallingford*, 133 Iowa, 605, 111 N. W. 37; *Minge v. Green*, 176 Ala. 343, 58 South. 381.

[4] In awarding specific (partial) performance, with abatement or indemnity, as the case may be, the courts of this group assume to apply an ancient rule of equity that a vendor, whose estate is less than or different from that which he agreed to convey, or who cannot give the exact subject-matter embraced in his contract, will not be permitted to plead his inability as a defense against the demand of the purchaser; but the vendee may, if he so elects, enforce performance to the extent of the vendor's ability to comply with the terms of the agreement and may compel a conveyance of the deficient estate, or defective title, or partial subject-matter, and have compensation for the difference between the actual performance and the performance which would have been an exact fulfillment of the terms of the contract, or, as the same doctrine is stated by Lord Eldon:

"If a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection by the vendor that the purchaser cannot have the whole." *Mortlock v. Buller*, 10 Ves. Jr. 292, 315.

If the foregoing constituted a statement of the rule in its entirety, slight criticism at most could be aimed at its application in any case involving the common-law right of dower or its statutory equivalent; but the courts, in applying the principle as stated, apparently overlook or ignore the fact that it is not complete. Two other considerations enter into a statement of the rule:

(1) If the vendee, at the time of entering into the contract, knows that the vendor's title is defective or that his interest is partial, or that the subject-matter is deficient, he is not entitled to any compensation. He is to be regarded as agreeing to purchase whatever interest the vendor has and is able to convey. *Peeler v. Levy*, 26 N. J. Eq. 330; *Lucas v. Scott*, 41 Ohio St. 636; *Free v. Little*, 31 Utah, 449, 88 Pac. 407; *Pomeroy on Contracts (Specific Performance)* § 442; 36 Cyc. 742.

(2) Whenever the nature of the subject-matter, the terms of the contract, or the kind and extent of the defect are such that they furnish no basis upon which to ascertain the amount of the compensation with any reasonable degree of certainty, and fixing the amount would be a mere matter of speculation, a partial specific performance, with compensation, will be refused. *Pomeroy on Contracts (Specific Performance)* § 448.

In the application of the rule to a case wherein the vendor's inability to convey all that he agreed to convey arises from his wife's refusal to relinquish her inchoate right of dower, *Pomeroy* lays particular stress upon the element of notice. He says:

"The true principle is that laid down in the English cases heretofore quoted. If the vendee knows that the vendor is a married man, he knows that his wife is entitled to dower, and that she cannot be compelled to release her dower right, and, entering into the contract with such knowledge, he is not entitled, within the doctrine as well established, to ask anything more than the husband himself can give. It is the vendee's knowledge, and not any notion of making a new contract for the parties, which prevents the purchaser from obtaining compensation. On the other hand, if the vendee entered into the contract in ignorance that the vendor was married, and under the supposition that the vendor could give an unincumbered title, then he ought to have a specific performance with an abatement from the price."

And, after considering the theory of indemnity in lieu of compensation, he concludes his observations as follows:

"But, as said above, it is not in accordance with the well-settled principles of equity that this or any other mode of compensation should be awarded to the vendee, unless he made the contract without knowledge that the vendor was married."

[5] The complaint in this action is open to criticism upon several grounds. Plaintiff does not allege that he entered into the contract in ignorance of the fact that Miller was a married man. He does not allege that Mrs. Miller is now or ever has been in Montana, and if it should be true that she has never been in this state (or territory), then, by his allegation that Miller tendered a deed duly executed by himself, but without the signature of Mrs. Miller, he literally pleads himself out of court. Section 3713, Revised Codes 1907 (section 5818, Rev. Codes 1921) provides:

"Any married man residing and owning real property in the state, whose wife has never been in the state or territory of Montana, can by deed * * * grant the full title to such property by his own signature, and the wife or widow shall have no dower interest in the property to which the title of the husband is so divested."

[6] But the more serious objection to granting the relief sought by plaintiff arises from

the nature of the right, the value of which it is sought to have appraised. Assuming that Mrs. Miller is a resident if this state, then our Codes determine that she has a right of dower in the lands in controversy. Section 3708, Revised Codes 1907 (section 5813, Rev. Codes 1921), declares that the dower right extends to equitable estates, and to all real estate of every description contracted for by the husband during his lifetime, the title to which may be completed after his death. But what is the character of the right?

(1) She has her common-law right of dower—a life estate in one-third of the land. Section 3708, Rev. Codes 1907 (section 5813, Rev. Codes 1921); *Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748.

(2) If the husband dies testate, making a specific devise or bequest to his widow, she may elect whether she will take such devise or bequest, or whether she will renounce the benefit and take her dower in the land and her share of the personal property. Section 3714, Rev. Codes 1907 (section 5819, Rev. Codes 1921).

(3) If the husband dies without children, or the descendants of children, the widow may elect whether she will take, in lieu of dower, an absolute title to one-half of all the real estate which shall remain after the payment of the deceased husband's debts and claims against his estate. Section 3716, Rev. Codes 1907; section 5821, Rev. Codes 1921.

Viewed in the light of these statutory provisions, it is apparent that, if the trial court had assumed to determine the value of the wife's outstanding interest in the lands in question, the following pertinent inquiries would have been presented for determination: Will Mrs. Miller survive her husband? If she survives him, over what period of time will her estate extend? Will the husband die testate or intestate? If he dies testate, will he make ample provision in his will for his widow? If he makes such provision, will his widow renounce it and elect to take her dower? Will the husband die without leaving children, or the descendants of children? If so, will Mrs. Miller elect to take a life estate in one-third of the land, or an absolute title to one-half after the payment of the debts and charges against the estate?

It may be conceded, for the purposes of this case, that the first two inquiries may be answered with a reasonable degree of accuracy by reference to standard tables of mortality (*Glaue & McClure's Present Value Tables*); but we submit that no human agency can answer the other inquiries, or determine in advance of the husband's death just what the extent of the widow's right will be, and hence a valuation placed upon that right would not rise to the dignity of a respectable guess. It is our conclusion that

the value of Mrs. Miller's outstanding right or interest in the property in question is not capable of measurement in dollars and cents; hence plaintiff cannot claim abatement from the contract price. The following authorities sustain our conclusion though some of them proceed upon a different theory: *Long v. Chandler*, 10 Del. Ch. 339, 92 Atl. 256; *Barbour v. Hickey*, 2 App. D. C. 207, 24 L. R. A. 763; *Murphy v. Hohne*, 73 Fla. 803, 74 South. 973, L. R. A. 1917F, 594; *Cowan v. Kane*, 211 Ill. 576, 71 N. E. 1097; *Plum v. Mitchell* (Ky.) 26 S. W. 391; *Bateman v. Riley*, 72 N. J. Eq. 316, 73 Atl. 1006; *Lucas v. Scott*, 41 Ohio St. 636; *Kuratil v. Jackson*, 60 Or. 203, 118 Pac. 192, 1013; *Riesz's Appeal*, 73 Pa. 485; *Free v. Little*, 31 Utah, 449, 88 Pac. 407; *Haden v. Falls*, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034; *Milam v. Williams*, 73 W. Va. 467, 80 S. E. 770.

The complaint does not state a cause of action, and the demurrer was properly sustained. The judgment is affirmed.

Affirmed.

COOPER and GALEN, JJ., and AYERS, District Judge, concur.

AYERS, District Judge, sitting in place of BRANTLY, C. J., disqualified.

(63 Mont. 437)

MUTCH & YOUNG CO. v. POWERS.
(No. 4771.)

(Supreme Court of Montana. May 24, 1922.)

1. Husband and wife \S 235(2) — Whether credit was extended to defendant or to her husband held for the jury.

In an action against a wife to recover for goods delivered and money loaned, whether the credit was given to defendant or to her husband held, on the evidence, a question for the jury, though the original sale slips showed a sale to the husband.

2. Account stated \S 20(1) — Assent to correctness of account held for the jury.

Evidence held to present a question for the jury of assent to the correctness of an account stated.

3. Account, action on \S 6(5) — Account stated will support action on open account.

Evidence showing an account stated will support an action on an open account.

Commissioners' Opinion.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Action by the Mutch & Young Company, a corporation, against Hattie Powers. From an order granting a nonsuit and denial of a motion for a new trial, plaintiff appeals. Reversed and remanded.

Frank & Gaines, of Butte, for appellant.
H. A. Tyvand, of Butte, for respondent.

COMER, C. Plaintiff (appellant herein) brought this action against defendant (respondent herein) to recover a balance due for certain goods, wares, and merchandise sold to and money loaned the defendant, between April 1 and June 16, 1917. The answer denies the allegations of the complaint.

The evidence discloses that during this period of time defendant and her husband, C. E. Powers, had a lease on what was known as the Dorothy Dining Room in the Dorothy Block in the city of Butte; that defendant had a conversation with witness Garrison, who worked for plaintiff as solicitor, in which she said she was taking over the Dorothy Dining Room; that she thought she could get some more boarders and make enough money to keep her husband out of the mines, as he was not very healthy. The witness reported this conversation to the plaintiff. After that conversation, defendant, Mrs. Powers, moved into the Dorothy Block; she ordered groceries from the witness; he was at that time taking orders for the plaintiff; she figured with him on the price and agreed on the price of what she ordered; he saw her around the dining room; after taking the orders he would turn them in to the store. Defendant also did the cooking at the Dorothy Dining Room during this period of time. The president of the plaintiff company testified that the solicitor reported Mrs. Powers was going into the Dorothy Block. He was informed she had moved into the Dorothy Block when an order of groceries was delivered there. He made a change in the ledger account. They had been selling goods to Mr. Powers prior to that time. The groceries mentioned in this case were sold to the defendant. Some checks from C. E. Powers were applied on the account, and some of the account was paid by checks signed over through the Dorothy Café. Plaintiff's bookkeeper testified he kept the books and passed on the credits; that he passed on the orders as to whether they should be delivered or not; he would total the slips and pass the total on the ledger sheets; that he was familiar with the account which was entered up for groceries and supplies that were furnished to the Dorothy Café or Dorothy Dining Room. From the original sales slips he prepared a memorandum showing the items that were furnished to the Dorothy Dining Room. This was marked as plaintiff's Exhibit 3 for identification. The witness stated that it is an itemized account of groceries delivered to the Dorothy Block from April 30 to June 16, 1917, and was prepared from the original charge slips, which are available for use if desired.

It was thereupon stipulated in open court that the original charge slips would show that the name of C. E. Powers appears under the caption "sold to"; plaintiff's Exhibit 3 was offered in evidence for the purpose of showing the items of merchandise delivered to the Dorothy Block between the period mentioned, April 30, 1917, to June 18, 1917, including the item of \$200 cash. This was objected to "as incompetent, irrelevant and immaterial, it appearing therefrom that the credit was not given to the defendant in this case, but to another person."

The court then said:

"It isn't offered for that purpose at this time. He said he simply offered it for the purpose of showing the merchandise that was delivered to the Dorothy Block."

The defendant then objected to it as incompetent, irrelevant, and immaterial, which objection was overruled; the court stating that, if it was not connected up, he would sustain a motion to strike it out.

The proposed exhibit is an itemized statement of the goods, wares, and merchandise alleged to have been sold and delivered by the plaintiff to the defendant, including the money loaned, during the times mentioned in the complaint, showing a total of \$1,058.85, credit by merchandise returned \$54.90, credit by cash \$554.30 leaving a balance due of \$449.65. This witness further testified that the goods sold by plaintiff which were delivered to the Dorothy Block Dining Room were sold to Mrs. C. E. Powers, the defendant. Witness Amos testified he had charge of the grocery department of Mutch & Young Company in 1916 and 1917; that the defendant personally, over the telephone, ordered supplies from him; that she would tell him what she wanted and ask prices on it; he would figure with her on the items that were ordered; he made a record of the order on a charge slip which was turned over to the order department for delivery; the slip would then go on file through the office for permanent record and be entered on the ledger; he agreed with Mrs. Powers as to the prices to be paid for these goods; that covers the goods involved in this action; he talked with Mrs. Powers at different times concerning her operation of the dining room; she ceased operating the dining room in June; she told him that she was giving up the dining room; that she had some merchandise that was in larger quantities than she cared to use; she wanted to know if it would be all right if she returned this merchandise, and we would pass her credit for the merchandise returned; she returned the same to the plaintiff, receiving a credit therefor, as shown on the exhibit, of \$54.90; she told him that the enterprise had been successful; that she had made some money and that she did not see fit to

put it out again to men who were not working.

This witness had another talk subsequently relative to the account with the defendant. He went to see her and presented a bill and asked for the money. She told him "she would be down and attend to it in a few days. But she never come in and attended to it."

When the plaintiff closed his case, defendant asked that Exhibit 3 and matters in connection with that exhibit be stricken "because it wasn't connected up." The court granted the motion. The defendant then moved the court for an order of nonsuit upon the ground the plaintiff failed to make out a case against the defendant, which the court granted. A motion for new trial was made and refused. From the judgment of nonsuit and order refusing a new trial, plaintiff appeals.

[1] The first error assigned is the granting of defendant's motion to strike Exhibit 3. The objection raised to the exhibit, as we gather it from the record and briefs of counsel and the theory of the defense at and during the trial, was that it appeared from the original sale slips and the ledger accounts that the credit was not extended to defendant but to another person. In defendant's brief, he says:

"The ledger accounts offered in evidence in this case certainly show no other name than that of C. E. Powers, and it certainly does not show the name of Hattie Powers. That of itself is clear evidence of to whom the merchandise was sold, to whom credit was given, and against whom the charges were made."

The original sales slips were available and subject to the examination of the defendant. The exhibit was clearly secondary evidence, but no objection was made to it upon that ground, the parties treating it as a correct copy of the entries upon the ledger account and the original sales slips. Defendant's position is that since neither the original sales slips nor the ledger accounts show the goods or money were charged to defendant, but to C. E. Powers, this is conclusive that credit was not extended defendant. This is the question raised on this assignment.

The testimony of plaintiff's witnesses is that the goods were sold and the money loaned to defendant; that she ordered the goods, negotiated as to their price, returned a portion of the goods to the plaintiff to be credited, not to her husband, but to herself. Under these circumstances, it was a question for the jury whether credit was given to defendant or her husband. 20 Cyc. 183; Fergus County Hardware Co. v. Crowley, 57 Mont. 340, 188 Pac. 374; McGowan Com. Co. v. Midland Coal & Lumber Co., 41 Mont. 211, 108 Pac. 655.

In Fergus County Hardware Co. v. Crowley, supra, one of the questions before the

court was whether the fact that the goods were charged to one Pentecost was conclusive that the sale was made to him, and the court said in passing on that question:

"It was peculiarly the province of the jury to pass upon the credibility of plaintiff's witnesses, and the general verdict is in effect a finding that their version of the transaction is the correct one. With these facts found, there cannot be any question that Crowley's obligation was an original one not affected by the statute of frauds. While it will be conceded that the facts that the goods were charged to Pentecost, that bills for them were rendered to him and partial payment received from him, tend strongly to indicate that the sale was made to him, still neither any one of the facts is, nor all of them are, conclusive against the plaintiff. They may be explained, and if the jury was satisfied, as it apparently was, that the sale was made altogether upon the credit of Crowley without any intention of resorting to Pentecost for payment, the recovery is warranted. 25 R. C. L. 491, 492. This entire subject has been covered so fully by this court in *McGowan Com. Co. v. Midland C. & L. Co.*, 41 Mont. 211, 108 Pac. 655, *Fortman v. Leggerini*, 51 Mont. 238, 152 Pac. 33, and *Breidenbach Bros. v. Upper Valley Orchards Co.*, ante, p. 247, 187 Pac. 1008, that further citation of authorities is unnecessary."

We are of the opinion the court should have denied the motion to strike out the exhibit.

[2] Did the court err in granting the motion for nonsuit? The evidence shows defendant operated the Dorothy Dining Room; she ordered the goods shown on Exhibit 3, which is an account prepared from the original sales slips, showing items delivered to the Dorothy Dining Room. Defendant stated to plaintiff she wished to return some of the groceries and receive credit therefor, as she was "giving up the dining room"; that she did return some groceries and received credit upon the account. She stated the enterprise had been successful; that she had made some money and did not see fit to put it out again to men who were not working.

Subsequently—that is, after she returned these groceries—she had a talk with one of plaintiff's witnesses relative to the account. He went to see her, presented a bill, and asked for the money. The evidence does not show she denied her liability, but she did say she "would be down and attend to it in a few days," which she did not do.

"It is quite generally held that where parties have been engaged in a course of dealings and there is an antecedent indebtedness in favor of one as against the other, and an account or bill purporting to be a statement of the account is rendered by the creditor to the debtor, who retains the same for an unreasonable length of time without objection, this is evidence of his assent to the correctness of the account, and, accordingly, is an account stated. See 1 *Corpus Juris*, p. 691, sec. 276, p.

695, Sec. 288. See, also, cases in *Decennial and Century Digest*, 'Accounts Stated,' § 6." *O'Hanlon v. Jess*, 58 Mont. 415, 193 Pac. 65, 14 A. L. R. 237.

See, also, *Baldwin v. Silver*, 58 Mont. 495, 193 Pac. 750.

[3] Evidence showing an account stated is sufficient to support a cause of action on an open account. *Roy v. King's Estate*, 55 Mont. 567, 179 Pac. 821; 1 Cyc. 485.

We are of the opinion the plaintiff made a showing sufficient to go to the jury; we therefore recommend that the judgment and order appealed from be reversed, and the cause remanded for further proceedings.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause is remanded for further proceedings.

(63 Mont. 262)

LEE v. STOCKMEN'S NAT. BANK OF HARDIN et al. (No. 4722.)

(Supreme Court of Montana. May 8, 1922.
Rehearing Denied June 19, 1922.)

1. Fraud §64(1)—Actual fraud question of fact.

As to whether actual fraud defined by Rev. Codes 1921, § 7480, has been practiced, is a question of fact under section 7482.

2. Fraud §50—Burden of proof on party alleging fraud.

The burden of proof is upon the one who alleges actual fraud.

3. Fraud §3 — Elements of actual fraud stated.

In order to go to the jury, plaintiff must make out a prima facie case embracing the elements of actual fraud, viz. a representation, its falsity, its materiality, the speaker's knowledge of its falsity, or ignorance of its truth, his intent that it should be acted upon by the person and in the manner reasonably contemplated, the hearer's ignorance of its falsity, his reliance upon its truth, his right to rely thereon, and consequent injury.

4. Trial §159—Nonsuit proper where plaintiff fails to prove case.

Under Rev. Codes 1921, § 9317, a judgment of nonsuit is proper where the plaintiff fails to prove a case for the jury, and, when no substantial evidence has been introduced by the party upon whom the burden rests, a question of law for decision by the court is presented.

5. Fraud §20 — Deception by misrepresentation essential.

Since it is essential that the party to whom a misrepresentation is made should be deceived thereby and believe it to be true, one can secure no redress for a misrepresentation which he knew to be false, nor failure to disclose facts which he knew to exist.

6. Fraud ¶64(5)—Evidence of fraud inducing purchase of chattel mortgage notes held insufficient to take case to jury.

In an action by the vice president, who was also director, of defendant bank, to recover for fraudulent representations by defendant's cashier in selling plaintiff notes secured by a chattel mortgage on automobile without disclosing the fact that certain cars had been sold by mortgagor, evidence held insufficient to take the case to the jury, it appearing that plaintiff was in as favorable a position as defendant to know the true situation and all the facts pertaining thereto.

Appeal from District Court, Big Horn County; A. C. Spencer, Judge.

Action by Walter O. Lee against the Stockmen's National Bank of Hardin and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Guinn & Maddox, of Hardin, and McIntire & Murphy, of Helena, for appellants.

C. F. Gillette, of Hardin, and E. E. Enterline, of Denver, Colo., for respondents.

GALEN, J. This is an action to recover damages for alleged false and fraudulent representations made to plaintiff by the defendant relied upon by the plaintiff, as a result of which he was induced to purchase from the defendant at face value two overdue promissory notes executed by one Thomas C. Smith, secured by chattel mortgages on certain automobiles, aggregating in amount \$3,366.35. Seven thousand dollars are claimed as actual and \$2,000 as exemplary damages. Upon issues joined, the cause was tried before a jury. At the conclusion of plaintiff's case, defendants moved the court for a nonsuit, which was granted, and judgment thereupon entered for defendants, with their costs. The appeal is from the judgment, and from the order denying plaintiff's motion for a new trial.

But one question is presented decisive of the case, viz.: Did the court err in granting a nonsuit?

It appears that one Thomas C. Smith was, on January 1, 1918, indebted to the plaintiff in the sum of \$1,606 and interest, represented by two promissory notes past maturity; that the plaintiff had on that date commenced action to recover thereon, in which an attachment issued and levy was attempted to be made upon certain automobiles covered by two chattel mortgages of record, executed by Smith as mortgagor, in favor of the defendant bank, mortgagee. In an effort to protect his demand and secure payment thereof, the plaintiff went to the defendant bank, paid off the amount of Smith's indebtedness to the bank, aggregating \$3,366.35, and the notes and chattel mortgages securing the same were thereupon assigned and delivered to the plaintiff. At the time of this transac-

tion, the plaintiff was accompanied by his attorney, John L. Waddell, and the sheriff, John Kifer. The business was conducted by the defendant Garvey as cashier of the bank, in the presence of the attorney and the sheriff; indorsements being made by the attorney. Thereupon the sheriff was given the mortgages and directed by the plaintiff to foreclose on the automobiles therein described, under a power of sale contained in the mortgages.

In several instances the sheriff took from the possession of persons claiming ownership by purchase from Smith, automobiles covered by said chattel mortgages, resulting in actions in claim and delivery, all of which terminated adversely to the plaintiff. See the case of *Luther v. Lee* (Mont.) 204 Pac. 365. In this action plaintiff seeks actual damages for loss of the amount paid to the bank by him in exchange for the Smith notes and chattel mortgages, the amount of Smith's independent indebtedness to the plaintiff, and for the expenses and costs incurred by him in litigation in an endeavor to recover the property covered by such mortgages. By way of proof of the alleged fraud and misrepresentation, it appears that the defendant Garvey, acting as the agent of the defendant bank, represented to the plaintiff, at and before the purchase by him of Smith's notes and the chattel mortgages securing the same, that such mortgages were in full force and effect; that none of the property described therein had been released or discharged from the liens of the same; and that they were unpaid and undischarged. Plaintiff was one of the organizers of the defendant bank, its vice president, and a member of its board of directors and loan committee.

The plaintiff Lee testified on direct examination, in part, as follows:

"C. T. Garvey was engaged in business in Hardin, Mont., on the 21st day of January, 1918, as cashier of the Stockmen's National Bank, and also as a director. He has been cashier of that bank since the bank opened, I think the 5th of September, 1917; I am not positive. C. T. Garvey was in charge of the business of that bank at the time it opened on January 21, 1918. As to whether he had full charge of all the business transacted there, I thought he had. He had as far as I was concerned. When Mr. Garvey was there, he had charge of the windows and moneys in making loans. * * * I had talked to Mr. Garvey about the indebtedness of Thomas C. Smith to me on these two notes. * * * Q. And just state to the jury what Mr. Garvey advised you and told you to do. A. Why, Mr. Garvey and I talked this over several times, but a day or two before that he advised me to take up this mortgage and foreclose on it. As to the substance of what Mr. Garvey told me, it would be hard to say. I talked it over with Mr. Garvey and asked him if he had ever given any con-

sent to sell any of these cars, to release any of them. I refer to the cars mentioned in this mortgage, Ford cars and Buicks. Mr. Garvey told me with reference to taking up these mortgages: 'That is a good way for you to get even, and also save the bank foreclosing on it.' He says: 'You have got to do it.' He says: 'That is the way for you to get your money.' He says, 'There is plenty there to pay the bank, to take up these mortgages,' and to pay me part anyway. I was to be paid by foreclosing on this mortgage, taking the cars, and selling them. Attachment was discussed by me and him at that time. I asked him how much there was due on it at the time, and he told me how much there was and how much stuff there was. * * * And to what was said by Garvey to me as to how I was to proceed to get the money on these cars and the mortgage, he just advised me to take up this mortgage and foreclose on them, foreclose on the mortgage.

"Q. Anything said about an attachment suit?

A. Yes. Well, there was quite a little said at the time, but he advised me to take up this mortgage at the bank and attach these cars and foreclose this mortgage. There was quite a little said. After I had this talk with Garvey, I had other talks with him. Q. Before you took up the mortgages? A. Well, I would say there for two days, every time he would meet, that was about all we would talk about. I think Mr. Waddell was with me at one time when I had subsequent talks about taking up this mortgage. Mr. Waddell at that time asked Mr. Garvey if he had ever given any permission to sell these cars. I think the date of that was * * * the morning of the 21st. That was the time that I made the payment to the bank, the afternoon of the 21st. Mr. Garvey was there with me and Waddell at the time Waddell asked this question. In answer to Waddell's question, Garvey told us he had never released them in any way. There were other things said there at the time Waddell and I were there. I think I mentioned about the Paisley car and the Small car and my own car, which was supposed to be in this mortgage. Concerning those, I told Garvey I didn't see where I could hold this car, on account of the Paisley car and the Small car coming through that bank, and he says: 'I think you could.' I says, 'I think you have been paid for them,' or words to that effect, 'because you have accepted their notes.' At that particular time Garvey said that the cars had not been absolutely released, none of them. I filed suit against Smith on the two notes. * * * I took up the chattel mortgage from the Stockmen's National Bank on the Buick and Ford cars. I did that on the 21st day of January, 1918. Mr. Waddell and Mr. Kifer, the sheriff of this county at that time, were with me when that was done. At the time I paid for these two chattel mortgages, when Mr. Kifer and Mr. Waddell were there, Mr. Garvey made the remark that he didn't see how Smith was going to stay out of the pen, providing that these people that these cars was taken from would crowd him, unless they was his friends and just let him off; and also it was asked there in the presence of the four of us if he had ever given any consent to release any of those cars in any way. In answer to that he said, 'No.' He was asked if he gave any authority to release any of those cars and gave

Smith permission to sell any of them, and he said he absolutely did not."

And further he testified:

"As to what I did towards taking over these Buick and Ford cars under the chattel mortgages, Mr. Kifer, Mr. Waddell, and I went over there and gave them a check, after I had gone to Mr. Waddell and got the papers fixed up and turned them over to Mr. Kifer. What cars I got under the mortgage I think I put in the garage over here. Of the Ford and Buick cars mentioned in these two chattel mortgages, we got two cars, a Ford and a four-cylinder Buick. I guess it was two Fords and one Buick. The Buick was a four-cylinder Buick that Edgar Jones down the valley here had. Of the Ford cars described in the chattel mortgage, I recovered the Young and Luther cars under the chattel mortgage. I did not hold those cars and dispose of them and sell them. I held them for a little while is all. They replevined them and took them back. They brought suits against me."

And as regards his connection with the bank and familiarity with its business and affairs, he testified on cross-examination:

"I can't say that I did anything at all on my own volition about the matters of the bank. I talked the matter over with Mr. Bowman and Mr. Garvey; Mr. Garvey more than Mr. Bowman. From month to month, as I attended the directors' meetings, I went over the various notes and discounts handled by the bank. Some of them I approved; some we would agree on; some we would not agree on. At any rate, I exercised my judgment on them. Then after September, 1917, along that year, the Smith notes came before the bank for consideration several times during the year. As to whether I inquired at any time as to the status of his financial condition, I would like to answer that so the jury and judge and all will understand. When we first was going to organize this bank, Mr. Smith goes to Mr. Garvey and wanted a loan, and I told Mr. Garvey not to let Mr. Smith go too far, and I says, 'Get security.' Mr. Garvey was down here a month or six weeks before the bank opened up. He was making loans to other people besides Smith. If I remember right, when we opened the bank, Smith had something over \$14,000 of notes, which he thought, when we got opened up and got these notes, because—he thought was \$8,000, and Mr. Langworthy and Mr. Bowman jumped all over him about it, that he thought he had only \$8,000, and come to find out he had about 14—about that, and they was after him to cut that down, until I took this up. I think I was a witness in my own behalf in the Luther case. I do not remember every word I testified about this same matter in the Luther case. Q. Didn't you testify there, in answer to a question of mine on cross-examination, that you were the cause of Mr. Smith getting started there at the Stockmen's National Bank and getting as much money as he did? A. I think I did—in this way. Getting 8 per cent. money, but I told Mr. Garvey to get plenty of security for it. As to whether I testified (in the Luther case) in answer to the following questions by you 'Why were you so solicitous about asking whether he turned money in or

not? A. If you want to know that, Mr. Enterline, I was the cause of Mr. Smith getting started there and getting as much money as he did, I will say I might have sworn to that. As to whether I will swear now that I didn't so testify, I wouldn't say. As to whether that is correct or not, I wouldn't say, but I will say now that I told Garvey to hold him down. I wouldn't say positively to the jury now that I didn't give that evidence.

"Q. Didn't you know before you purchased these notes that Smith was from time to time disposing of this mortgaged property? A. Well, the Paisley car and the Small car and my own car, which it turned out that my own car wasn't mortgaged. As to whether you asked me the following question, and I made the following answer, (in the case of Luther v. Lee): 'Q. Did you know, Mr. Lee, or didn't you know, that Mr. Smith from time to time was selling this mortgaged property? A. Oh, yes, sir. It is a cinch he was selling it.' It is a cinch that he had sold some of it. I did not know that he was disposing of this mortgaged property from time to time, only what I have mentioned. In this particular bank case I knew that he had disposed of that. I did not know his financial condition exactly when I took him down to the Stockmen's National Bank. I did know that I was an indorser there on a note secured by a mortgage and that he had disposed of the property. I knew Mr. Smith three or four years before these transactions arose. He started in to build the garage in which he afterwards transacted his business, first in partnership with me, and then he couldn't keep up his end, and then I rented the garage to him. Until the 1st of November, 1917, he kept his cars and transacted his business at my garage. I kept my car in that garage. I was not there almost daily. At times I would be out of town for a week or ten days. When I came to town I would come to that garage. There is where he kept his Buick cars and the Ford cars and the Hupmobiles until November 1, 1917, all of which were mortgaged in the general transaction of this business. Any fool would know they were not keeping the cars just for exhibit. As to whether I knew he was selling them in the general course of business, any fool would know that. If a man paid cash for a car that was mortgaged, I supposed that Smith would turn in the cash. As to whether that was the arrangement, I couldn't say what arrangement Garvey had. I did not make any investigation then as a director and a member of these committees as to the financial situation. I quit taking my cars there or quit being on friendly terms with Smith on the 1st or 3d of November. He first went into the garage when it was first built; I think it was 1915; I wouldn't say when; the fall of 1915, I think. I could not say I was acquainted with his way of doing business from then to November. This note that I signed as an indorser in the First National Bank of Hardin, I knew that that was due six months after September 4, 1916, as it reads.

"Q. Let me understand. When you first had the conversation with Garvey, whereby you made up your mind to bring this suit and pay the note of the First National Bank and take up these other notes, when was the first conversation had in reference to that? A. Well, that I really made up my mind to do it? Q. No,

when you had the conversation with Garvey. A. Well, you said when was the first conversation I had and when. I would say the first conversation I had was four or five days before. We might have been up in Garvey's room. There wasn't a day that Garvey and I wasn't together going to eat, or something like that. My purpose in taking Waddell down there after I talked to Garvey was because he was my attorney. I wanted to take him down there because I wanted him and Garvey to talk it over. Q. And what was your purpose, you say, to have him tell it before Waddell, or what? A. That is to have him look over these papers—to have him look over the mortgage and one thing another. That was the purpose, for assigning them over to me. That is the reason that I took Waddell down there, and draw up the necessary papers for me—to take up the papers. That is what Garvey advised me to do—to take up the mortgage. That I would go and get Waddell is not the only thing I said. As to what else I said at that time when I went there before I brought Waddell down, we might have talked over some other business. It is true that, as I attended meetings from time to time after the bank was started, monthly meetings, notes were turned in by Smith on the sales of various cars that were mortgaged, and I was present at the meeting and approved them. I will have to say that I never had much to say about Smith's notes; just as I told Mr. Garvey not to let Smith go too far. I knew at all times, and before January 21, 1918, that Smith was doing business on borrowed money and mortgaging his stock from time to time to secure his indebtedness. He was doing business on borrowed money, but we had agreed at a directors' meeting some time before January not to carry him any more on borrowed money. I knew he was selling Hupmobiles and Buicks and Fords in the course of his business, and, I think, Overlands.

"Q. You knew before you purchased these notes on January 21, 1918, that Smith was borrowing money from the Stockmen's National Bank and he would secure all those loans by mortgages on the cars that he was handling? A. Well, not all loans, I didn't know. I didn't know what cars. Q. As director of the bank, you never made any suggestion, did you, to take back any of these cars that were being sold by Smith, the mortgaged property? A. Just as I told you. The only three that was mentioned was my own and this here Paisley car and the Small car. The money was turned in when we approved those notes. Q. In the former trial, Mr. Lee, in the trial of the Luther case, in January of this year, didn't you testify that Garvey advised you that Smith had sold part of the mortgaged property? A. Yes, he advised me about this Paisley and Small car. I can't say that I testified that he advised me about any other, because I don't think he did. I can't say positively about that. Q. As to the record in that case (Luther v. Lee), on your cross-examination, as follows: 'Q. And you never made any inquiry before you bought the note? A. I never did, outside of talking to Mr. Garvey about it as I have said. Q. Then Mr. Garvey, cashier of the bank, advised you before you purchased the note, he had sold this mortgaged property, at least a part of it? A. Well, yes, sir, I knew of two of them he said was the Paisley and the Small car.' I think that

is all right. And it is right that I never made any inquiry. The reason that I wanted Smith to get me off from the note at the First National Bank and the Merchants' National was not because Smith had sold all the property covered by the mortgages securing these notes. His note was way past due, and really until Mr. Howe spoke to me about this, I supposed this one was taken up. I knew that they were secured by mortgages to the bank, but I supposed this one was taken up. I knew then that he disposed of this property covered by the mortgage securing these notes on which I was indorser to the Merchants' National and the First National Bank. Q. Now, calling your attention to page 59 of the record in your testimony that you gave in the Luther trial, the questions propounded to you by me on cross-examination at the trial and your answers: 'Q. Well, let me ask you this, Mr. Lee, when you bought this note in question prior to that, what investigation did you make as to what mortgaged property was still undisposed of under that mortgage? A. What mortgaged property was still undisposed of? Q. Yes. A. Well, now I cannot say that I made any. Q. You didn't make any investigation at all? A. No, sir; not of the mortgaged property—that wasn't disposed of or anything. Q. You knew at the time you bought (referring to one of the notes in suit here) some of it was disposed of? A. It is a cinch some had been disposed of. I talked to Mr. Garvey about it afterwards.' A. I did.

'By the Court: Did you so testify—that is the question. A. Well not in this case here now. I did so testify in the Luther case. Continuing quotation of the testimony on page 60 of the witness in the case of Luther v. Lee: 'Q. And at a meeting held before you bought that note. Weren't Mr. Smith's financial conditions talked over and the fact disclosed he had sold a lot of this mortgaged property? A. Well, there was some, yes, sir. I think Mr. Garvey was authorized by some of the directors to make Mr. Smith pay this note. Q. And you knew then before you bought this note in question that Smith had disposed of a lot of the mortgaged property and the notes hadn't been paid, didn't you? A. I would not say "a lot."'

'Mr. Enterline: This is on page 60: 'Q. Didn't you know at all times yourself that Smith in the automobile business was disposing of mortgaged property? A. Well, not all the time; no I didn't. Q. Didn't you know, Mr. Lee—in the first place you started, you and he, to build a building, and that fell through, didn't it? A. It never got much of a start. He fished to me a little bit, I guess. Q. So you knew his financial condition was such that he was doing business by borrowed money, secured by mortgages, did you? A. Yes, sir; he was borrowing money, and Smith gave me the impression he had money. He always said he could get plenty of money. Q. He was still borrowing money? A. Any of us borrow money; I am at present myself.'

'I did not know it part of the time. After having to take up this note, I did. Referring to the meeting we had, in which Mr. Smith's financial condition was talked of, Mr. Richardson, one of the directors, did not tell me that he was my customer and that I would have to take it up. With reference to my claim of various items of damages, I have that list

with me, I think. The first item which I gave was P. W. Young. That was paid out on compromise. \$183 was paid to him on the compromise. That was after I was beat in the Luther case. Young had a Ford car. We learned that he had that Ford car. I will say some time in January—the last of January, 1918. Before I purchased the notes, I had not made any inquiry about that car that he had. Young lived about 12 miles north of Hardin. I knew him. I believe I learned that Young had one of these cars through Waddell looking it up and finding out where it went after we started this action. I suppose I could have found that out before I purchased the notes if I had made an investigation. The next item is Fraser Bros. They purchased a six-cylinder Buick, covered by one of the mortgages I introduced in evidence. That six-cylinder Buick was a touring car. I paid them \$52.50. I had the sheriff go and take the car from their possession and the Fraser Bros. replevined it back. I paid that money out on a compromise with those parties. I knew the Fraser Bros. before I purchased these mortgages. As far as I know, they are reputable people. I suppose I could have found out where it was before I purchased the mortgage. I paid them \$52.50. That was a Buick covered by one of the mortgages introduced in evidence here. The next item is Edgar Jones. He had purchased a Buick, four-cylinder. That was also one of the ones mentioned in this mortgage. I found out that he had that the same as the others. After Mr. Waddell started out, we found out where we had these cars. It was quite a little before we found out who had all these cars. I said the last one was Edgar Jones, four-cylinder Buick. The Fraser Bros. had a six-cylinder Buick. Both of those were touring cars. The last one I mentioned was Jones. I knew Jones. He is a citizen of this county. He lives about 10 or 11 miles north of here. All these parties that I have mentioned so far, all claim to have purchased this property from Tom Smith while he was engaged in the automobile business right here in this town. Of course, if I had conducted the investigation before I purchased these mortgages, I would have learned that fact. Probably it would have taken me quite a while. In that case, I paid \$125. That was in the way of compromise also. The next one that I have down here—of course, that isn't paid yet—the Luther judgment. Of course, I am charging that up to this man and I haven't paid it. I had my lawyers argue a motion for a new trial in that case. I don't know as my intentions is to keep on fighting that case. I don't know whether I am charged here with abusing him—sort of fining me in that case. It may be that I was fined when I took the car away from the man, if that is the way you look at it, if that was the rule on which I was punished there. I paid the sheriff \$30 for going and getting these cars and one thing another mentioned in their expenses. He got the cars mentioned in here. He got the Small car. That is not included in this. He got the Paisley car. That is not included in this. As to whether I sent him out after the Paisley car and the Small car, although as you remember my testimony, I told Garvey I could never get them—I told Garvey we couldn't hold them; that was my idea. Still, I sent the sher-

iff out, since Mr. Garvey insisted we could. I seemed to be under the domination of Garvey.

"Q. Now what else, what other cars did you find under this mortgage—I am referring now to the Buick mortgage—other than the two touring cars that you have mentioned? A. What other cars under this mortgage? Q. Yes. A. Well, my car was supposed to be under the mortgage. It is on, it is mentioned. My car, this Buick roadster, model E44, was my car. That is the description of my car which I bought. Come to find out, I bought the car before the mortgage was given. Q. Now this note and mortgage were passed on by you as one of the directors, after it was given, at one of those meetings, was it not, before you bought it? A. Before I bought the car? Q. No, no, before you bought the mortgage. A. Yes, I did not, as one of the directors, pass upon Exhibit F (the mortgage covering the Buick cars) in this case as all right, in which my car was described, and which I now say I purchased before the mortgage was given. As to whether or not it was rejected, there was quite a little talk about it. Mr. Garvey was notified by the directors to get after Smith and close in. We told him to get the money from Smith and make him cut down on the loan—words to that effect. I did not conduct an investigation as a director of that bank at any time as to the situation of the mortgage and the condition of the property, for I relied upon Mr. Garvey's statements."

John H. Kifer, a witness for the plaintiff, who occupied the position of sheriff in Big Horn county in 1918, testified, in part:

"I recall a transaction that Mr. Lee had with reference to some chattel mortgages against a man named Thomas C. Smith. With regard to that transaction, I think I was present when any inquiries were made as to the status of the property covered by the mortgages. As I recall it, it was the day that we took the mortgage up at the Stockmen's Bank. I don't think I talked with anybody at the Stockmen's National Bank, but I heard the conversation, I think, that was directed there with Waddell and Lee; I think was there. I think the conversation was had with Mr. Garvey. I heard something in that conversation that was said by Mr. Garvey, for instance. It was with reference to whether or not he gave Smith permission to dispose of any of the property, automobiles. I heard Mr. Garvey say, in response to that inquiry, that he had not. That is practically all, I believe, that I just recall at this time of the conversation that was had at that time in my presence. As to whether I had anything at all to do with these mortgages until after this conversation, it was just about that time. I think I was possibly taking up the mortgage at that time, or near then. If you direct my attention to what, if anything, I did with reference to any of the property covered by these two chattel mortgages, I would state that I think it occurs to me that we made an attempt to get in possession of some of them. When I made the attempt, we had some luck, and some we didn't. Some of them wouldn't give them up. I found the property scattered throughout the county, and some of them we never did find."

John L. Waddell, a witness for the plaintiff, testified, in part, as follows:

"I was in the law business in the month of January, 1918. I had something to do as the attorney of Mr. Lee with reference to some chattel mortgages owned by the Stockmen's National Bank in the month of January, 1918. I was present when some conversation was had between Mr. Lee and Mr. Garvey with reference to some chattel mortgages. If I remember correctly, the time when this conversation was had was the morning of January 21, 1918, in the Stockmen's National Bank in the town of Hardin. I recall who was present when that conversation was had. Mr. Garvey and Mr. Lee and myself were present. There was nobody else present right at that time. I know a man named Kifer who was sheriff at that time. As to whether he was present at that time, he was present at a second conversation that we had, and Mr. Kifer and Mr. Garvey and Mr. Lee and myself. As to what was said and what was done at that conversation, Mr. Lee had me prepare papers for an attachment against the property of Mr. Smith, and we checked up the items on the mortgages held by the Stockmen's National Bank and the Ballantine State Bank against property of Mr. Smith. That was in the first conversation. Mr. Lee was present. Mr. Garvey and I checked that over. As to how long after the first conversation the second conversation was had, it occurs to me that was some time in the afternoon of the 21st of January, 1918. Mr. Garvey and Mr. Kifer and Mr. Lee and myself were present at that second conversation. As to what conversation was had at that time, Mr. Lee opened the conversation, I believe. Anyhow, he made the statement that we were going to attach, or that he was going to attach, the property of Smith, and that he was going to arrange to take up the mortgages held by the Stockmen's National and the Ballantine State Banks. He stated that to Garvey. Mr. Garvey immediately produced the bank's copy of the mortgage, and we began to go over the items, and I asked Mr. Garvey if permission had been given for the sale of those cars, and he said: 'No, only Smith must account to me for the purchase price before title could be secured.' That was not all of the conversation with reference to the mortgaged property. We then asked the amounts due, and a check was drawn."

And on cross-examination, he testified as follows:

"As to when I was employed by Mr. Lee to bring the attachment suit, with reference to January 21st, it must have been a matter of a week or ten days before that. That is, I was consulted about the matter a little before that. I was not consulted by Mr. Lee relative to an attachment suit against Mr. Smith a week or ten days before January 21st; it was with reference to a foreclosure. I was consulted about bringing a suit about a week or ten days prior—somewhere about there—I don't just remember. I am not positive whether I had already drawn the papers and commenced the action before I went to the bank on January 21, 1918. I don't know what day the action was filed. I must have had out the attachment because we bought (brought) it under that act of the Legislature which provided that, after attachment writ was issued, we could then buy up the mortgaged property. It might have been filed

that day, but it was surely filed before the second conversation when Mr. Kifer was present; but possibly it might not have been filed when we had the first conversation. In the course of that conversation—either the first or second—I asked Garvey as to whether he consented to the selling of three of these particular cars, I think, as to whether he consented to sell to those particular individuals. As to whether Mr. Garvey told me that the arrangement was that any sales made by Smith, Smith was to account to the bank for the purchase price; he did not tell me in those words. As near as I can remember, it was that the purchase price must be accounted to Garvey. He didn't say that if that was done it would be satisfactory, but I judged from what he said. * * * I mentioned those particular individuals, but I knew as attorney for Lee that certain of those cars had passed out of the possession of the mortgagor at the second conversation. At the second conversation, we found out that some of those cars were not in the possession of the mortgagor. That was not before Lee paid the money. The second conversation was when I and Kifer and Lee went down there. I, as representing Mr. Lee, knew the importance of finding out what property was still covered by this mortgage, and I made no investigation other than the conversation we had with Mr. Garvey. I was on friendly terms with him, and am now, as far as I know. I did not go over to the garage and make any investigation before making this investigation. As to whether I could have found out if I had made the investigation just as the sheriff did, making attachments, I never made the practice to investigate those things myself. As to whether I knew the importance as a lawyer and man buying a mortgage, I relied entirely upon the statements of Mr. Garvey. My recollection is that the suit was filed before we purchased the notes, but there might have been a conversation or two before we filed the suit."

The plaintiff then offered in evidence the testimony of C. T. Garvey, taken by deposition in the case of John Luther v. Walter O. Lee et al., and four other cases then pending in the district court of Big Horn county. On direct examination, he testified:

"After the taking of these three mortgages which have been testified to, and which are attached to the complaints which I have identified, I did not at any time give to Thomas C. Smith any authority to sell any of the automobiles mentioned in any one or all of these chattel mortgages. I did not know that Thomas C. Smith ever sold to John Luther a four-cylinder, model T, Ford touring car, described in the complaint as car number 2220238. He never advised me at any time that he had sold that car to John Luther. Thomas Smith never advised me that he had sold to P. W. Young one Ford automobile numbered 2247443, included in the mortgage covering Ford automobiles, which I have heretofore identified. I never knew he sold that car to P. W. Young. Thomas C. Smith never told me that he had sold to Edgar Jones, one Buick automobile, touring car, model E35, frame 349296, motor 368667. I did not know, at any time prior to the sale of this note, that Thomas C. Smith had sold the cars just mentioned to John Luther, P. W.

Young, and Edgar Jones. I never knew, prior to the sale of these three notes, 1, 2, and 3, to Walter O. Lee, by my bank, that that car had been sold to Gibbs. Prior to the time I sold the notes, Exhibits 1, 2, and 3, to Walter O. Lee under demand of the sheriff, as I testified, Thomas C. Smith had never told me of his having sold cars other than those described in the complaint, or answers, in the five present actions, that were covered by these three mortgages and mentioned in these complaints."

Upon cross-examination, he testified:

"When I took the notes * * * which are also secured by chattel mortgages on automobiles handled by Mr. Smith in the conduct of his automobile business, I knew then, as cashier of the Stockmen's National Bank, he was from time to time disposing of the mortgaged property under the same agreement, and I consented to that, that is, on condition that he should turn in the proceeds to the bank. That was a private agreement between me and Mr. Smith; I acting as cashier of the Stockmen's National Bank, and Mr. Smith, of course, acting for himself. As to whether I gave my consent as cashier of the Stockmen's National Bank that he should from time to time dispose of the mortgaged property, that is, sell it, but that he should turn the proceeds of the sales when he made them in to the bank, I would say cash sales were to be indorsed and the notes O. K'd by me. With reference to these specific instances where the sales were made, he didn't come out and tell me he sold the cars to these fellows. Sure, I knew he sold them to somebody. They weren't there. As to whether I knew when I took all these chattel mortgages as cashier of the Stockmen's National Bank, and also as an officer of the Balantine State Bank, at that time that the only way Smith had to pay would be to sell this mortgaged property, I would say these loans were not the full valuation. We didn't stake him the full amount of a carload of cars. I knew there is where he would get his money. He was in the automobile business, sure, to sell automobiles. Surely he could not take the merchandise over in one place and let them stand there doing nothing. Surely, I knew at the time on November 27, 1917, when he paid this \$1,000 on note marked Exhibit 3, that he must have sold some cars to get that money. He must have sold some cars, but I didn't know what cars he was selling. Q. Every time he came in and paid any money, you accepted the money and didn't want to know what car he sold; but you were satisfied? A. Selling cars and indorsing it on the paper, that was all right. I made no objection. With reference to this particular mortgage introduced in evidence, I knew that Mr. Smith was going to sell these automobiles to various purchasers from time to time while the mortgage was in existence. I, as cashier of the bank, consented to him doing that. I consented as cashier on behalf of the bank to him selling these automobiles from time to time in due course of business, and that was our arrangement and understanding."

The foregoing synopsis constitutes the gist of all of the plaintiff's testimony offered in support of his complaint.

[1, 2] As defined by our statute, section 7480, R. C. M. 1921—

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (3) The suppression of that which is true, by one having knowledge or belief of the fact; (4) A promise made without any intention of performing it; or, (5) Any other act fitted to deceive."

As to whether actual fraud has been practiced is a question of fact (section 7482, R. C. M. 1921), and the burden of proof is upon the one who alleges it. *Lindsay v. Kroeger*, 37 Mont. 231, 95 Pac. 839.

[3] In order to go to the jury the plaintiff must make out a prima facie case embracing the elements of actual fraud, viz.: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. 26 C. J. 1062.

"When it appears that a party, who claims to have been deceived to his prejudice, has investigated for himself, or that the means were at hand to ascertain the truth * * * of any representations made to him, his reliance upon such representations, however false they may have been, affords no ground of complaint." *Grinrod v. Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891; *Power & Bros. v. Turner*, 37 Mont. 521, 97 Pac. 960; 26 C. J. 1149.

"One cannot secure redress for fraud where he acted in reliance upon his own knowledge or judgment based upon independent investigation." 26 C. J. 1162.

[4] A judgment of nonsuit is proper where the plaintiff fails to prove a case for the jury (section 9317, R. C. M. 1921); and when no substantial evidence has been introduced by the party upon whom the burden rests, a question of law for decision by the court is presented. *Brophy v. Idaho Produce & Provision Co.*, 31 Mont. 279, 78 Pac. 493; *Escalier v. Great Northern Ry. Co.*, 46 Mont. 238, 127 Pac. 458, Ann. Cas. 1914B, 468.

[5, 6] In our opinion the district court properly granted a nonsuit, as the proof clearly establishes the fact that the plaintiff was in a position as favorable as the defendant to know the true situation and facts pertaining thereto. The plaintiff was vice

president of the defendant bank, one of its directors, and a member of its examining and discount committees. He was the cause of Smith doing business with the bank and obtaining as much money as he did. He knew that Smith was doing business on borrowed money, that Smith was selling automobiles in the course of trade, and that same were mortgaged. He had been indorser on Smith's notes, secured by mortgaged cars, which mortgaged property he knew was sold and disposed of by Smith, notwithstanding the mortgage. He was with Garvey constantly when in Hardin, visited with him, slept with him, ate with him, worked with him in the bank in connection with the conduct of the business of the bank, frequently discussed the condition of Smith's indebtedness and the mortgage security therefor. He rented the garage to Smith, used by him as his place of business, kept his car therein, and frequently visited Smith's garage. He himself bought a Buick car from Smith, which he thought was covered by chattel mortgage, allowing him a credit of \$600 on rent due for the garage, paying him \$700 cash, which cash he learned upon inquiry had not been turned in to the bank. He knew of the sale of cars made by Smith to Small and Paisley, which cars were covered by chattel mortgages to the bank.

Since it is essential that the party to whom a misrepresentation is made should be deceived thereby, and believe it to be true, one can secure no redress for a misrepresentation, which he knew to be false, nor for failure to disclose facts which he knew to exist. If the representee knew the truth, it is obvious that he was neither deceived nor defrauded, and that any loss he may sustain is not traceable to the representations, but is in effect self-inflicted. The facts disclosed in this action present a case falling clearly within the rule of caveat emptor under the great weight of authority. The evidence was not sufficient to take the case to the jury. The weakness of plaintiff's position prompts the remark that just because one brings a lawsuit or appeals a case to this court is not indicative that either is meritorious. Under all of the evidence submitted, the plaintiff failed to prove his case, and in our opinion the nonsuit was properly granted.

The judgment and order are affirmed.
Affirmed.

COOPER and HOLLOWAY, JJ., and AYERS, District Judge (sitting in place of REYNOLDS, J., disqualified), concur.

BRANTLY, C. J., being absent, takes no part in the foregoing opinion.

**AUSTBY v. YELLOWSTONE VALLEY
MORTGAGE CO. (No. 4788.)**

(Supreme Court of Montana. May 24, 1922.)

1. Army and navy ⚡34—Federal Civil Relief Act not in conflict with state statute.

Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½ss), suspending during the "present war" legal proceedings prejudicing the civil rights of persons in military service, was designed to protect such persons while in active military service, while Laws 1919, c. 104, expressly protects them from foreclosure of their mortgages only for one year after an honorable discharge, and there is no such substantial conflict between them as to render the latter inoperative.

2. Army and navy ⚡34—Allegation sufficient under statute allowing double damages to discharged soldier for wrongful foreclosure of mortgage.

In an action to recover for foreclosure of a mortgage contrary to Laws 1919, c. 104, prohibiting the same against ex-service men for one year after honorable discharge, an allegation that immediately upon securing a decree of foreclosure the mortgagee procured the sheriff to take possession of the mortgaged property is sufficient under section 5 thereof, providing any person whose security is taken contrary to the act may recover double damages.

3. Army and navy ⚡34—Allegation held to necessarily imply oppression, fraud, or malice in foreclosure of mortgage on property of discharged soldier.

In an action by discharged soldier to recover double damages for foreclosure of a mortgage and taking of security contrary to Laws 1919, c. 104, § 5, prohibiting the same against ex-service men for one year after honorable discharge, an allegation that the mortgagee procured the sheriff to take possession of the mortgaged premises before sale is sufficient, even though recovery depends upon oppression, fraud, or malice, without express use of the terms "oppression," "fraud," or "malice," and even though the statute is penal and permits recovery of more than compensation.

4. Army and navy ⚡34—Failure to allege plaintiff discharged soldier employing attorney to set aside foreclosure paid or was liable for attorney fee sought to be recovered renders complaint insufficient.

In an action to recover damages for wrongful foreclosure of mortgage against an ex-service man within one year after honorable discharge, under Laws 1919, c. 104, an allegation in the complaint that plaintiff was compelled to, and did, employ an attorney, stating the reasonable value of the services, but failing to allege payment by plaintiff or any liability to pay therefor, is insufficient.

5. Army and navy ⚡34—Not recoverable if unnecessarily incurred.

In an action to recover damages for wrongful foreclosure of a mortgage against an ex-

service man within one year after honorable discharge, under Laws 1919, c. 104, damages for time lost and for traveling expenses and attending the hearing on the motion to vacate the foreclosure decree could not be recovered where the complaint showed that the motion was made on affidavits, and therefore plaintiff's presence was not required; only damages proximately resultant from defendant's wrongful act being recoverable.

6. Army and navy ⚡34—Costs in foreclosure suit abide judgment in such action and are not recoverable as damages in action for wrongful foreclosure.

In an action by an ex-service man under Laws 1919, c. 104, for damages for wrongful foreclosure of a mortgage against him within a year after honorable discharge, he may not recover, as damages court costs paid by him in the foreclosure suit, which must abide the result of such suit under Rev. Codes 1921, § 9788, as he cannot recover them twice.

7. Army and navy ⚡34—Act extending time for foreclosure against ex-service men merely stays entry of decree in suit commenced before passage.

A foreclosure suit, commenced before Laws 1919, c. 104, prohibiting foreclosure of a mortgage against an ex-service man within a year after honorable discharge, was not wrongful, and the effect of the act thereon was only to stay entry of a decree until expiration of the time limited by the act.

Appeal from District Court, Richland County; O. C. Hurley, Judge.

Action by Nels Austby against the Yellowstone Valley Mortgage Company. From a default judgment for plaintiff and an order refusing to set it aside, defendant appeals. Reversed and remanded.

Brattin & Ketter, of Sidney, for appellant. Jens Rivenes, of Glendive, and A. A. Grodud, of Helena, for respondent.

HOLLOWAY, J. This action was brought to recover damages for the wrongful foreclosure of a mortgage. Plaintiff recovered judgment by default, and defendant appealed therefrom and from an order refusing to set aside the default and permit it to answer.

The complaint alleges that plaintiff was in the military service of the United States from June, 1917, until December, 1918, on which latter date he was honorably discharged; that on October 2, 1918, defendant herein commenced an action in the district court of Richland county to foreclose a mortgage which plaintiff had theretofore executed; that such proceedings were taken that on July 1, 1919, the default of this plaintiff was entered, and a decree of foreclosure rendered; that plaintiff was required to, and did, employ an attorney to procure the decree to be set aside, and it was set aside on September 3, 1919; that the reasonable value of the

attorney's services was \$175; that plaintiff attended the hearing on the motion to set aside the decree, and lost seven days' time to his damage in the sum of \$42; that he paid out \$28.50 in traveling expenses to attend such hearing; and that he was required to pay \$2.50 court costs. These items aggregate \$248, and the prayer is that plaintiff recover double that amount. The judgment follows the prayer, and is for \$496.

[1] We are not impressed by the argument advanced by defendant that chapter 104, Laws of 1919, is not operative. If there were any irreconcilable conflict between this act and the Soldiers' and Sailors' Civil Relief Act (40 U. S. Stat. 440 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½ss]), then clearly the federal statute would prevail, at least to the extent of the repugnancy, but the purpose of the two acts is altogether different. The preamble to the federal statute declares:

"For the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war," etc.

That act is distinctly a war measure designed to protect those in the military service of the government, and thereby enable them to devote their entire energies to the needs of the nation. Chapter 104 was not enacted until March 4, 1919, more than four months after the Armistice was signed. It is not intended to afford protection to persons while in the military service, but, on the contrary, expressly declares that its protection extends only to those who have been honorably discharged. Speaking in general terms, the federal act protects the soldier while he is in active military service, whereas our state statute extends protection to him for one year after his service has been terminated by an honorable discharge. There is not any substantial conflict between the two acts. Chapter 104 differs materially from the statute considered in *Konkel v. State*, 168 Wis. 335, 170 N. W. 715, or the Oregon Act involved in *Pierrard v. Hoch*, 97 Or. 71, 184 Pac. 494, 191 Pac. 328.

[2] In the complaint herein it is alleged that immediately upon securing the decree of foreclosure, this defendant, plaintiff in the foreclosure suit, procured the sheriff to take possession of the mortgaged property. If this allegation be true, the case is brought within the meaning of section 5 of chapter 104 above.

[3] Assuming that the statute in so far as it authorizes the recovery of double damages is penal in character (17 C. J. 997), and that a recovery of more than compensation can be had only in the event that the person causing the damages was guilty of oppression, fraud, or malice (*McDonald v. Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616), still the complaint herein is not open to the criticism that it does not warrant a recovery of double damages if any damages are recoverable. It is true that plaintiff does not employ any of the statutory terms "oppression, fraud or malice," but if the facts stated give to the acts of the plaintiff in the foreclosure suit the character of oppression, fraud, or malice, the complaint is sufficient, and the allegation that the plaintiff in that action procured the sheriff to take possession of the mortgaged premises before sale necessarily implies that he acted oppressively, for there is not any authority in law for such procedure.

[4] The complaint is subject to other objections lodged against it. It is alleged that plaintiff was compelled to and did employ an attorney to have the decree set aside, and that the attorney's services were of the reasonable value of \$175, but it is not anywhere alleged that plaintiff has either paid or become liable to pay that sum or any sum whatever. In principle, the case is governed by *Plymouth Gold Mining Co. v. United States F. & G. Co.*, 35 Mont. 23, 88 Pac. 565, 10 Ann. Cas. 951.

[5] Actual damages are claimed in the sum of \$42 for time lost, and \$28.50 for traveling expenses in attending the hearing upon the motion to vacate the foreclosure decree, but it is alleged in this complaint that the motion to vacate the decree was made upon affidavits, so that it appears impossible that plaintiff's presence at the hearing was necessary, and it is elementary that the only damages which he can recover are those which resulted proximately from the defendant's wrongful act.

[6, 7] It is alleged that plaintiff was required to pay \$2.50 court costs, and this must refer to his appearance fee in the foreclosure suit. The costs in that action will abide the judgment. If plaintiff herein, defendant in that suit, finally prevails, he will recover his costs as a matter of course. Section 9783, Rev. Codes 1921. He cannot recover them in that action and also in this one, but whether he does or does not prevail in the foreclosure suit, that item of expense is not a proper element of damages in this action. The foreclosure suit was instituted before chapter 104 was enacted; hence the commencement of the action was not wrongful. The only effect of the act was to stay the entry of a decree until the time therein mentioned expired.

The complaint does not state facts sufficient to constitute a cause of action, and will

not support the judgment. The judgment and order are reversed, and the cause is remanded to the district court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

COOPER and GALEN, JJ., and AYERS, District Judge (sitting in place of BRANTLY, C. J., disqualified), concur.

(63 Mont. 435)

McVEY v. JEMISON et al. (No. 4781.)

(Supreme Court of Montana. May 24, 1922.)

1. Appeal and error \S 854(6)—Grant of new trial supportable on any ground alleged not disturbed.

The action of the trial court in granting a new trial will not be disturbed on appeal, where supportable on any one of several grounds relied on.

2. Appeal and error \S 979(2)—Discretion in granting new trial not disturbed where the evidence is conflicting.

Where the evidence is conflicting, the discretion of the trial court in granting a new trial will not be disturbed on appeal, in absence of anything showing abuse of discretion.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by Ralph McVey against Abraham Jemison and Philip Jemison. Verdict for plaintiff, and, from an order granting a new trial, plaintiff appeals. Affirmed.

Richard H. Smith and Arthur A. Brown, both of Missoula, for appellant.

HOLLOWAY, J. This action was brought to recover damages for trespass upon real estate. Plaintiff alleges that from January 1, 1914, to January 1, 1919, he was the lessee, in possession, and entitled to the possession, of 100 acres of land situated in Missoula county; that in September, 1918, the defendants wrongfully entered upon the land and plowed up and destroyed growing crops, to his damage in the sum of \$400. The answer is a general denial. The cause was tried to the court sitting with a jury, and resulted in a verdict in favor of plaintiff for \$150. Upon application of defendants, the court granted a new trial and plaintiff appealed from the order.

[1] The notice of intention to move for a new trial specifies all the statutory grounds except newly discovered evidence. The order granting the motion is in general terms, hence it will be sustained if it can be upon any of the grounds mentioned in the notice. *Sell v. Sell*, 58 Mont. 329, 193 Pac. 561.

[2] Among the grounds relied upon are insufficiency of the evidence to justify the verdict, and excessive damages appearing to have been given under the influence of passion or prejudice, and upon either of these grounds the order may be sustained. The evidence is in direct conflict upon the question: Did the defendants go upon the land and do the plowing in question under expressed permission from the plaintiff? In the district court is lodged the sound legal discretion to grant or refuse a new trial in a case where the evidence is conflicting, and its action in the premises will not be disturbed on appeal except for manifest abuse of discretion. *Fournier v. Coudert*, 34 Mont. 484, 87 Pac. 455. If the court had in mind the conflict in the evidence upon the matter to which reference has just been made, it did not abuse its discretion in granting the order. If, however, the court resolved that conflict in favor of the plaintiff, the evidence does not justify a verdict for more than nominal damages if the testimony of the defendants as to the extent of their operations be accepted as true, or, if plaintiff's testimony be accepted, the verdict is grossly excessive.

The district court, having observed the witnesses on the stand, was in a much more advantageous position to judge of their credibility and of the propriety of their verdict than are the members of this court, and the order granting the motion will not be disturbed in the absence of anything to indicate an abuse of discretion. In *Fadden v. Butte Miners' Union*, 50 Mont. 104, 147 Pac. 620, this court said:

"The question in the first instance was for the jury, and, upon motion for new trial, for the judge who saw the witnesses on the stand. If he was satisfied, as he may have been, that the preponderance of the evidence was not with the plaintiff, it was his duty to set the verdict aside. With such an order made under such circumstances we may not interfere."

The order is affirmed.
Affirmed.

COOPER and GALEN, JJ., and AYERS, District Judge (sitting in place of BRANTLY, C. J., disqualified), concur.

(63 Mont. 50)

STATE ex rel. NEVILLE v. MULLEN et al.
(No. 4939.)(Supreme Court of Montana. April 5, 1922.
Rehearing Denied June 12, 1922.)**1. Intoxicating liquors §246—"Other vehicle"**
In statute relating to transportation refers to vehicles of character of those enumerated.

The general term "other vehicle" of Laws 1921 (Ex. Sess.) c. 9, § 26, providing for search and seizure when any officer discovers any person transporting intoxicating liquors in any buggy, etc., or "other vehicle," is limited in its meaning to designate vehicles of the general character of those particularly enumerated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

2. Intoxicating liquors §245—Statute denouncing transporting liquors in buggy, etc., not applicable to carrying in hand bag.

Under Laws 1921 (Ex. Sess.) c. 9, § 26, "other vehicle" being construed to designate vehicles of the general character of those enumerated, that section has no application to the seizure of liquors transported in a hand bag, and the section is not irreconcilable with Laws 1917, c. 143, § 9.

3. Intoxicating liquors §245—Statutes relating to traffic and possession of liquors not being irreconcilable, each to be given effect.

Laws 1921 (Ex. Sess.) c. 9, § 39, declares, "Except as herein otherwise specified, this act shall be construed as supplemental to add a part of all laws of this state relating to intoxicating liquors," and should be read with Laws 1917, c. 143, as constituting one general legislative plan, and, there being no irreconcilable conflict between chapter 9 and chapter 143, each should be given full force and effect.

4. Intoxicating liquors §244—Proceeding to seize liquor, when law violated in officer's presence, in rem.

The proceeding to seize liquor when the law is violated in the officer's presence, warranted by Laws 1917, c. 143, § 9, is in rem, and is independent of any criminal prosecution for violation of the liquor laws.

5. Intoxicating liquors §255—Inquiry as to officer's right to seize liquor not authorized when record does not disclose that liquor was seized as evidence.

Where the record does not disclose that liquor was seized for use as evidence, an inquiry on motion for return of the liquor, as to the sheriff's right to the possession held not authorized.

6. Intoxicating liquors §249—Right to seize liquor without process coextensive with right to arrest without warrant.

Under Laws 1917, c. 143, § 9, the right to seize intoxicating liquors without process is coextensive with the right to arrest without a warrant, and the authority to arrest without a warrant is conferred in the same terms as is the like authority given to any peace officer by Rev. Codes 1921, § 11753.

7. Arrest §63(3)—Circumstances as to officer's right to arrest without warrant stated.

The utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue. In other words, if the circumstances are such that the officer could properly secure a warrant of arrest, he may arrest without warrant if the offense which the circumstances tend to establish was committed in his presence.

8. Arrest §63(4)—Intoxicating liquors §249—Evidence held to show that officer had "probable cause" to believe law was being violated.

Where, at the time liquor was seized by the sheriff, he knew that a banquet was being given at a hotel, and that some of the persons present showed effects of drinking, and that defendant was in an alley immediately west of the hotel carrying a demijohn which was incased in a wicker cover, only partially concealed in a hand bag, and that defendant had been in the employ of one of the persons attending the banquet and was then acting as such employé, and the sheriff had been informed that he was transporting liquor to deliver it to the banquet, there was "probable cause" to justify the sheriff in securing a warrant for defendant's arrest, and consequently the seizure of liquor without warrant was proper (citing Words and Phrases, Second Series, Probable Cause).

Galen, J., dissenting.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Proceeding by the State, on relation of J. E. Neville, Sheriff, to confiscate certain intoxicating liquors seized by the Sheriff. From judgment confiscating the liquors and ordering them destroyed, Louis Mullen, claimant, appeals. Affirmed.

C. A. Spaulding, of Helena, and W. E. Keeley, of Deer Lodge, for appellant.

W. D. Rankin, Atty. Gen., and L. A. Foot, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. On the night of April 30, 1921, the sheriff of Powell county met the defendant Mullen in an alley in the city of Deer Lodge, carrying a hand bag from which protruded the top of a demijohn, the demijohn containing two gallons of intoxicating liquor. The sheriff without a warrant seized the hand bag and the demijohn and its contents, and on May 2 filed a complaint charging the transportation of intoxicating liquor in violation of law and made return, setting forth a particular description of the liquor and property seized and of the place where seized. A warrant was thereupon issued and delivered to the sheriff, commanding him to retain possession of the seized property until discharged by process of law. At the same time the court entered an order fixing the

time and place for hearing, and a citation directed to the defendant was issued and served. Prior to the hearing defendant filed his verified claim of ownership of the property and demanded a return, but at the hearing failed to offer any evidence in support of his claim. Upon the hearing the state offered its evidence, and thereafter a judgment was duly given and made confiscating the property, ordering the liquor destroyed and the hand bag and demi-john sold. From that judgment this appeal is prosecuted.

The defendant was not arrested or tried, and it is contended that the district court erred in entering judgment forfeiting the property before the defendant was convicted of violating the law.

Chapter 143, Laws of 1917, is known familiarly as the Prohibition Enforcement Act. Several sections of that act were repealed and other changes in the law effected by chapter 9, Laws of the Extraordinary Session of 1921. Speaking in general terms, chapter 143 provides two distinct methods of procedure, one applicable to cases in which the enforcement officer had probable cause for believing that the liquor laws are being violated, though not in his presence, and the other applicable to cases in which the law is being violated in the presence of the officer. Section 7 provides that in instances of the first class a complaint shall be made, a search warrant issued, a search made, and the warrant with the officer's return filed. Section 8 designates the procedure then to be followed. Section 9 provides for cases of the second class. It requires the officer, without a warrant, to arrest the offender and seize the liquor, vessels, fixtures, and appurtenances, to take the offender before the court or judge, make complaint charging the offense committed, and furnish a particular description of the liquor and property seized and of the place where the same were seized. Thereupon the court or judge shall cause a warrant to issue directing the officer to hold in his possession the seized property until it shall be discharged by process of law. The procedure shall then conform to the provisions of section 8.

[1] The present proceeding was instituted and prosecuted upon the theory that there was presented a case of a violation of the law in the presence of the officer, and, though there was not a literal compliance with the terms of the statute, the defendant cannot complain that he was not arrested or taken before the court or judge. Aside from this dereliction of duty on the part of the officer, there was a substantial compliance with the provisions of sections 8 and 9 of chapter 143, above. Neither section 8 nor section 9 was repealed in terms by chapter 9, Laws of 1921; but it is the contention of the defendant that, by necessary implication, section 9 was superseded by section 26 of the later act. Section 26 provides:

"When any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this Act in any court having competent jurisdiction. * * * The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized," etc.

The words "or possessed" in the second sentence of this section are apparently meaningless and were inserted inadvertently. The section deals exclusively with the unlawful transportation of intoxicating liquors by means of a wagon, buggy, automobile, water, or air craft or other vehicle, and, under the rule of statutory construction universally applied by courts, the general terms "or other vehicle" are to be limited in their meaning to designate vehicles of the same general character as those particularly enumerated (*Helena Light & Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446), and this was manifestly the intention of the Legislature, as the most cursory reading of the section will indicate.

[2] Under this construction it is apparent at once that section 26 has no application to such a state of facts as here presented, and that it is not irreconcilable with the provisions of section 9 of chapter 143.

[3] Section 39 of chapter 9, Laws of 1921, declares that—

"Except as herein otherwise specified, this act shall be construed as supplemental to and a part of all laws of this state relating to intoxicating liquors."

In other words, the Legislature declared that after the particularly enumerated changes in prior laws had been effected, chapter 9 should then be construed as supplemental to and a part of the remaining statutes dealing with this subject, and this declared purpose the courts are not at liberty to disregard.

"Supplemental statutes include every species of amendatory legislation which goes to complete a legislative scheme." *First State Bank v. Bottineau*, 56 Mont. 363, 185 Pac. 162, 8 A. L. R. 631.

Construed according to the manifest intention of the Legislature, chapter 9, Laws of 1921, is to be read with chapter 143, Laws of 1917, as constituting one general legislative plan; and, since there is not any irreconcil-

able conflict between the provisions of section 9 of the one act and section 26 of the other, each is to be given full force and effect.

Prior to the enactment of chapter 9, Laws of 1921, a statute substantially in the language of section 9 of chapter 143, Laws of 1917, had been held to be not sufficiently comprehensive in its terms to authorize the seizure of an automobile or other like vehicle used in the unlawful transportation of intoxicating liquors (*One Cadillac Automobile v. State* [Okl. Sup.] 172 Pac. 62), and apparently it was the purpose of our Legislative Assembly, in enacting section 26 of chapter 9 above, to broaden the scope of the laws and avoid the conclusion reached in the Oklahoma case.

[4] This proceeding, warranted by section 9, c. 143, is in rem and altogether independent of any criminal prosecution for a violation of the liquor laws. *State v. Kelly*, 57 Mont. 123, 187 Pac. 637; *State v. Nielsen*, 57 Mont. 137, 187 Pac. 639. We need not determine the character of the proceeding authorized by section 26 of chapter 9.

[5] Again it is contended that the trial court erred in refusing to order the liquor, container, and hand bag returned to the defendant upon his written demand therefor, seasonably made, and the decision of this court in *State ex rel. Samlin v. District Court*, 59 Mont. 600, 198 Pac. 362, is invoked in this behalf. In the Samlin Case we went no further than to hold: (1) That a search warrant issued upon a complaint or affidavit which does not set forth any facts showing, or tending to show, probable cause, is void; and (2) that articles seized by virtue of such warrant should be suppressed as evidence and returned to the owner whenever, in a direct proceeding instituted prior to the hearing to test the validity of the process, it is made to appear that the articles were seized unlawfully. That case has no application to the facts here presented. There is not a suggestion in the record that the articles in question were seized or held as evidence. In the Samlin Case the property was ordered returned to the possession of the owner only as an incident to his right to have it suppressed as evidence. We do not mean to intimate that one whose property is seized in a proceeding of this character cannot contest the officer's right to its possession, but only hold that the Samlin Case does not authorize the inquiry.

[6] Prior to the hearing, defendant moved the court to quash the proceeding upon the ground, among others, that the complaint and sheriff's return of the articles seized disclosed that there was not any violation of law in the presence of the officer, and this notwithstanding that the complaint recites that the defendant was unlawfully transporting intoxicating liquors in the presence of the officer. It is the contention of counsel

for the defendant that from the very nature of the case the sheriff did not know, and could not know, that the demijohn contained intoxicating liquor at the time the articles were seized or until after seizure and an examination of the contents of the container; hence the seizure was unlawful. As we understand this contention, it is that, to authorize a seizure under section 9, the officer must have actual, personal knowledge that the acts of the alleged offender constitute a violation of the liquor laws, and, if counsel are correct, then the arrest and seizure provision of section 9 becomes a dead letter; for practically any conceivable circumstances it would be impossible for the officer to have such knowledge.

[7] Section 9 imposes upon the sheriff the duty to arrest the offender and seize the contraband articles without a warrant whenever a violation of the liquor laws occurs in his presence. The right to seize without process is thus made coextensive with the right to arrest without a warrant, and the authority to arrest without a warrant is conferred in the same terms as is the like authority given to any peace officer by section 11753, R. C. M. 1921, so that we may properly determine the scope of the officer's authority to seize under section 9 by determining the scope of his authority to arrest without a warrant. Whatever else may be said upon that subject, the utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue. In other words, if the circumstances are such that the officer could properly secure a warrant of arrest, he may arrest without a warrant if the offense which the circumstances tend to establish was committed in his presence; and it is settled in this jurisdiction that the officer need not have actual, personal knowledge of the facts which constitute the offense in order to be able to make complaint and secure a warrant. The question was settled in *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63, wherein the court said:

"It seems to us that the proper construction of the words 'probable cause,' as used in the Constitution, may be facts embodied in a complaint which charges the offense upon information and belief."

The doctrine of that case was expressly approved in *State v. Shafer*, 26 Mont. 11, 66 Pac. 463.

[8] Reverting to our premise that the sheriff may arrest without a warrant upon such state of facts as would justify the issuance of a warrant, it becomes necessary to consider what circumstances will justify the issuance of a warrant, and the authorities are unanimous in holding that there must be probable cause. The terms "probable cause"

are variously defined, but an analysis of the definitions will disclose that the difference, if any, is in the mode of expression, rather than in the substance.

"Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." *Burt v. Smith*, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576.

"Probable cause [for a criminal prosecution] is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief." *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082.

It is not essential to probable cause "for an arrest * * * that the accuser shall believe that he has sufficient evidence to procure a conviction." *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, L. R. A. 1915D, 1.

"Probable cause does not depend on the actual state of the case in point of fact, for there may be probable cause for commencing a criminal prosecution against a party, although subsequent developments may show his absolute innocence." *Mundal v. M. & St. L. R. Co.*, 92 Minn. 26, 99 N. W. 273.

"The expression 'probable cause,' as used in the federal Constitution, referring to the issuance of warrants, means that there is a probability that a crime has been committed by the person named in the warrant." *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77.

In *Burt v. Smith* above, the New York court said:

"One may act upon what appears to be true, even if it turns out to be false, provided he believes it to be true and the appearances are sufficient to justify the belief as reasonable. Belief alone, however sincere, is not sufficient, for it must be founded on circumstances which make the belief reasonable."

The same rule as applied to an arrest without warrant is stated in 5 C. J. 417, as follows:

"The reasonable and probable grounds that will justify an officer in arresting without a warrant one whom he suspects of felony must be such as would actuate a reasonable man acting in good faith. The rule is substantially the same as that in regard to probable cause in actions for malicious prosecution, and there is no difference in its application between arrests for felonies and arrests for misdemeanors. The necessary elements of the grounds of suspicion are that the officer acts upon a belief in the person's guilt, based either upon facts or circumstances within the officer's own knowledge, or upon information imparted to him by reliable and credible third persons, provided there are no circumstances known to the officer sufficient to materially impeach the information received. It is not every idle and unreasonable charge which will justify an arrest. An arrest without a warrant is illegal when it is made upon mere suspicion or belief, unsupported by facts, circumstances, or credible information calculated to produce such suspicion or belief."

See, also, *Words and Phrases*, vol. 3, Second Series, 1224 et seq.

The record before us discloses these facts: At the time of the seizure the sheriff knew that a banquet was being given in the Hotel Deer Lodge, and that some of the persons present showed the effects of having been drinking intoxicating liquors. It was about 9:30 of the evening of April 30th while the banquet was in progress, and defendant was in an alley immediately west of the hotel. He was carrying the demijohn, which was incased in a wicker cover and only partially concealed in the hand bag. The defendant was then, and for a long time prior thereto had been, in the employ of one of the persons attending the banquet, and was then acting as such employee, and the sheriff had been informed that he was transporting liquor to deliver it to his employer or to some other person at the banquet. We need not stop to consider whether this evidence would be sufficient to convict the defendant in a criminal action. It is only necessary to determine whether the sheriff had probable cause to believe that the law was being violated, and we have no hesitation in saying that the facts and circumstances were sufficient to justify him in making complaint and securing a warrant for the arrest of Mullen, and, if the warrant had been secured and the arrest had been made, the right of the sheriff to seize the liquor and container and retain them as evidence against the accused could not be gainsaid. *Kneeland v. Connelly*, 70 Ga. 424; *State v. Hassan*, 149 Iowa, 518, 128 N. W. 960; note to *State v. Mausert*, L. R. A. 1916C, 1017. Speaking upon the subject, the Supreme Court of Maine said:

"It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court." *Getchell v. Page*, 103 Me. 387, 69 Atl. 624, 18 L. R. A. (N. S.) 253, 125 Am. St. Rep. 307.

The question of unreasonable search is not involved. *State v. Quinn*, 111 S. C. 174, 97 S. E. 62, 3 A. L. R. 1500. There was not any occasion for the sheriff to procure a search warrant. The defendant was openly transporting the articles in the immediate presence of the officer.

Having determined that the circumstances would have justified the sheriff in making complaint against Mullen and in securing a warrant for his arrest, it follows from what has been said that he would have been justified in arresting defendant without a war-

rant, and, since his authority to seize the articles without process was coextensive with his authority to arrest without a warrant, the seizure was not unlawful, and the motion to quash was properly overruled.

There does not appear to be any reversible error in the record, and the judgment is affirmed.

COOPER, J., and H. H. EWING, District Judge, sitting in place of Mr. Justice REYNOLDS, disqualified, concur.

BRANTLY, C. J. (concurring). I concur in the conclusion reached by Mr. Justice HOLLOWAY, but in doing so do not wish to be understood as giving my assent, even by implication, to the proposition that an arrest may be made without a warrant in any case where the facts and circumstances, independently of those discovered through the arrest, are not sufficient to produce in the mind of the arresting officer a conviction, which amounts to a practical certainty, that he is witnessing at the time the commission of a public offense. In other words, mere suspicion founded upon hearsay evidence only, however trustworthy in source, without personal observation by the officer of occurrences actually taking place at the time, which, in themselves, indicate that an offense is being committed, does not justify an arrest or seizure. To recognize any other rule would authorize the officer to arrest upon a bare suspicion not supported by the actual existence of facts and circumstances which in the mind of a reasonable person, point to the commission of an offense; and it must not be overlooked that the provision of the Constitution prohibiting unreasonable searches and seizures (Constitution, § 7, art. 3) makes no distinction between persons and property, and the seizure of either without warrant must be justified by the facts. On the other hand, the announcement of a rule which would deny the right to make an arrest in all cases except upon personal knowledge of the officer would render it well-nigh impossible to enforce the prohibition, the anti-gambling, and other similar laws enacted to suppress crimes which from their nature are generally committed in secret. It is not understood that anything said by Mr. Justice HOLLOWAY is contrary to my view. No rule can be laid down applicable to all cases. The arrest or seizure must be justified by the circumstances disclosed by the facts in each case. The facts found by the trial court in this case were not entirely satisfactory, but, after a careful examination and analysis of them, I am not willing to say that they were wholly insufficient to justify the seizure.

GALEN, J. I dissent. That which is said in the majority opinion respecting the construction of the provisions of the act of

1921 (chapter 9, Laws Extra Session 1921) as additions to and supplementary to the unrepealed provisions of the act of 1917 (chapter 143, Laws 1917) meets with my approval. *State v. Bowker* (Mont., No. 497) 205 Pac. 961, decided March 27, 1922. However, I do not and cannot agree to the latter portion of the opinion, holding in effect that a sheriff or other peace officer is authorized upon suspicion to arrest a person carrying a grip or satchel and examine the contents thereof without either a warrant of arrest or a search warrant. Such holding has no place under our theory of government. It is violative of the foundation principles establishing the freedom of the Anglo-Saxon race as embraced in the Magna Charta exacted of King John by the people at Runnymede, July 15, 1215, section 38 of which provides:

"No bailiff from henceforth shall put any man to his law upon his own bare saying without creditable witnesses to prove it."

In its tendency it is destructive of the Bill of Rights for which our forefathers fought so valiantly and successfully in the Revolutionary War. It invades the well-recognized principles of a free government and the constitutional guaranties of freedom of the people, of which we have been so justly proud since our success in breaking the shackles by which we were held by Great Britain prior to 1781. It disregards the constitutional guaranty of both the federal and the state Constitutions. The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

And section 7 of article 3 of the Constitution of Montana provides:

"The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing."

If such invasion of the personal rights and liberties guaranteed to the people be given sanction by the judicial department of this state, it is in my opinion a distinct and far-reaching backward step tending to destroy our much-boasted of and said to be carefully guarded liberties. Reform measures are unobjectionable, but the vigor, ardor, and arguments of their advocates should not induce the court on any theory to disregard or avoid the constitutional guaran-

ties of our people. The Constitution applies with equal force to crimes committed against the prohibition laws; its guaranties are equally sacred and inviolate as to all crimes; and no exception or distinction should be made as respects laws for the enforcement of prohibition. The rule enunciated by the majority is not consistent with the holding of the entire court in the Samlin Case (State ex rel. Samlin v. District Court, 59 Mont. 600, 198 Pac. 362), for, if a peace officer is authorized in apprehending and searching a man's person under suspicion, why not his house? I cannot draw the fine distinction made by the majority between the two cases. The doctrine laid down in the Samlin Case is, in my opinion, correct and unanswerable when applied in this instance. It was there said by Mr. Chief Justice Brantley, speaking for the court, as follows:

"Speaking of the Fourth Amendment to the Constitution of the United States, Mr. Justice Day, in *Weeks v. United States*, 232 U. S. 383, Ann. Cas. 1915C, 1177, L. R. A. 1915B, 834, 58 L. Ed. 652, 84 Sup. Ct. Rep. 341 (see, also, *Rose's U. S. Notes*), said: 'The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.' This forceful statement of the learned justice applies as well to the guaranty found in our own Constitution; for, except that the order in which the several clauses in it are arranged is different, it is expressive of the same fundamental principles and was intended to be equally as effective to prevent an invasion of the rights of the citizen of the state under the guise of law by the state government or any of its officers. Since it was intended to take away from the Legislature the power to authorize an invasion of the rights of the citizen by a search of his home or a seizure of his person or property in any other case than it permits, it is to be strictly construed in his favor. On this subject the eminent author, Mr. Cooley, in his work on *Constitutional Limitations*, has this to say: 'For the service of criminal process, the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works on criminal

law, and need not be enumerated here. And there are also cases where search warrants are allowed to be issued, under which an officer may be protected in the like action. But as search warrants are a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection, it is essential that these rules be carefully observed. In the first place, they are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place. And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it.' Page 429."

In the Samlin Case we held that a search warrant issued upon an affidavit alleging merely that the affiant "has probable cause to believe, and does believe," intoxicating liquors are unlawfully possessed in certain premises described, is not sufficient to authorize the issuance of a search warrant, being violative of section 7 of article 3 of our Constitution; that, to authorize the issuance of a search warrant, sworn facts and circumstances must be made to appear to the judge upon which he may act judicially in determining whether or not it is a proper case for the issuance of a warrant. In my opinion, the doctrine laid down in the majority opinion substitutes the judgment of the sheriff or peace officer for that which is expressly lodged in a court or judicial officer under constitutional and statutory provisions as held in the Samlin Case. To say the least, it seems to me utterly inconsistent to hold in the one instance that the sheriff or peace officer must secure a search warrant in order to enter and search any place, which warrant will be issued only upon sworn statements of facts and circumstances showing probable cause, rather than upon bald assertions or conclusions, the judge alone being vested with the prerogative of determination from the facts presented whether probable cause exists for the issuance of a search warrant; and the other, by the decision in the present case, that the sheriff or peace officer, has the independent right of determining facts and circumstances deemed sufficient probable cause for the arrest of a person suspected, and a seizure and examination of his personal effects, without a warrant, thus clothing him with judicial functions.

"To thus limit the power of a peace officer makes difficult the enforcement of a law whose strict enforcement is undoubtedly a matter of grave public policy; but this is far better, in the final analysis, than the establishment and encouragement of a practice which would dishonor and transcend the basic and fundamental principles of our constitutional form of government." *State v. One Hudson Automobile*, 116 Misc. Rep. 399, 190 N. Y. Supp. 481; *People v. 738 Bottles of Intoxicating Liquor*, 116 Misc. Rep. 252, 190 N. Y. Supp. 477.

Upon the state of facts presented:

"The seizing officer was nothing but a trespasser acting in open violation of law, and the trial court should have, on ascertaining the facts, ordered the seizing officer to return the property to the claimant, and a judgment of forfeiture entered under such a proceeding is absolutely null and void.

"The function of the courts of this country is to enforce a government of laws, and not a government of men. The final arbiter in all cases presented to appellate courts is the substantive law as controlled, limited, and regulated by the written law (meaning, by the written law, the federal and state Constitutions, and the statute law enacted in accordance with the Constitutions). When an appellate court abandons the law as thus defined, it puts its ear to the ground to determine what is popular and what will or will not please the popular will. Such a court is then treading near a precipice that may engulf this government in anarchy. Such a court has broken with the law and the accepted wisdom of the ages, and is accepting in lieu thereof the rule of the popular will, and this is only a euphonious name for mob law and means nothing else but mob law in its final analysis. Between these two positions there can be no halting of the ways if we are to save our government from confusion and ultimate anarchy.

"We know of no court or judge that has openly and specifically committed itself to a rule of men in lieu of a rule of law. This does not mean that the courts are opposed to progress or change, but does mean that the courts are irretrievably committed to the propositions that, when these changes come, they must be changes in accordance with the fixed rules of law providing for such changes, and not by ignoring, overriding, and disregarding the legal methods providing for such changes." *Hess v. State* (Okla. Sup.) 202 Pac. 310.

The passage of the prohibition amendment to the federal Constitution did not inaugurate a reign of legislative despotism to be carried out by snooping constables or peace officers, as to them may seem expedient. The Constitution was amended, not abrogated, and searches and seizures are to be made to-day as yesterday, according to the law of the land.

I do not believe that my learned and worthy associates fully appreciate the importance of the principle laid down in this decision. To my mind, it knocks at the very foundation of guaranteed constitutional rights of the

people, and I feel that I should be derelict in the performance of my duty were I not to voice emphatic protest. Under this decision, every person who carries a container for liquids may be subjected to an invasion of personal rights and privileges—the messenger who files from the dairy with pasteurized product of the cow, in basket or bottle, to the infant in the nursery, as well as the druggist clerk who carries a demijohn or flask which cheers the expiring moments of the sick or aged on their hospital cots. My brothers at the bar had best discard their green bags and portfolios for fishnets, in order to avoid inquisitive constables attracted by a bulging bag, from mussing their papers while forcing an inspection.

The learned trial judge was in far better position, after the hearing and examination of the exhibits, to make determination of probable cause for the arrest, of the defendant and the seizure of the grip and contents than the sheriff could possibly have been at the time of the arrest. The sheriff could only suspect and surmise, but the judge found, among other facts, that the hand bag "contained one two-gallon demijohn full of whisky of an excellent quality, and not of the moonshine variety." It is not clear from the record, however, upon just what proof this judicial determination was made.

The record discloses that the defendant appeared by motion to quash the proceedings and made timely formal demand for the return of the property seized, asserting that the seizure made by the sheriff was wrongful, unlawful, and without and in excess of jurisdiction. In my opinion the motion should have been sustained, the proceeding dismissed, and the property returned to the defendant, having been unlawfully taken from his possession.

(63 Mont. 399)

In re CUFFE'S ESTATE. (No. 4785.)

(Supreme Court of Montana. May 18, 1922.)

1. Guardian and ward §164—Presumption that settlement with ward is constructively fraudulent unless shown as act of ward with full knowledge.

Rev. Codes 1921, § 5888, provides that after the ward has come to his majority, he may settle accounts with his guardian and give him a release, which is valid if obtained fairly and without undue influence, but from the confidential relation between the guardian and ward it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent, and will be set aside unless shown to have been the deliberate act of the ward, with full knowledge of his transaction.

2. Guardian and ward \S 164—Rule as to evidence removing presumption of fraudulent character of transaction between guardian and ward.

To remove the unfavorable presumption indulged in by the courts against transactions between guardian and ward during the existence of the relation or soon after its termination, the court must be satisfied that there was an absence of any influence springing out of the relation and of any violation of the duty by the guardian, and the act must proceed from the volition of the ward, and he must have full knowledge of its effect, and then only will such transaction be approved.

3. Guardian and ward \S 164—Settlement with ward held made in good faith.

Where facts disclosed that in the settlement of a guardian with his ward no advantage was taken of the ward, and that the ward acted with full knowledge and appreciation of all conditions surrounding the settlement, of the effect thereof, and that it was made with his own volition, and that no fraud was practiced and no prejudice resulted to the ward, and that the ward was not in any manner acting under the influence of the guardian when ratification was made, and the guardian acted in good faith, the guardian discharged the burden of removing the presumption of undue influence and fraud that attached to the ratification, and the ratification was of a nature as is recognized by law.

4. Guardian and ward \S 150—Guardian's failure to return inventories of estate penalized by disallowance of attorney's fees.

Where the guardian of a minor did not return to the court inventories of the estate as provided by Rev. Codes 1907, \S 7774 (Rev. Codes 1921, \S 10422), nor render an account as provided by section 7775 (section 10423), in disallowing the guardian an attorney fee, there was no error.

5. Guardian and ward \S 6—Person assuming status of guardian must comply with statute.

A person assuming the legal status of guardian must comply with the requirements of the statutes or suffer the penalties incident to his failure.

6. Guardian and ward \S 150—Within court's discretion to penalize guardian for failure to comply with statutory duty.

Under Rev. Codes 1907, \S 7777 (Rev. Codes 1921, \S 10425), the penalty of a forfeiture of fees to the guardian and those paid or contracted to be paid to his counsel is properly within the discretion of the court when a violation of the statutory duty of the trust occurs.

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

In the matter of the estate of John J. Cuffe, a minor. On hearing of the guardian's final account. From an order disallowing credits and refusing to allow guardian or attorney fees, the guardian appeals. Affirmed in part, reversed and remanded, with directions, in part.

Logan & Child, of Kalispell, for appellant. Brennen & Kendall, of Kalispell, and A. L. Hughes, of Whitefish, for respondent.

AYERS, District Judge (sitting in place of REYNOLDS, J., disqualified). Matt Cuffe died intestate in February, 1917, leaving surviving him four children, all minors except Katherine Cuffe Gallegher, who was appointed administratrix of his estate, which was appraised at \$36,000. John J. Cuffe, one of the minor children, had 80 acres of land in his own name, and under the law inherited one-fourth of his father's estate, all in Flathead county. Soon after his father's death and while yet a minor (he was born January 1, 1898), he went into business for himself—live stock and farming—bought cattle and farm machinery in excess of \$5,500, all of which was done on credit. In fact, he became considerably involved financially, and on August 30, 1917, Katherine Cuffe Gallegher made her note as administratrix to the First National Bank of Whitefish for \$3,500 to enable him to pay an account of \$3,000 which he owed for cattle, the balance to be used for putting up hay and operating expenses. At the time his sister signed this note, it was agreed between them that he would have a guardian appointed who should take up the note and release her from that obligation. Henry Good, the appellant, after several requests, finally consented to make application for letters of guardianship of the estate of John J. Cuffe, a minor, and finally, by nomination of the minor himself and at the request of his adult sister, Good was appointed such guardian, and duly qualified on December 3, 1917. Good never actually took possession of the estate over which he was made guardian. The boy had been married for some time and had been considered emancipated—had been dealing and contracting as freely, fully, and completely as if he had attained majority. The guardian permitted him to continue the management and operation of his estate the same as before, and it is not certain that his live stock enterprise would not have been successful had it not been for the "hard winter" conditions encountered.

Immediately upon qualifying as guardian, Good sought from the minor a statement of his indebtedness, receiving a report that it amounted to \$929.35 on open accounts and \$6,000 which had been reduced to promissory notes. This included the \$3,500 note at the Whitefish Bank signed by the sister. However, it was soon learned that the open accounts amounted to \$2,532.10 instead of \$929.35, all of which was for necessities of life and necessary operating expenses of the business of the minor, none of which were disputed; in fact, all had been contracted by him and was admitted by him. Good gave

his note as guardian to the First National Bank of Whitefish for \$3,662.75, taking up the sister's note with accrued interest, and gave his notes in like manner to the Conrad National Bank of Kalispell for \$4,850 to take up other outstanding notes of the minor and to pay his open accounts.

During the guardianship, the minor bought a team of horses for \$325 and attempts to repudiate the purchase for the reason that he bought them from the guardian. The evidence is in conflict on this point, but it is all to the effect that the minor needed the team; that the team was reasonably worth the amount paid therefor; that the guardian did not profit by the transaction; and that no prejudice resulted to the minor regardless of who sold him the team.

After the filing of the guardian's final account, Cuffe filed his objections against the allowance of the same upon the general theory that guardians cannot, by their contracts, bind the person or estate of their wards, and consequently the notes made and the obligations contracted by the guardian were recoverable only against the guardian personally, and that he should discharge the same and turn back and account to the ward for all the property owned by the ward at the time of his appointment. Good's defense to this contention, on the facts, was that no injury had resulted from his actions, and that a complete ratification of all his acts, deeds, and contracts as guardian had been made by Cuffe after his attaining the age of majority.

On the hearing of the guardian's final account, the court by its decree of October 23, 1919, found that the purported ratification did not meet the requirements of the law, and disregarded the same; disallowed him credit for the note at the Whitefish Bank, amounting at that time, together with interest, to the sum of \$3,925.95; disallowed him credit for interest at the Conrad Bank in the sum of \$145.59; disallowed him credit for the team in the sum of \$325; and refused to allow him any guardian or attorney's fees. The guardian is appealing from the decree in so far as it disallowed these items.

John J. Cuffe became of age on the 1st day of January, 1919. Negotiations then commenced between him and the guardian for the settlement of his estate and the release of the guardian. On January 6th they met, together with the wife of Cuffe and E. L. Geddes, and the details of all the accounts were explained to Cuffe. However, they did not need explanation, for indeed he knew all about them. Good contends a settlement was made on that day between him and Cuffe, whereby Cuffe ratified all his acts as guardian. In fact, Cuffe and his wife executed a deed and bill of sale of all their real estate and personal property to him on that occasion, which he asserts were given as se-

curity until he be released from his trust as guardian and his bondsmen discharged, and which he holds only to that end. That a settlement was reached on that occasion concerning everything except guardian and attorney fees, and that the settlement included all the items disallowed by the court except guardian and attorney fees, is manifest from the testimony.

Mrs. Cuffe testified:

"I don't remember of John questioning any of these accounts or bills. I understood, of course, that these deeds that were signed were for the purpose of enabling Mr. Good to pay off the debts that John had contracted, or that he had contracted for him. I don't believe that John ever questioned these bills, or claimed that he didn't owe them, or anything of that kind. * * * There was no question raised at any time, as to these claims, by John."

Geddes testified:

"Mr. Good had taken the matter up with Mr. Cuffe, and asked him about these accounts, and Mr. Cuffe said that he wanted to secure him in transferring property, that the debts that he had paid for and were contracted for were just and correct at that time; and they talked along a while, and deeds were suggested, given as security. * * * I never had any other conversation with him [Cuffe] other than the one about 10 or 12 days later, when he came back and said things were all right—not a word; the thing seemed to have been closed at the time the deeds were given. He went over—and so did his wife—that the debt was one that had been contracted and were just, and he wanted to secure Mr. Good at this time, and he was over age and wanted to enter into the transaction. Mr. Cuffe and also his wife said they wanted to secure Mr. Good. They were talking back and forth. * * * John did not at that time or at any other time make any objection to any items. It seems like it simply settled it at that time, and that is all there was to it."

Good testified:

"Shortly after John became of age, I went to Whitefish, and talked the matter over with him, and explained to him the status of his affairs as nearly as possible, and also talked to John's wife. We went over to the house and explained things as near as I could, and I asked him—John was of age—if he knew of any way we could take care of this account, that is, any way to take care of those claims, etc., and talked over the matter carefully and very extensively with Mrs. Cuffe and John, and they said no, that if I could take care of it until such time that they could sell some of the real estate or take care of it; that was the only solution they knew of; and I told them it was a large amount, and to secure myself and bondsmen, if everything was satisfactory and they thought I had done the best I could with it, I would like to have a ratification of the transaction, and they give me a deed to the property. I gave them a contract back, and then in Mr. Geddes' office I explained the matter to Mr. Geddes, Mr. Cuffe, and Mrs. Cuffe, and told Mr. Geddes to impress upon his mind

in which way we took those deeds, and as soon as the court would release me as guardian and release me from those bills and responsibilities that the property would be deeded back to them at once. I don't claim the property except in that way. * * *

"Q. Did you strike a balance of indebtedness, agree on the approximate amount of indebtedness there; this stuff that had been bought? A. I went over every item with the exception of overpayment, which I didn't know at that time. Mr. Dickey found it later. I told him the amount of the outstanding bills and the different notes and the check books, what stubs were written out, etc., and this difference in the Gallagher account, had him charged twice—I didn't know at that time—and this overpayment I didn't know until Mr. Dickey checked that up. (This was later corrected.)

"Q. Any particular reference to the note to the Whitefish Bank? A. Yes, sir. * * * John made no objection to any of these bills or claims, he said he wanted to pay every man every dollar that he owed, and his wife made the same statement; said they wanted to pay their bills first if it took at all."

Cuffe's own testimony discloses that he received a statement of account at the time of settlement, and even as late as the trial he did not dispute the correctness of the same or contend that any fraud or deceit had been practiced upon him; his only objection to the account, even then, was with reference to the indefiniteness of a meat item, which was not disallowed by the court, but approved. His objection to the settlement was an afterthought, as is evident by his objection, when on the witness stand, to the settlement of the guardian's account, which was as follows:

"My objections to the account are that I wasn't properly controlled. I was just a wild kid, and thought I was smart; and I didn't know what I was doing when I went into all these things and was handling the business I was in. I hadn't had any experience, and I was green, and everybody I dealt with seemed to be able to beat me. Then there was the beef account, I wasn't satisfied with; and the only full account I had ever seen of the beef was when the final account was filed here in court. Henry was never able to give me any account of all the beef—never able to get all the papers together so that I was able to know just exactly where I was at. I am blaming Henry, now, because he didn't properly control me, or take control of my business."

Many questions are involved in this appeal, but the determination of the case resolves itself to the ratification of January 6, 1919.

The formal objections to the settlement of the final account were made and prosecuted on the theory that the guardian could not by his contracts bind either the person or estate of his ward, and that such contracts bind the guardian personally, and recovery must be had against him. That point, however, is not involved in the case, for if

the settlement made on January 6, after the ward reached his majority, was legal, it ratified all acts of the guardian. That a ratification of all the acts, contracts, and deeds of Good, as guardian, was made by Cuffe after he attained his majority is the only conclusion we can reach; and now the question occurs: Was it such a ratification as is recognized in law?

[1] Section 5888, Revised Codes 1921, provides:

"After the ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence."

Thus we see that such settlements and ratifications, if secured fairly and without undue influence, are recognized by the statutes of this state. However, courts look upon settlements made by guardians with wards recently coming of age with distrust, and jealously watch the same, or any transaction between them affecting the estate of the ward. From the confidential relation between them it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent, and will be set aside unless shown to have been the deliberate act of the ward with full knowledge of his transaction. *Meek v. Perry*, 36 Miss. 190; *Clark's Appeal*, 18 Pa. 175; *McConkey v. Cockey*, 69 Md. 288, 14 Atl. 465; *Ferguson v. Lowery*, 54 Ala. 510, 25 Am. Rep. 718; 21 Cyc. 169. With this presumption we have no complaint, for it is our opinion that the jealousy of the courts and the general principle of public policy are to be directed to the protection of the ward in every respect, and that settlements, receipts, ratifications of guardians' acts, and releases immediately after the ward's majority should be discouraged—not upon the theory that actual fraud is likely to be present in each case, but upon the broader ground that opportunity to commit fraud be minimized. Ordinarily, the relation of guardian and ward is next in order to that of parent and child, and the presumption (of undue influence) exists perhaps in the highest degree, and especially does that presumption exist if the dealing is the release of property by the ward to the guardian, and where there is an inadequacy of consideration the deal can rarely, if ever, stand. *Wade v. Pulsifer*, 54 Vt. 45; *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609; *Bisham's Principles of Equity*, § 234, p. 337.

[2] It is neither desirable nor possible to define particularly what evidence will remove the unfavorable presumption indulged in by the courts against transactions between guardian and ward during the existence of the

relation or soon after its termination. The guardian is an officer of the court, an agent of the law, and the law will not permit its agent to make a profit out of the trust which it has confided to his control. It exacts from him absolute fidelity, and will be satisfied with nothing less. Each case must depend upon the facts and circumstances attending it. In general, it may be said that the court must be satisfied that there is an absence of any influence springing out of the relation, and of any violation of the duty by the guardian—the act must proceed from the volition of the ward, and he must have full knowledge of its effect; then, and then only, will such transaction be approved. *Rhodes v. Robie*, 9 App. D. C. 305; *Adams v. Reviere*, 59 Ga. 793; *Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628; *Fleider v. Harbison*, 93 Ky. 482, 20 S. W. 508; *Dunsford v. Brown*, 19 S. C. 560; *Hawkin's Appeal*, 32 Pa. 263; *Norris v. Norris*, 85 App. Div. 113, 83 N. Y. Supp. 77; *Korn v. Becker's Executor*, 40 N. J. Eq. 408, 4 Atl. 434; *Holscher's Heirs v. Gehrig*, 127 Iowa, 369, 94 N. W. 486, 101 N. W. 759; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; 21 Cyc. 169. See, also, note "Settlement after Ward Becomes of Age," L. R. A. 1916E, 864.

[8] The burden was upon Good to remove the presumption of undue influence and of fraud attaching to the ratification; to show good faith on his part, and that Cuffe had full knowledge of all the transactions of his, as guardian. Upon a discharge of this burden the ratification must be approved. Cases *supra*, and *Harrison v. Harrison*, 21 N. M. 372, 155 Pac. 356, L. R. A. 1916E, 854.

Here, the usual confidential relation did not exist between the guardian and ward; Good, in fact, was not the guardian of the person of Cuffe, but only of his estate, which the ward himself was permitted to manage and operate. This the guardian should not have permitted, but under the circumstances, if he had placed another in physical charge, complaint could have been made that it was an unnecessary expense, and he, as all parties well knew, was a business man whose own affairs occupied all of his time, and who, therefore, was unable to assume actual charge himself; consequently his permitting the ward to continue in charge was excusable, but not commendable, and any act of the ward while managing and operating the estate, was, in law, the act of the guardian.

The record discloses that in the settlement of January 6, 1919, no advantage was taken of Cuffe; that he acted with full knowledge and appreciation of all conditions surrounding the settlement and the effect thereof,

and that it was made of his own volition. Good gained no advantage over him, except to take security that he be released from his trust as guardian, which was freely given and its effect fully understood by Cuffe. It discloses further that Good will reconvey the security when so released; that no fraud was practiced; that no prejudice resulted to Cuffe; that he was not in any manner acting under the influence of Good when the ratification was made, and that Good acted in good faith. Therefore he discharged the burden cast upon him. The ratification was of such a nature as is recognized by law.

The court erred in disallowing credit to the guardian for the Whitefish Bank note in the sum of \$3,925.95; the interest item at the Conrad Bank of \$145.59, and the item for the team in the sum of \$325.

[4-6] As to the disallowance of the guardian and attorney's fees the court committed no error. The guardian did not return to the court inventories of the estate, as provided by section 7774, Revised Codes 1907 (section 10422, Rev. Codes 1921), nor did he render an account as provided by section 7775, Revised Codes 1907 (section 10423, Rev. Codes 1921). We appreciate that the record here discloses that Good considered himself, and was by all concerned considered, an "accommodation guardian," but such in law does not and cannot exist. A person assuming the legal status of guardian must comply with the requirements of the statutes or suffer the penalties incident to his failure thereof. The penalty of a forfeiture of fees to himself and those paid or contracted to be paid to his counsel is properly within the discretion of the court when a violation of the statutory duties of the trust occurs (section 7777, Rev. Codes 1907; section 10425, Rev. Codes 1921; *In re Allard Guardianship*, 49 Mont. 219-225, 141 Pac. 661), and the court did not abuse its discretion in the disallowance of those items of the account.

The order appealed from, in so far as it disallows guardian and attorney's fees is affirmed. As to all other items, it is reversed, and the cause is remanded to the district court, with directions to amend its decree settling the guardian's account, made October 23, 1919, so as to approve the guardian's final account, except as to guardian and attorney's fees.

Reversed.

COOPER, HOLLOWAY, and GALEN, JJ., concur.

BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(111 Kan. 379)

STATE v. McGLORIA. (No. 23691.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Indictment and information §132(7)—**Intoxicating liquors** §222—**Information not required to allege that defendant was not a druggist or registered pharmacist; state not required to elect between separate counts charging possession of liquor, keeping a common nuisance, and manufacturing liquor.**

Assignments of error, relating to form and substance of an information charging violations of the liquor law, to sufficiency of evidence to sustain conviction, and to conduct of the county attorney and the court, *held* to be without merit.

Appeal from District Court, Franklin County.

Merle McGloria was convicted of violating the liquor law, and he appeals. Affirmed.

Elisha Scott and Roy M. Van Dyne, both of Topeka, for appellant.

Richard J. Hopkins, Atty. Gen., and R. R. Redmond, of Ottawa, for the State.

BURCH, J. The defendant was convicted of violating the liquor law, and appeals.

The information contained four counts. The first count, which charged the defendant with selling intoxicating liquor, was withdrawn. The remaining counts charged the defendant with having intoxicating liquor in his possession, with keeping a common nuisance, and with manufacturing intoxicating liquor contrary to law. It was not necessary the information should allege the defendant was not a druggist or registered pharmacist, and the information was otherwise correct in form and proper in substance. Each count of the information charged a separate offense, and the state was not obliged to elect between them. Venue was proved by the testimony of the sheriff. Each offense was fully proved. Neither the court nor the county attorney was guilty of misconduct. The motion for a new trial was properly denied.

The judgment of the district court is affirmed.

All the Justices concurring.

(111 Kan. 406)

NATHOO v. JONES et al. (No. 23778.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Deeds §70(1)—**Petition held to state cause of action in action to set aside deed for fraud.**

In an action to set aside a deed because of fraud in its execution, a petition, wherein

plaintiff alleged that the defendants fraudulently substituted a deed conveying property which plaintiff was induced to sign without reading it, in the belief that it was a contract which she had read and had agreed to sign, and that the substitution was purposely made by defendants to defraud plaintiff of her property rights, states a cause of action, and if the facts alleged are established by the evidence, she will be entitled to the relief sought.

Appeal from District Court, Montgomery County.

Action by Barbara Nathoo against Olive E. Jones and others. Demurrer to petition sustained, and plaintiff appeals. Reversed and remanded.

Hal R. Clark, S. H. Piper, and W. B. Grant, all of Independence, for appellant.

E. L. Burton, of Parsons, and Lamb & Reed, of Coffeyville, for appellees.

JOHNSTON, C. J. This was an action by Barbara Nathoo to cancel and set aside a deed which she had signed, purporting to convey a tract of land which she had occupied as her homestead. The case was determined on a demurrer of Olive E. Jones to plaintiff's petition, and, it being sustained, plaintiff appeals.

In substance the plaintiff alleges that a divorce action was pending between her husband and herself, and that he and Olive E. Jones, a proposed purchaser of the home property, comprising 11½ acres, entered into a conspiracy to defraud the plaintiff by the following means: They represented to plaintiff that Olive E. Jones had agreed to buy the property for \$11,000, which consideration included a \$2,300 mortgage that was to be assumed by the purchaser; that \$5,000 was to be paid in cash to plaintiff, and that certain attorneys' fees and costs of the divorce proceeding should be paid. They prepared a typewritten contract of these negotiations, and presented it to plaintiff to read, and when it was read she agreed to sign it. After plaintiff had verbally consented to sign the contract, her husband, acting for himself and Mrs. Jones, telephoned to a notary public to come and take the acknowledgments of those signing the contract. When the officer appeared, her husband sat down and appended his signature to what the plaintiff believed was the contract she had read, and agreed to sign, and then procured her to attach her signature to the instrument. She signed it believing it was the typewritten contract which she had previously examined, but it turned out to be a deed which her husband and Mrs. Jones had fraudulently arranged to switch and substitute for the contract she had read, and which she was led to believe she was signing. Immediately after the instrument was signed, her husband delivered it to Mrs. Jones, who caused it to be

recorded. Plaintiff did not, she alleges, receive any consideration for the signing of the deed, and Olive E. Jones never paid any consideration for the deed or for the purchase of the property. It was further alleged that Mrs. Jones did not for a long time claim ownership of the property, but represented to divers persons that the deed was not intended to represent a purchase of the property, but as the plaintiff and her husband were having trouble between themselves, she was holding the deed to enable her to collect money which she had loaned to plaintiff's husband a long time before the signing of the instrument. It was also alleged that the plaintiff remained in possession of the property, and did not learn of the fraud perpetrated upon her until a few days before the action was begun, when she ascertained that Mrs. Jones claimed to own and was attempting to sell the property to innocent purchasers. The plaintiff's husband and the husband of Mrs. Jones were named as defendants in the action. Mrs. Jones alone demurred to the petition, and on her demurrer it was held that a cause of action was not stated against her.

The defendant claims that the petition contains only a general averment of fraud without stating the facts upon which the fraud is based, and it is therefore insufficient. Plaintiff states quite plainly and definitely that the fraud had been accomplished by the shifting and substitution of a deed for the instrument which embodied the terms of the agreements between the parties, and that the defendants had induced her to believe that she was signing the instrument she had read and agreed to sign when she attached her name to the other. It was further alleged that Mrs. Jones conspired and participated with plaintiff's husband in the deception. There is no dearth of averment as to the means by which the fraud was accomplished.

Defendant also invokes the rule that one who can read and voluntarily signs an instrument affecting rights without reading it should not be permitted to deny its binding force. The rule has no application where the execution of a contract is obtained by fraud, as where a party is tricked into signing an instrument he did not know he was signing, and did not intend to sign. *Deming v. Wallace*, 73 Kan. 291, 85 Pac. 139. If the defendant purposely switched the instruments or caused it to be done as alleged in the plaintiff's petition, a flagrant fraud was committed, one shocking to equity and good conscience, and the fact that, if plaintiff had been less credulous and confiding, she might have read the instrument and detected the fraud, does not preclude her from contesting the validity of the contract she was fraudulently induced to sign. *Shook v. Manufac-*

turing Co., 75 Kan. 301, 89 Pac. 633, 8 L. R. A. (N. S.) 1043; *Jewelry Co. v. Bennett*, 75 Kan. 743, 90 Pac. 246; *Disney v. Jewelry Co.*, 76 Kan. 145, 90 Pac. 782; *Tanton v. Martin*, 80 Kan. 22, 101 Pac. 461; *Byers v. Daugherty*, 40 Ind. 198; *Givan v. Masterson*, 152 Ind. 127, 51 N. E. 237; *Burroughs v. Pacific Guano Co.*, 81 Ala. 255, 1 South. 212.

We see nothing substantial in the contention that plaintiff cannot maintain her equitable action to set aside the fraudulent instrument because she has an adequate remedy at law. The case is peculiarly one for the interposition of a court of equity.

The judgment is reversed, and the cause remanded for further proceedings.

All the Justices concurring.

(111 Kan. 630)

HOAG et al. v. KUIKEN et al.*
(No. 23578.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Banks and banking §40—Stockholders who agreed to increase the capital stock if all stockholders approved not liable for voting against contract on objections by some stockholders.

Under a contract with stockholders to increase the capital stock of a bank, and to sell part of the new stock to certain parties if satisfactory to all the stockholders, and approved by them, there is no liability for failure to sell to the parties with whom the contract is made, nor for voting not to comply with the contract when it is objected to and disapproved by some of the stockholders.

Appeal from District Court, Jewell County.

Suit by W. S. Hoag and others against Ben Kuiken and others. Judgment for plaintiffs, and defendants appeal. Reversed, with directions.

D. M. McCarthy, of Mankato, and Ritchie & Smith, of Salina, for appellants.

R. W. Turner and Donald F. Stanley, both of Mankato, for appellees.

MARSHALL, J. The plaintiffs sued to compel the specific performance of a contract for the sale of shares of stock in a bank; to have defendants Ben Kuiken and R. D. Rose decreed the holders in trust of a number of shares of the stock for the use and benefit of the plaintiffs; and, if it were impossible to compel specific performance of the sale of the shares of stock in the bank, to recover damages for the failure of the defendants to comply with the contract. Judgment was rendered in favor of the plaintiffs for \$300 damages, and the defendants appeal. Findings of fact and conclusions of law

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 208 Pac. 553.

were made by the court. The findings of fact showed that defendants Ben Kuiken, R. D. Rose, Charles Thompson, John Denton, and William Bechtold were stockholders and directors of defendant the Ionia State Bank of Ionia, Kansas; that they owned a majority of the stock in the bank; that plaintiffs began the organization of another bank to be established in Ionia; that negotiations resulted and a contract was entered into between the plaintiffs and defendants Ben Kuiken, R. D. Rose, Charles Thompson, John Denton, and William Bechtold, by which they agreed to increase the capital stock of the Ionia State Bank from \$10,000 to \$20,000, to sell to each of the plaintiffs 20 shares of stock at the price of \$125 a share, to increase the number of the directors of the bank from five to seven, and to elect two of the plaintiffs to the board of directors. Findings of fact numbered 16, 17, 18, and 19 were as follows:

"(16) That the defendants stated at the time of the entering into said oral contract and their understanding was that it was not to be binding unless it was satisfactory to and approved by all of the stockholders of the bank.

"(17) It was further understood by and between plaintiffs and defendants that defendants would in good faith try to procure the consent of the stockholders to the terms of said agreement.

"(18) That defendants did pursuant to said agreement call a stockholders' meeting for April 1, 1919, at the defendant bank, and immediately set about in good faith to procure the consent of the stockholders to the oral agreement of the directors of said bank with plaintiffs.

"(19) That the defendant Denton never was favorable to the agreement with plaintiffs, and that the other stockholders of the bank, not defendants herein, immediately began to oppose the proposed action of the defendants, and many of the depositors and customers of said bank expressed themselves as opposed to the plaintiffs procuring so large a block of stock, and some of them threatened to withdraw their deposits and business from the defendant bank if the proposed deal was consummated."

The court further found that, when the stockholders met, it was unanimously determined to increase the capital stock of the Ionia State Bank to \$20,000, and that it was also unanimously determined not to sell 20 shares of the new stock to each of the plaintiffs, and not to sell more than 5 shares to any one person.

The contract was not violated by the defendants. It provided that "it was not to be binding unless it was satisfactory to and approved by all of the stockholders of the bank." The contract was not satisfactory to all the stockholders; some of them objected to it. Neither was it approved by all of them.

The defendants voted not to sell 20 shares

of stock to each of the plaintiffs. The plaintiffs argue that, by thus voting, the defendants violated their contract. That puts a wrong interpretation on it. The defendants held a majority of the stock, and could have voted to increase that stock and to sell to each of the plaintiffs 20 shares; but their contract was not to sell to the plaintiffs unless it was satisfactory to all the stockholders. When the defendants learned that the contract was objected to by some of the stockholders, and that they disapproved it, the defendants were released from all obligation to the plaintiffs under it. There was no binding contract until it was approved by all the stockholders.

The judgment is reversed, and the trial court is directed to enter judgment for the defendants.

All the Justices concurring.

(111 Kan. 495)

VENABLE v. BRADBURY et al. (No. 23685.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Deeds \S 70(4)—Where means of information as to vendor's title were equally open to vendor and purchaser, purchaser's withholding of legal opinion not remediable fraud.

The plaintiff had received a conveyance of land from his father, and there was a question as to whether a fee-simple title was conveyed or only a life estate. Plaintiff had received legal advice that only a life estate was conveyed, and, believing that to be the extent of his interest, he executed a life lease to his brother-in-law, and conveyed the legal title thereof to the children of his brother-in-law for a substantial consideration, but which plaintiff claims was much less than its value. Before purchasing plaintiff's interest the brother-in-law had obtained a letter from a lawyer, stating that in his opinion the plaintiff held an absolute title to the land. The brother-in-law did not inform the plaintiff of the contents of this letter before making the purchase. Eleven years afterwards plaintiff learned of the letter and legal opinion, and brought an action to set aside the lease and deed upon the ground that the withholding of the legal opinion was actionable fraud which vitiated the transfers. Held, that the silence of the purchaser and withholding of the legal opinion which he had received as to the state of plaintiff's title, the means of information being equally open to both parties, did not, in the absence of confidential relations, constitute remediable fraud.

2. Deeds \S 70(6)—Facts held not to show confidential relationship requiring purchaser's disclosure of legal opinion as to vendor's title.

There was no technical confidential relation between the parties, and it is held that there was nothing in the circumstances of their

associations which raised a confidential relationship, making it the duty of the brother-in-law to disclose the opinion he had received from a third party as to the doubtful title.

3. Deeds §70(6)—That plaintiff formerly lived in family of purchaser held not to raise confidential relationship.

The fact that plaintiff had formerly lived in the family of his brother-in-law and was on friendly terms with him did not raise a confidential relationship.

4. Deeds §68(5)—Invalidity of deed cannot be based on intemperate habits of vendor where he was not intoxicated when making transfer.

No invalidity can be predicated on the intemperate habits of the plaintiff, where it appears that he was not intoxicated or incapable of understanding what he was doing when the transfers were made.

Appeal from District Court, Chase County.

Action by Gilbert M. Venable, Jr., against Edwin H. Bradbury and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to enter judgment for defendants.

Z. T. Hazen, J. B. Larimer, and W. Glenn Hamilton, all of Topeka, for appellants.

Stratton & Stratton, of Erie, and Ganse & Frith and Owen S. Samuel, all of Emporia, for appellee.

JOHNSTON, O. J. This was an action by Gilbert M. Venable, Jr., to set aside a life lease of land given to Edwin H. Bradbury, and a deed made by him to two children of Bradbury. The plaintiff also asked to have the title to the land quieted in him and for the construction of the deed given to plaintiff by his father. The action resulted in a judgment setting aside the life lease and deed from which defendants appeal.

[1] The deed executed by Gilbert M. Venable, Sr., to plaintiff was executed on September 28, 1888. It was in the ordinary form of general warranty, except that it contained a provision that—

It was "expressly understood by the parties hereto that the party of the first part shall during his natural life have exclusive control and management of the real estate described and may at any time sell and convey the same with the consent of the party of the second part, and it is further provided and expressly understood by and between the parties hereto that if the party of the second part shall die without heirs begotten of his body, the real estate herein described shall all revert to the party of the first part, his children or their heirs if they be dead."

Venable, Sr., had two children, the plaintiff and a daughter, Ada, who married Edwin H. Bradbury. She died in 1899, leaving two children, Gilbert V. Bradbury and Dorothy Bradbury, who are named as defendants.

Venable, Sr., died in 1894, six years after the deed to his son was executed. During his lifetime he retained possession and control of the property, and his son being addicted to the excessive use of intoxicating liquor, and a spendthrift, led the father, it is contended, to limit the conveyance to a life estate only. That appears to have been the interpretation placed upon the deed by the son as well as his father, and also by the other parties concerned. From the death of his father in 1894 to 1901, the son undertook to control the land, but he was unable to make it yield enough to pay taxes and maintain the property. On March, 1, 1901, he leased it to Bradbury for three years at a stipulated rental of \$25 per month, and possession was taken by the lessee. This lease was renewed for two years longer, expiring in 1906, and also a third lease expiring in 1909. The rentals were paid to the plaintiff, and Bradbury continued in the control and possession of the land up to the time of the execution of the instrument sought to be set aside in this action. In a letter written by an attorney in May, 1908, Bradbury was advised that the deed executed by Venable, Sr., to his son conveyed to him a title in fee simple. In September, 1908, Bradbury entered into negotiations with plaintiff for the purchase of his interest in the land, with the result that plaintiff executed the life lease of the land to Bradbury, and a deed in which his wife joined, conveying the title of the property to Bradbury's children. The consideration for these instruments was the payment by Bradbury to plaintiff of \$60 on the first day of each month during the life of the plaintiff. The stipulated payments were made as they fell due from September, 1908, until about the time this action was begun in 1920. Some time before the execution of the instruments the plaintiff obtained the opinion of an attorney as to the title or interest he held in the land, who advised him that he only held a life interest, and that the property would descend to the heirs as provided in the deed. Plaintiff alleged and contends that the life lease and deed were fraudulently obtained and were void for the reason that Bradbury had concealed from him the opinion given by his lawyer in 1908 with respect to the title. His claim is that Bradbury took advantage of the confidential relations existing between them, and with the knowledge given him by the attorney as to his title he had procured the transfers for a monthly annuity of \$60 when the property transferred was actually worth \$20,000. Plaintiff had lived with Bradbury from 1894, when his father died, until 1899. He had been employed by Bradbury a short time in 1896 and again for a short period in 1906. Plaintiff drank heavily most of the time from 1900 to 1909, and often lost positions he had

obtained because of his intemperate habits. In 1909 he gave up these habits, and has been a total abstainer since that time. Friendly relations existed between plaintiff and Bradbury for 25 years, the period from the death of plaintiff's father until this action was brought. It appears that he was in the employ of Bradbury in 1920 as a book-keeper, and while rearranging the papers in a desk found and read the letter of Bradbury's attorney written in May, 1908, expressing the opinion that the title to the land was in the plaintiff. He then left the defendant's employment and instituted the action.

The defendants contend that, as plaintiff had for 25 years acquiesced in the view that he held only a life estate in the property, and did not question the rights of inheritance of Gilbert V. and Dorothy Bradbury in it, and also that he had sold his interest in it more than 11 years before challenging the transfers made, and further that the annuity to be paid him of \$720 during his life, the expectancy being 26 years, and which represented an aggregate of \$18,726, the actual cash value of the land, the ground relied on by plaintiff for relief did not warrant the cancellation of the lease and deed, nor afford any basis for equitable relief. As already indicated, the ground for setting aside the lease and deed is the fact that Bradbury did not inform plaintiff as to the opinion of the lawyer respecting the title given to defendant about three months before the execution of the instruments, and that with the information derived from the letter he dealt with the plaintiff on the theory that the extent of plaintiff's interests was a life estate. Did the withholding of the opinion expressed by Bradbury's lawyer constitute such fraud as will justify a cancellation of the deed and lease? The opinion related only to a question of law, the legal effect of an instrument of conveyance. It was only an opinion, and one which did not change the title of the plaintiff or affect his existing rights. It had no more effect than the legal opinion secured by plaintiff from another lawyer that he held only a life estate in the land. The effect of the recitals in the deed was a debatable question of law upon which the opinions of the attorneys were given. Both opinions were based upon the recitals of the instrument, and these were equally available to both parties. That it was a doubtful question was shown by the fact that capable lawyers placed different interpretations upon the same instrument. As between the parties dealing with each other, an expression of opinion not amounting to a representation does not constitute actionable fraud.

It has been said that:

"The vendor cannot be held responsible where he merely expresses an opinion as to the legal effect of known facts or muniments of title or

his opinion as to the validity of his title." 12 R. C. L. 274.

Here the opinion withheld was that of a stranger. It was not used to induce action, and the case is not like one where one party used a legal opinion to procure another to enter into a contract or to execute a conveyance. Every one is presumed to know the law, his rights and the state of his own title to property. The plaintiff had the same means of knowledge of his rights and interest in the land that the defendant had, and had previously used the means employed by defendant of obtaining a legal opinion as to his interest in the land. It has been said:

"The presumption is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law acting on his title." 1 Story's Equity Jurisprudence (14th Ed.) vol. 1, pp. 173, 174.

In a case where there was more than silence, but representations by the grantee to the effect that the title of the grantor had been divested by legal proceedings, it was held:

"The means of information were equally open to both parties. The grantor also consulted an attorney at law concerning his title, and executed the deed supposing that he had no title. Held, that he was not entitled to recover for the alleged fraudulent representations." Cobb v. Wright, 43 Minn. 83, 44 N. W. 682.

See, also, Robins v. Hope, 57 Cal. 493; Williams v. Beasley, 26 Ky. (3 J. J. Marsh.) 578; Boddy v. Henry, 113 Iowa, 463, 85 N. W. 771, 53 L. R. A. 769; Boileau v. Records & Breen, 165 Iowa, 134, 144 N. W. 336; Du Moulin v. Board of Education (Sup.) 124 N. Y. Supp. 901; Brown v. Lead & Zinc Mining Co., 194 Mo. 681, 682, 92 S. W. 699.

[2, 3] Plaintiff contends that if silence of defendant as to the opinion of his lawyer would not of itself operate to impeach the transaction, the confidential relationship existing between the parties made the withholding of the opinion an actionable fraud, which warranted the setting aside of the lease and deed. As has been seen, the only relationship between them was that of brothers-in-law. There being no blood relationship, the mere fact that the plaintiff lived in the family of defendant and was on friendly terms with him cannot be regarded as raising a confidential relationship. Plaintiff had left Bradbury's home and lived apart from him for about 5 years before the transaction in question, and nothing is seen in their relations or the circumstances which approaches a confidential or fiduciary relationship, one which under the law made it the duty of Bradbury to disclose mere opin-

ions that he had received from third parties. In *Bigelow on Fraud*, it is said:

"The mere fact, however, that a party was once in a relation of confidence to another, and that he still continues to be a trusted friend, appears not to be enough; a sale to such an one will be valid though the price was to his knowledge, and not to that of the vendor, inadequate, being of property of which he had formerly for many years had special charge as a servant. It need hardly be said that the fact that a party dealing with another has great confidence in him and may be easily influenced by him does not raise the technical confidential relation." *Bigelow on Fraud*, p. 366.

If the parties had been brothers in fact, that without more would not have created a relation of trust and confidence which would have required a disclosure of the opinions of strangers as to the effect of the deed. In *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384, it is said:

"In the absence of a confidential relation, the defendants were under no obligation to volunteer information to the plaintiff which was as readily accessible to him as it was to the defendants, and as 'the law will not undertake the care of persons who will not, with means at hand, take care of themselves,' the mere silence of the defendants cannot be construed to be a fraudulent concealment sufficient to support an action for fraud."

If the defendant had been the agent of plaintiff or had stood in a confidential or fiduciary relation to him, a full disclosure of all material facts relating to the subject of their dealings would have been required. But there was no actual or assumed relation of confidence between them. The state of the title had been brought to the attention of both, each had obtained independent advice concerning it, and the effect of the deed and the interpretation of its terms still remains a matter of doubt. The conflicting legal opinions which the parties had received in no way changed the status of the title, and the silence of the defendant related, as we have seen, to a question of law as to which the means of information was equally available to both parties. On the controlling facts as disclosed in the testimony by plaintiff we conclude the defendant was under no legal obligation to inform the plaintiff as to the advice given him by his attorney.

[4] Considerable is said about the intemperate habits of plaintiff, but there is no contention nor anything tending to show that he was intoxicated or lacking in capacity to understand what he was doing when he made the transfers based on what must be regarded as a substantial consideration. The conclusion reached makes it unnecessary to place a construction upon the deed executed by Venable, Sr., to the plaintiff or to consider the other questions discussed by counsel. Upon plaintiff's evidence it must be held that

he was not entitled to the relief sought, and therefore the judgment is reversed, and the cause remanded, with the direction to enter judgment for the defendants.

All the Justices concurring.

(111 Kan. 423)

OLDFIELD v. PHELPS et al. (No. 23788.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Execution \S 171(1) — Levy may be enjoined where issued on a judgment on which an execution had been previously issued and lands sold for the full amount of the judgment.

The levy of an execution may be enjoined where it is issued on a judgment on which an execution had been previously issued under which land had been sold for the full amount of the judgment, interest, and costs, the sale had been confirmed, and a deed had been issued, and where there is nothing to show that the title of the purchaser failed or that the judgment creditor did not receive the proceeds of the sale.

Appeal from District Court, Finney County.

Action by C. Bevan Oldfield against John B. Phelps and another. Judgment for plaintiff, and the defendants appeal. Affirmed.

C. L. Marmon, of Garden City, for appellants.

Hoskinson & Field, of Garden City, and F. Dumont Smith, of Hutchinson, for appellee.

MARSHALL, J. The defendants appeal from a judgment overruling their demurrer to the plaintiff's petition.

The petition alleged that on September 13, 1915, defendant John B. Phelps obtained a judgment against the plaintiff for \$374; that execution was issued on that judgment and levied on real property which was sold under the execution to John B. Phelps for the full amount of the judgment, interest, and costs; that the sale was confirmed; that afterward, on January 7, 1920, a sheriff's deed therefor was issued to John B. Phelps. The petition also alleged that by reason of the execution, sale, and sheriff's deed, the judgment in favor of the defendant had been fully satisfied. The petition further alleged that on January 7, 1921, defendants John B. Phelps and C. L. Marmon caused another execution to be issued on the judgment and placed in the hands of defendant Lee Richardson, sheriff of Finney county; that Lee Richardson was about to levy that execution upon a share of stock belonging to the plaintiff in the Garden City Land & Immigration Company; that the levy of the execution upon the stock would be illegal and wrongful; and that the plaintiff had no adequate remedy at law to prevent the sale of the stock. A permanent injunction was asked.

The judgment from which the appeal is taken reads:

"Now, on this 17th day of May, A. D. 1921, * * * the above case came on for hearing upon the demurrer of defendants to the petition of plaintiff filed herein. * * *

"Upon argument of counsel, and pending a ruling of the court in said matter, it was stipulated and agreed in open court that the same admissions and evidence adduced in the trial of the case of John B. Phelps v. Geo. W. Finnup et al. would be admitted as the evidence in this action, in so far as same was applicable to the point in issue. The court being fully advised in the premises, overrules said demurrer.

"It is therefore, by the court considered, ordered, adjudged, and decreed that the demurrer of the defendants to the petition of the plaintiff filed herein be overruled, and the defendants electing to stand on the demurrer and excepting to the rulings of the court, said exceptions were duly allowed."

The action of John B. Phelps v. Geo. W. Finnup et al. was prosecuted by Phelps to recover possession of the land described in the sheriff's deed. He failed in that action. These facts are not stated in the petition and are not included in the stipulation set out in the judgment in this action.

Unless the admissions and evidence named in the judgment were made a part of the petition, they had no place in the hearing on the demurrer. There is nothing to show that they were made a part of the petition or that they were so considered. If they were not made a part of the petition, the trial court could not consider them on the demurrer, and this court should not do so now. The judgment indicates, but does not say, that only the petition was considered when the ruling on the demurrer was made. The defendants who appeal apparently did not consider the admission and evidence as a part of the petition because they are not abstracted, although a transcript of them has been filed in this court. The admissions contained in that transcript do not add anything to the petition in this action. The facts shown by the evidence set out in the transcript, if they had been pleaded in the petition, might compel a different judgment; but the judgment should not be reversed until it affirmatively appears that those facts were considered the same as if they had been alleged. This action must be disposed of on the petition, as written, and the demurrer thereto.

The practice of simplifying matters in the courts in the trial of a lawsuit is to be commended; but, when it is sought to reverse the judgment of the trial court, matters must be placed in the record brought to this court to show that error was committed, or the judgment must be affirmed. There is nothing in the record presented to this court in this action to show that error was committed by the trial court.

The defendant argues that by setting aside a sheriff's sale of real property, the judgment under which the sale had been made would be reinstated. It may be conceded that the argument of the defendants on this proposition is correct, but that is not the case that is presented to this court. Here, there had been a sale of real property under execution; the sale had been confirmed; and a deed had been issued. There is nothing in the petition to show that the title of the purchaser failed or that the judgment creditor, John B. Phelps, did not receive the proceeds of the sale. So far as the petition is concerned, the purchaser acquired good title to the property. The purchase money was, under the law, applied in satisfaction of the judgment, and another execution cannot be lawfully issued on it.

The demurrer was properly overruled, and the judgment is affirmed.

All the Justices concurring.

(111 Kan. 455)

WEIGAND v. LESTER, City Clerk, et al.
(No. 23982.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Municipal corporations \S 413(2)—Cost of paving street intersections not to be segregated from total cost, for purpose of dividing cost between city and benefited property.

Under chapter 118 of the Session Laws of 1921, one-third of the entire cost of repaving a street is to be borne by the city at large, and the remainder of the cost is to be assessed against the benefited property, and in this division the cost of paving the street intersections is not to be segregated from the total cost, nor added to that part of the burden imposed by the statute on the city at large.

2. Mandamus \S 3(9)—Will not lie at instance of taxpayer to question validity of levy or assessment.

Taxpayers, specially aggrieved by the action of public officials in levying taxes against their property, have a right of action provided by the Code to enjoin such levy or assessment, if such remedy is properly invoked; but they have no general legal right to question the validity of such levy or assessment by instituting an original action in mandamus in the Supreme Court to compel the public officers to perform their official duty.

3. Mandamus \S 146—Action to compel public officials to perform duty should be brought in name of state, on relation of county attorney or Attorney General.

An action to compel public officials to perform their duty should be brought in the name of the state, on the relation of the county attorney or Attorney General, and such action cannot ordinarily be maintained by a private citizen.

Petition by John P. Weigand, for himself and others similarly situated, for a writ of

mandamus against H. D. Lester, City Clerk of Wichita, and others. Writ denied, and action dismissed.

J. N. Haymaker, A. V. Roberts, and R. E. Angle, all of Wichita, for plaintiff.

Robert C. Foulston and Geo. Siefkin, both of Wichita, for defendants.

DAWSON, J. The plaintiff on behalf of himself and others similarly affected filed this original action in this court, praying for a writ of mandamus against the city officials of Wichita, directing them to assess the cost of a certain street improvement according to plaintiff's notion of how that ought to be done, and not as the defendant officials have done it.

As the dispute between the parties over the correct interpretation of the statute is one very easily settled, we will decide that question, but we will have to add some comment touching the propriety of this kind of a lawsuit to settle this sort of questions at the instance of private individuals. And, first, as to the statute:

Chapter 118 of the Session Laws of 1921 authorizes cities of a certain population to repave their streets, at the discretion of the city government and regardless of protest or remonstrance, when the original paving is 10 years old, and provides that the city shall pay one-third of the entire cost of such repavement, and that the remaining two-thirds of the cost shall be borne by abutting property owners as provided in other and earlier legislation. East Douglas avenue, in Wichita, is one of the principal thoroughfares of that city, and as the original paving thereof had become worn and dilapidated, the city government determined to repave a portion of it under the authority of chapter 118. The entire cost was determined, and two-thirds thereof assessed against the abutting property, which included the plaintiff's.

[1] Under other and earlier statutes, the entire cost of paving, except the street intersections, 'is assessed against the abutting property. Gen. Stat. 1915, §§ 1231, 1233, 1757, 1974. Under such statute the cost of paving the intersections is paid by the city at large. Now, in this case, notwithstanding the plain terms of the act of 1921, which declares that the city at large shall bear one-third of the cost of repaving and the benefited property shall bear two-thirds of the cost, it is plaintiff's contention that the cost of repaving the intersections should be segregated from the entire cost of the street improvement, and that portion of it should likewise be borne by the city at large. The statute will not bear that interpretation. It means precisely what it says—one-third of the entire cost is chargeable to the city, and the remainder is to be assessed to the benefited property. The only relation this statute has to earlier legislation touching street improvements is that the assessment of two-

thirds of the cost shall be apportioned among the lots, tracts, pieces, and parcels of land within the benefited district in the same manner as provided by law for the construction of street paving under statutes covering such matters in detail.

[2] With that question settled, we must now add that this action is not properly maintainable in this court at the instance of private litigants. Our original jurisdiction in mandamus should not be perverted into the entertainment of actions by private citizens to compel public officers to perform their official duties. Exceptions to this rule there are, but ordinarily an action in mandamus to compel public officials to do their duty must be brought in the name of the state of Kansas, on the relation of one of its officers duly authorized—the county attorney or the Attorney General. There is a statute giving private citizens peculiarly aggrieved by a tax assessment a right, if timely exercised, to challenge the validity of an assessment of taxes made or threatened. It reads:

"An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge, or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction. * * * Gen. Stat. 1915, § 7163.

[3] Aside from this statute just quoted, private individuals have no general legal right to provoke litigation to question the action or conduct of public officials. They should lodge their complaints against public officials with the public functionary selected by law to deal with official irregularities. *Bobbett v. State*, 10 Kan. 9; *Miller v. Town of Palermo*, 12 Kan. 16; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1; *Nixon v. School District*, 32 Kan. 510, 4 Pac. 1017; *Albach v. Fraternal Aid Union*, 100 Kan. 511, 515, 516, 164 Pac. 1065; *Abraham v. Weister*, 103 Kan. 162, 172 Pac. 998.

Even in the cases where private individuals may maintain a taxpayers' suit under section 265 of the Civil Code (Gen. St. 915, § 7163), expedition is a prime requisite, and usually there is a 20 or 30 days limitation in which such a suit may be brought. If the present controversy had been brought as an injunction suit in a court of general jurisdiction, it would have been too late to enjoin the assessment as made by the city officials. *Rockwell v. Junction City*, 92 Kan. 518, 141 Pac. 290, Ann. Cas. 1916B, 315. This does not conclude all the objections which could be made against the sort of action here presented, but

it is clear that the writ of mandamus should be denied and the action dismissed.

It is so ordered.

All the Justices concurring.

(111 Kan. 577)

STATE v. BOLTON. (No. 24113.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Criminal law §508(9), 510—Fact that witness is an accomplice goes to his credibility; uncorroborated evidence of accomplice sufficient for conviction.

The fact that a witness was an accomplice in the commission of the crime charged goes to the credibility of his evidence, and not to its competency, and if the jury are fully convinced of the truth of his testimony, and are fully satisfied that it is sufficient to establish the guilt of the defendant, they may convict upon the uncorroborated evidence of the accomplice.

2. Larceny §59—Evidence held to prove value of property to be in excess of \$20.

The evidence examined, and held to be sufficient to support the conviction of defendant.

3. Criminal law §1172(2)—Instruction that testimony of witnesses as to other crimes could be considered only to affect their credibility held harmless notwithstanding denial of one witness that he had participated in other crimes.

A questioned instruction is held to be without material error.

(Additional Syllabus by Editorial Staff.)

4. Witnesses §337(6), 345(1)—Evidence as to participation of defendant and other witnesses in other thefts admissible to affect credibility as witness.

In prosecution for larceny, testimony of defendant and another witness on cross-examination as to participation in other thefts held admissible for the purpose of affecting the credibility of the witnesses.

5. Criminal law §673(5)—Court required to instruct that evidence as to defendant's participation in other thefts was admissible merely to affect his credibility as a witness.

Where defendant was cross-examined as to participation in other thefts, it was the duty of the court to instruct the jury that such evidence could be considered only for the purpose of affecting his credibility as a witness.

Appeal from District Court, Rice County.

Clarence Bolton was convicted of larceny, and he appeals. Affirmed.

Don Shaffer and Eustace Smith, both of Hutchinson, for appellant.

Richard J. Hopkins, Atty. Gen., and Ben Jones, of Lyons, for the State.

JOHNSTON, C. J. Clarence Bolton was convicted upon a charge of the larceny of an Exide battery. In his appeal he contends that the verdict was not sustained by the evidence. The testimony for the state was

to the effect that in the early part of October, 1921, defendant and four others went from Lyons to Little River in a Ford car owned and driven by the defendant. While riding about Little River defendant directed those with him to get a battery for his car, saying that if they did so he would make it right with them. Two of them acting upon his suggestion tried to take a battery from a car pointed out, but they were interrupted, and one of them said, "We about got caught and gave it up." Defendant then told them to go over to a certain place and try and take a battery from another car. Two of them went to the place designated, where the car of Dr. Bush was parked, and while one Nordstrom was detaching the battery another of the party named Colberg stood guard. While they were engaged in taking the battery and in hiding it behind a church, the defendant drove his car about the town, and shortly afterwards returned to the place where others of the company were, took them into the car, drove to the church where the stolen battery was left, and when it was loaded into his car the defendant and his companions drove back to Lyons. On the way back the defendant remarked that the battery taken was an Exide battery. When they arrived in Lyons the battery was taken into the shop of defendant's garage. There defendant got tools and removed the name plate from the battery. In his testimony defendant stated that the battery in his possession alleged to have been stolen was given to him by a tourist for repairs he had made on the car of the tourist. There is no lack of incriminating testimony. That produced by the state was mainly given by those who accompanied the defendant and had a part in the larceny.

[1] It is argued that, as the witnesses were accomplices in the crime, their uncorroborated testimony will not sustain a conviction. The rule invoked has no application in Kansas. It has long been settled that the uncorroborated testimony of an accomplice is legally sufficient to sustain a verdict. The evidence of an accomplice is as competent as that of any other, and his participation in the offense only goes to his credibility. For obvious reasons the testimony of an accomplice is to be cautiously scrutinized, but if it is otherwise sufficient and fully satisfied the jury of the defendant's guilt, a verdict may be based upon his unaided testimony. *State v. Patterson*, 52 Kan. 335, 84 Pac. 784; *State v. Bratcher*, 105 Kan. 598, 185 Pac. 734; *State v. McDonald*, 107 Kan. 568, 193 Pac. 179.

There is no complaint of the instructions given by the court as to the caution to be used in accepting and acting upon the uncorroborated testimony of accomplices, and the fact that the witnesses against defendant

had participated in the commission of the crime charged was brought to the attention of the jury with the admonition that such participation should be considered in determining the weight and credit to be given their testimony.

[2] Complaint is made that the value of the property stolen was not sufficiently established. There was testimony and enough of it to show that the value of the battery taken exceeded \$20, the amount essential to the offense of grand larceny. The market value of a new battery was shown to be \$25, and the one in question had only been used for a few days. One witness did place a valuation of \$18 upon it, but the testimony of another fixed it at \$25, and the jury was warranted in finding that its value was more than \$20.

[3-5] Objection was made to an instruction in which the jury was told that inquiries had been made on cross-examination of defendant and one Diggs as to the commission of other offenses, and that such testimony could be considered for no other purpose than as it might affect the veracity and credibility of the witnesses. For this purpose the evidence was admissible, and it became the duty of the court to tell the jury what application could be made of the testimony. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Bowers*, 108 Kan. 161, 194 Pac. 650. The defendant admitted that he had previously committed thefts other than the one charged, but Diggs in his testimony denied that he had participated in other offenses about which inquiry was made. It is contended that a reference by the court to the inquiry of Diggs was improper. In view of the denial of Diggs the reference to him might well have been omitted, but, as there was no testimony or admissions of misconduct or guilt, the mention of him in the instruction cannot have been prejudicial.

Judgment affirmed.

All the Justices concurring.

(111 Kan. 428)

WELDGRUBE v. KERNS et al. (No. 23797.)

(Supreme Court of Kansas. June 10, 1922.)

(*Syllabus by the Court.*)

1. Chattel mortgages \S 250—Mere payment of interest on maturity held not to constitute renewal of mortgage.

The transaction relied on held not to amount to a renewal of the chattel mortgage in controversy.

2. Chattel mortgages \S 251—Mortgagee who deems himself insecure may foreclose, regardless of grounds for such belief under provision entitling him to so do if he shall deem debt insecure.

The rule followed that a chattel mortgagee who in fact deems himself insecure may fore-

close regardless of the grounds for such belief, the instrument providing that he may take possession and sell the property if at any time he "shall deem the debt unsafe or insecure."

Appeal from District Court, Wyandotte County.

Action by W. F. Weldgrube against W. N. Kerns and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. K. Ward and James T. Cochran, both of Kansas City, Kan., and Toby Fishman, of Kansas City, Mo., for appellants.

E. L. Eaton, of Bonner Springs, for appellee.

WEST, J. The plaintiff foreclosed a chattel mortgage, and the defendants Nichols and Spiwak appeal and insist that there was no default and that the suit was prematurely brought. Another matter involved is the question of the plaintiff's deeming himself insecure.

The petition alleged that the defendant Kerns gave the plaintiff a note for \$3,500 secured by chattel mortgage on the Edwardsville Telephone Exchange. The note was dated February 19, 1919, payable on or before one year after date. The mortgage provided, among other things, that if default be made in payment of the debt or any part thereof, "or if at any time the payee of said note shall deem the said debt unsafe or insecure," he was authorized to take possession and sell the property. A further stipulation was:

"That the undersigned may renew said indebtedness and this mortgage at the maturity thereof at his option, if he shall have paid the interest due thereon, for the period of one year from February 19, 1921, and may, also, under the same condition, at his option, renew said indebtedness and this mortgage further, from year to year, thereafter, but not more than three times after February 19, 1921. * * *

The petition alleged that the note was past due and that the condition of the mortgage had been broken and the plaintiff deemed the debt insecure and unsafe.

The answer of the defendants Nichols and Spiwak (subsequent owners of the telephone system) alleged, among other things, that the note and mortgage were not due and payable and not in default and that the indebtedness was not unsafe and insecure. It was further alleged that on February 8, 1921, and prior to the beginning of the suit Kerns paid the plaintiff through its authorized agent, the Farmers' State Bank, \$210, "the said amount being received by said bank and duly indorsed on said note, and being the interest due and payable on the said note and mortgage by the terms thereof, from February 19, 1920, to February 19, 1921." Further, that on the date of this payment Kerns elected to exercise the option to renew and

did renew for one year and the plaintiff in recognition thereof filed his renewal affidavit.

In reply the plaintiff averred that on or about August, 1920, and prior to January 1, 1921, the defendant Kerns sold the property to Nichols subject to the mortgage and Nichols assumed and agreed to pay the debt, and at the time of the interest payment on February 8, 1921, Kerns was not the owner of the property.

The court rendered judgment for the plaintiff. The errors alleged are: Admitting improper and refusing proper evidence, entering judgment for the plaintiff, and denying a new trial.

The plaintiff testified, among other things, that when the interest was paid in 1920, there was nothing said about a renewal; that he did not know when Kerns sold out and was told nothing about it by Kerns. The defendant Nichols testified that he owned the telephone system February 8, 1921, but had dated the paper back to the first of February because that was when the contract was made between him and Spiwak.

The plaintiff testified that he looked over the telephone lines and they were in poor shape; that he saw Kerns some time in June and talked to him about the note and mortgage.

"Q. Now, you may state, knowing what you did about the system and Mr. Kerns, and the property he had, what he may have told you whether you deemed yourself and this debt safe and secure. * * * A. I felt unsafe and insecure on account of changing hands, and—"

In their brief counsel say that all the specifications of error are based upon the fundamental proposition that the judgment is in whole or in part contrary to the evidence. They argue that the court erred in finding there was no renewal of the mortgage and its construction of the insecure clause of the contract, and that the evidence showed that the plaintiff did not deem himself insecure.

Whether or not the renewal clause between the plaintiffs and the mortgagor Kerns could be taken advantage of by the defendants to whom the property was sold subject to the mortgage need not be determined at this time.

[1] We do not regard the evidence as showing a renewal of the note and mortgage by the mere payment of interest to the bank, but even if a renewal was made the insecure clause still retained its primary force.

[2] Whatever the views of other courts may be, the rule is settled in this state that, if a chattel mortgagee in fact deems himself insecure, that is the end of all strife, and the grounds thereof cannot be inquired into by other parties. *Thorp v. Fleming*, 78 Kan. 237, 86 Pac. 470, 19 L. R. A. (N. S.) 915, 130 Am. St. Rep. 366.

While counsel claim there was evidence to show that the plaintiff did not in fact deem the debt insecure, his own evidence, already quoted, was the other way, and the trial court evidently took that view of the matter, and we are bound thereby.

No material error appearing in the record, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 329)

SMITHMEYER et al. v. HOPKINS, Atty. Gen.
(No. 24334.)

(Supreme Court of Kansas. May 10, 1922.)

(Syllabus by the Court.)

1. Monopolies \S 25—In anti-trust law investigation, books and documents produced for prosecuting officer's examination must be returned without unreasonable delay.

When in the course of an investigation concerning violations of the anti-trust law, certain books, documents, letters, telegrams, and papers are produced for the examination of the Attorney General or county attorney in obedience to an inquisitorial subpoena issued by such officer, all such property should be returned without unreasonable delay to its owner or to the witness producing the same, and the prosecuting officer has no right to withhold them.

2. Mandamus \S 7—Writ will not compel prosecuting officer to return document or letter which is an instrumentality used in consummating a crime.

When any document, letter, etc., produced under the circumstances outlined in syllabus 1 is not so returned, but is withheld on the ground that it is in fact an instrumentality used in consummating the crime, and has thereby lost its character as property, the return of such document, letter, etc., will not be compelled as a matter of right by the issue of the discretionary writ of mandamus.

3. Mandamus \S 176—Will issue to compel Attorney General to return books and documents seized under subpoena with qualification as to those instrumental in committing a crime.

In memorandum opinion, controlling facts stated, and writ of mandamus allowed, with qualifications.

4. Prohibition \S 5(2)—Facts held not to justify issue of writ of prohibition.

The circumstances indicated in the memorandum opinion held not so singular and unusual as to justify the issue of the extraordinary writ of prohibition.

Burch, J., dissenting in part.

Original proceeding in mandamus by F. H. Smithmeyer and others against Richard J. Hopkins, Attorney General of the State of Kansas. Writ allowed conditionally.

Thomas F. Doran and John S. Dean, both of Topeka, S. D. Bishop, of Lawrence, and Harry W. Colmery, of Topeka, for plaintiffs.

Richard J. Hopkins, Atty. Gen., and John G. Egan, Asst. Atty. Gen., for defendant.

DAWSON, J. This is an original proceeding in mandamus filed four days ago, in which the plaintiffs pray for a peremptory order, directing the Attorney General to return forthwith to defendants certain letters, papers, telegrams, books, records, and documents, belonging to the Poehler Mercantile Company, which the Attorney General took into his possession some two years ago, at a time when such property was produced for his examination in obedience to his subpoena, in an investigation being conducted by him touching certain violations of the Anti-Trust Law. All this property still remains in the Attorney General's hands, and he has declined to return it. A criminal prosecution under the Anti-Trust Law is pending in the Douglas county district court against the two individual plaintiffs, set for trial to-morrow, and plaintiffs allege that the documents, books, papers, etc., are being unlawfully retained by the Attorney General for use as evidence in that criminal case. They further allege that they cannot prepare their defense until the Attorney General is compelled to surrender this property, so that they may inspect the same and prepare their defense to any evidential matters contained therein to their prejudice.

This purpose to so use this property is virtually admitted by the Attorney General; but he contends that the matter is not controlled, or at least not fully controlled, by the decision of this court in *State v. Smithmeyer*, 110 Kan. 172, 202 Pac. 638, because here at least some of the letters, documents, etc., which he retains are not merely evidence of the crime, but actually instrumentalities by which the unlawful combination in restraint of trade was effected, and that such parts of the documents, etc., which he retains have lost their character as property. The urgency of an immediate decision will not permit us to go into this subject in detail, nor to discuss the pertinent law at length, nor can this court, in mandamus, undertake to segregate what part of the plaintiff's property should of right be returned, and what part, if any, may be merely instrumentalities of the alleged crime as to which plaintiffs can claim no property interest, nor should we in this summary proceeding consider the admissibility of any of the retained property as evidence in the criminal case.

[1] But under the rule announced in *State v. Smithmeyer*, supra, the Attorney General had no right to retain any property produced for his inspection under his inquisitorial subpoena, and so the order must be that he return forthwith to the plaintiff the Theo. Poehler Mercantile Company all its property in his hands, except such particular documents, etc., as he claims to be actual instrumentalities used in the commission of the

crime or crimes for which the individual plaintiffs stand charged, and as to those retained by the Attorney General he is ordered forthwith to furnish to the plaintiffs copies of such alleged instrumentalities so that plaintiffs may be advised thereof and prepare their defense accordingly.

[2-4] The plaintiffs also ask for an ancillary writ of prohibition directed to the district court, Attorney General, and county attorney, to enjoin them from proceeding with the criminal trial, and to direct that such trial be continued until the property involved herein is returned to plaintiffs, and until they have an opportunity to examine the same and prepare their defense thereto. While the circumstances are unusual, the court does not deem the situation so singular and rare as to justify the use of so high and extraordinary a remedy as the writ of prohibition, and it is therefore denied. But the writ of mandamus for the immediate return of all the property to the plaintiff corporation is allowed, except as to that portion of it which may as actual instrumentalities of crime have lost its character as property, and as to all such instrumentalities retained by the Attorney General he is ordered forthwith, before proceeding to the trial in the criminal case in Douglas county against the individual plaintiffs, to furnish plaintiffs with copies of all documents, etc., so retained by him as such alleged instrumentalities.

JOHNSTON, C. J., and MASON and WEST, JJ., concur.

MARSHALL, J. I am of the opinion that there are no instrumentalities used in the commission of crime among the documents retained, and that all should be returned.

BURCH, J. (dissenting), is of the opinion that the writ of mandamus should be allowed without condition or exception.

PORTER, J., not sitting.

(111 Kan. 371)

HAYEN v. GREENFIELD. (No. 23559.)

(Supreme Court of Kansas. June 10, 1922.)

Appeal from District Court, Marion County.

Action by Edward Hayen against E. J. Greenfield. From the judgment rendered, defendant appeals. Affirmed.

H. O. Caster, of Wichita, and K. W. Shortel, of Des Moines, Iowa, for appellant.

S. Burkholder and Carpenter & Carpenter, all of Marion, for appellee.

PER CURIAM. (BURCH, J.) The questions presented by this appeal are similar to those disposed of in the case of *Schlotthauer v. Greenfield*, 110 Kan. 701, 205 Pac. 623, and the judgment of the district court is affirmed, on the authority of the decision in that case.

(120 Wash. 487)

CAVANAUGH v. CAVANAUGH et al.
(No. 16704.)

(Supreme Court of Washington. June 22, 1922.)

1. Frauds, statute of §129(3)—Execution of will held not to take contract to devise out of statute.

Execution of a will which was afterwards revoked did not overcome an objection that a contract to devise was within the statute, where the will did not set forth the contract.

2. Frauds, statute of §130(2)—Contract to will property void in part void as whole.

A contract to will property, being void under the statute as to real estate, could not be enforced as to the personalty because being void in part it was void as a whole.

3. Frauds, statute of §158(4)—Part performance of agreement to devise property held not sufficiently shown.

In an action involving an agreement to devise property in consideration of past and future services, evidence held not to show sufficient part performance to take the agreement out of the statute.

4. Specific performance §62—Agreement of children to share property received from father equally held enforceable in equity.

Where father in his declining years remarried, an agreement, among children, to share the estate equally with one among them chosen to approach the father for purposes of settlement of property rights in case he should incur the displeasure of the father and receive a smaller part of the estate, was enforceable in equity in an action wherein it appeared that such children in bad faith procured the father to convey all of his property to them for the purpose of defeating the contract; such contract not being against public policy and being founded upon sufficient consideration.

En Banc.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Fred B. Cavanaugh against Martin L. Cavanaugh and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Karr & Gregory and H. G. Sutton, all of Seattle, for appellant.

Poe & Falknor, of Seattle, for respondents.

TOLMAN, J. Appellant, who was plaintiff below, seeks in this action to establish his right to receive, upon the death of his father, the respondent Martin L. Cavanaugh, who is still living, a certain share in the property heretofore belonging to the latter. The other individual respondents are the remaining surviving children of Martin L. Cavanaugh, and the Title Trust Company now holds title to the property in question in trust as will more fully appear.

Demurrers to the complaint were overruled, issue was joined, and the case came on for trial on the merits. An opening statement was made by counsel. Appellant was called as a witness in his own behalf, and after he had testified in chief as to his version of the facts up to the time of the making of the written agreement between the children of the elder Cavanaugh, hereinafter set out, the trial court reached the conclusion that the complaint as modified by the opening statement and appellant's testimony failed to state a present cause of action, and a judgment of dismissal without prejudice followed, from which this appeal is prosecuted.

The complaint, as modified by the testimony, seems to sufficiently charge the following facts:

That appellant, in 1895, at his father's request, went from Seattle to San Rafael, Cal., where the father was operating a hotel, and was there employed in and about his father's business for 8½ months, for which he received no compensation, and was not reimbursed for his expenses. The father promised him a half interest in the hotel, or wages, and repayment of his traveling expenses, but that the hotel was sold, the father receiving the purchase price, and the son received nothing whatever in payment for his services or as reimbursement for his expenses; that in November, 1900, the father telegraphed the son to come immediately to Bradley, Cal., for the purpose of assisting him in drilling for oil, and that the son complied with that request, and worked for his father at the oil well from November, 1900, to May, 1901; that the father promised him 10,000 shares of stock in payment for this service, but never delivered the stock, nor made any payment for the services rendered. In the fall of 1901 appellant again worked at the oil well for his father at the latter's request, continuing the service until the spring of 1902. What was said about compensation is testified to by the son as follows:

"In March, 1902, the latter part of February, or the fore part of March, I was sitting at the table in the oil camp playing the guitar, and Mr. Harvey was seated across the table, and Mr. Wallin, the driller, was at the other end of the table, and Father got some paper and sat down at the table and was writing, and we paid no attention to him, and finally he said 'Boys, I have been doing some writing, and I want to read this to you.' And he read what he had been writing, and he had written out his will. * * *

"He asked Mr. Harvey and Mr. Wallin to witness his signature. He signed it in the presence of Mr. Wallin and Mr. Harvey, and he said to me, he said, 'This will take the place of the agreement and will pay you well for your services at the hotel and for your services here.'"

And in the complaint it is alleged that by this will the father bequeathed to appellant three-fifteenths of his entire estate and told appellant that in consideration of the bequest appellant would be expected to perform further services for him in looking after certain property interests in Seattle. After making the will (which it appears gave to each of the other children a share less than that given to appellant), according to appellant's testimony, it was understood that he was to return the following fall to the oil well and assist his father, which he did, and having married in the meantime he took his wife with him and both worked for the father from December 1, 1902, until the spring of 1903, receiving no compensation and no reimbursement for expenses. Afterward from the year 1906 to the year 1912 appellant looked after certain business affairs in Seattle for the father, and loaned certain moneys for him, receiving nothing directly from the father, but upon his making complaint the father informed him that he might charge a brokerage in making loans, thus covering his expenses and receiving compensation, and apparently this was done. It appears, however, that appellant's mother, the wife of Martin L. Cavanaugh, was interested in the Seattle property, it being the community property of herself and husband, and appellant's attention to the property was as much in the interest of his mother as of his father. The mother died in April, 1912, and the father shortly thereafter, being of the age of 74 years, contracted a second marriage, which proved unfortunate, and soon resulted in an action for divorce by the wife, in which she made claims which threatened serious inroads upon the elder Cavanaugh's fortune. Learning of this situation, all of the surviving children of Martin L. Cavanaugh entered into a written agreement as follows:

"Memorandum of Agreement.

"This memorandum of agreement made and entered into this 25th day of November, 1912, A. D. by and between Fred B. Cavanaugh of Kent, Washington, herein designated the party of the first part, and Rose Mae Newell, Frank F. Cavanaugh, Emma J. Fulford, Mrs. Tabitha A. Card, and Elvira C. Mitchell, parties of the second part, witnesseth:

"That whereas, M. L. Cavanaugh, the father of all the parties hereto, has recently contracted a marriage, and is at this time married and whereas, on account of said marriage all of the parties hereto believe it to be for the best interests of the heirs of M. L. Cavanaugh that some steps be taken at this time looking forward to a settlement between M. L. Cavanaugh and his lawful issue, and,

"Whereas, the parties of the second part have this day constituted and appointed Fred B. Cavanaugh their sole representative to act for them in an attempt to settle their rights with M. L. Cavanaugh at this time, and

"Whereas, all the parties hereto realize that the said Fred B. Cavanaugh in arranging for such settlement is apt to incur the displeasure of the said M. L. Cavanaugh.

"Now therefore, in consideration of the premises and other valuable consideration it is hereby mutually understood and agreed by and between the parties hereto: First, that in the event that Fred B. Cavanaugh shall attempt to make a settlement of the rights of the parties hereto with M. L. Cavanaugh, and for any reason fail, and by so doing be in any manner or form deprived of his full rights as an heir of M. L. Cavanaugh, and shall by so doing be in any manner disinherited by the said M. L. Cavanaugh, then and in that event the said parties of the second part hereby agree with Fred B. Cavanaugh that they and each of them shall contribute to the said Fred B. Cavanaugh from any portion of the property or property rights they shall receive from the settlement of the estate of M. L. Cavanaugh such property and property rights so that Fred B. Cavanaugh shall receive an amount equal to that of any of said parties of the second part, share and share alike.

"This agreement shall only be in force and effect in the event Fred B. Cavanaugh shall be under the terms of the last will and testament of M. L. Cavanaugh, bequeathed an amount less than that received by the said parties of the second part and under all other conditions and circumstances, this agreement shall be null and void.

"Dated this 25th day of November, 1912

"[Signed.] Fred B. Cavanaugh.

"Frank F. Cavanaugh.

"Rose M. Newell.

"Elvira C. Mitchell.

"Tabitha A. Card.

"Emma J. Fulford."

It is further alleged that appellant in accordance with the terms of the agreement made an attempt to secure a settlement with his father for himself and his brother and sisters, in accordance with the terms of the agreement; that he failed in his efforts, but did thereby incur the displeasure of his father to such an extent that the elder Cavanaugh revoked the will which he had theretofore made, repudiated his agreement to provide by will for the services rendered by appellant, and, for the purpose of defeating appellant's rights under the agreement to devise, has, without any consideration, conveyed all of his property of every kind and nature to his children other than appellant; that the father's action was induced by the persuasions of the respondent children, who acted therein with a fraudulent intent of avoiding the agreement which we have set out. The allegations are sufficient to make a charge of bad faith against all of the respondents except the trust company, which, it is alleged, now holds the property in trust for the respondent children, or some of them. Appellant prays that the respondents be ordered to submit an inventory of all the property transferred to them by Martin L. Cavanaugh, or held by them for Mar-

tin L. Cavanaugh, and that a decree be entered to the effect that whatever interest has been transferred or assigned by the elder Cavanaugh to the other respondents herein be subject to a three-fifteenths interest in appellant, being the interest alleged to have been bequeathed to him in the will referred to, and that it be further decreed that such three-fifteenths interest is held in trust for the appellant, to be delivered to him upon the death of the elder Cavanaugh, together with a prayer for general relief.

[1, 2] The first question is whether the rendering of services and the expenditure of money, as stated, upon an agreement for payment in money or property for which, after the services were rendered, was substituted an agreement to devise property by will, is such a consideration and part performance as will operate to prevent the later revocation of the will. It may be remarked in passing that the testimony fails to show the terms of the will, but since the plaintiff's case was not completed when the case was dismissed, we must assume that had the trial proceeded the proof would have been offered tending to show that the will, as charged in the complaint, was more favorable to appellant than to the other children of the testator.

In solving the question we are now considering, we must first inquire whether the promise was an oral one, void under the statute of frauds, or whether the execution of the will was such a writing as would avoid the statute. In *Swash v. Sharpstein*, 14 Wash. 428, 44 Pac. 862, 32 L. R. A. 796, where the promise to devise was held to be oral and under the ban of the statute, no will was in fact made, and this court expressly declined to pass upon the question as to whether the making of a will would, or might have been, sufficient to overcome the objection. In *re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041, is a case involving mutual wills, which were executed, but the wills failed to set forth the contract, if one there was, which would make them mutual in law, and thus irrevocable except by agreement or upon notice, and an oral mutual agreement to will, one to the other, was sought to be shown. After reviewing and discussing the authorities, this court there said:

"We conclude, therefore, that the contract relied upon by appellant as rendering the wills of July 3, 1909, irrevocable, other than by agreement or upon notice, is within the statute of frauds, and that it cannot be recognized by us as of any force unless evidenced in writing or partially performed so as to relieve it from the operation of the statute of frauds."

And it was further said:

"We are of the opinion that these wills do not, of themselves, prove the making of any contract of mutuality on the part of the testa-

tors, nor that one was made in consideration of the other, though upon their face they appear to have been simultaneously executed before the same witnesses and were, as the evidence shows, placed for safe-keeping together in the hands of a third person. So far as any written evidence such as is required by the statute of frauds shows, these are individual wills of the simplest possible character, and there is no competent written evidence in this record tending to show that they were made in pursuance of any contract between the respective testators which would in the least impair their power of revocation."

This doctrine was reaffirmed in *McClanahan v. McClanahan*, 77 Wash. 188, 137 Pac. 479, Ann. Cas. 1915A, 461, and is therefore the settled law of this state. Applying it to the case at bar, the will of the elder Cavanaugh, so far as appears from the allegations of the complaint, or the testimony of the appellant, contains no language which could be construed into a contract to devise in consideration of the services of the son, and such contract, if it existed, was oral, and therefore unenforceable. The property involved, as appears by the complaint, was, to a large extent, real estate, and we held both in the *Swash* Case and in the *Edwall* Case that the contract, being void as to the real estate because of the statute of frauds, cannot be enforced as to the personalty, for the reason that being void in part it is void as a whole.

[3] Nor does it appear that there was sufficient part performance. The complaint charges that subsequent services in looking after the Seattle property were to be rendered, but the testimony shows that these services were by agreement to be compensated for by a brokerage charge to borrowers, and so far as appears the son was fully compensated in that way for such services. It is not alleged in the complaint that further services were to be rendered in California, as a part of the consideration for the making of the will, and what little testimony there is upon that subject was at the best a mere conclusion of the witness and not the statement of any material fact. As was said in the *Edwall* Case, *supra*:

"Some contention is made by counsel for appellant rested upon the theory of part performance on her part of the contract she relies upon. The record furnishes no evidence whatever of part performance, unless we regard the mere execution of the wills by both testators as performance. We do not think that the mere making of a will in pursuance of a contract required to be evidenced in writing by the statute of frauds, constitutes a part performance of such a contract so as to render the same enforceable."

This case is clearly distinguishable upon the facts from *Velikanje v. Dickman*, 98 Wash. 584, 168 Pac. 465, and *Alexander v. Lewes*, 104 Wash. 32, 175 Pac. 572, upon

which appellant relies. Nothing herein said is intended to in any wise modify or lessen the force of those cases.

These views, tending to the conclusion that no right of action can be sustained upon the will at any time, render it unnecessary to discuss the question of whether in any event a right of action can be maintained while the testator is still living.

[4] We come now to the consideration of the contract of November 25, 1912, between the surviving children of the elder Cavanaugh.

Starting with the contract and the allegations of the complaint, that in bad faith the children procured the father to convey all of his property to them for the purpose of defeating the contract, and that the father, in bad faith, did so transfer all of his property for the purpose of precluding appellant's rights under the will, or otherwise, the question involved becomes comparatively simple. The contract was a proper and natural one under the circumstances disclosed; it is in no wise against public policy; on its face it is founded upon sufficient consideration, and its intent, spirit, and purpose are clearly evidenced by its terms, namely, that appellant, by undertaking to act on behalf of all the brothers and sisters in an extremely delicate matter, should lose nothing in the event that he thereby incurred the father's displeasure. If necessary in order to do equity a broad interpretation should be given to the contract.

" * * * In the event that Fred B. Cavanaugh shall attempt to make a settlement of the rights of the parties hereto with M. L. Cavanaugh, and for any reason fail, and by so doing be in any manner or form deprived of his full rights as an heir of M. L. Cavanaugh, and shall by so doing be in any manner disinherited by the said M. L. Cavanaugh, then and in that event the said parties of the second part hereby agree with Fred B. Cavanaugh that they and each of them shall contribute to the said Fred B. Cavanaugh from any portion of the property or property rights they shall receive from the settlement of the estate of M. L. Cavanaugh such property and property rights so that Fred B. Cavanaugh shall receive an amount equal to that of any of said parties of the second part, share and share alike."

Clearly in the case of the father, now at least in his eighty-fourth year, disposing of all of his property in the manner alleged, there can in the nature of things be no presumption that he will leave at his death as great an estate as he would have done had no such transfer been made, and hence appellant has, in some manner and to some extent, been disinherited, or placed in a position where he must in all human probability be disinherited, and since the respondent children now have control of all the property formerly belonging to the father, with

the legal right to dispose of it absolutely so that there may be nothing left for the contract to operate upon after the father's death, equity will at least preserve appellant's rights until that time; which is, in brief, the prayer of the complaint. Moreover, leaving out the question of bad faith, the transfer of the property by the father to the children as alleged was undoubtedly testamentary in character, and under the terms of the contract it might very well be that for that reason alone equity should intervene to preserve appellant's rights.

We find no case exactly in point upon this question, but the elementary rules of equity applied to the facts pleaded render, we think, the citation of authority unnecessary.

The judgment appealed from is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

PARKER, C. J., and HOLCOMB, MITCHELL, MAIN, MACKINTOSH, and BRIDGES, JJ., concur.

HOVEY, J., concurs in the result.

(120 Wash. 446)

NUDD et ux. v. ROWE et al. (No. 17164.)

(Supreme Court of Washington. June 17, 1922.)

1. Joint adventures §5(2)—Failure to deny plaintiffs' allegation as to value of land conveyed to defendants held not to entitle plaintiff under contract to difference between such amount and advances made by defendant.

Where plaintiffs conveyed land to defendants under an agreement requiring defendants to procure sufficient money to discharge incumbrances, to defray other necessary expenses and sell the land and divide the proceeds with plaintiffs, and on defendants' inability to dispose of the property brought an action for an accounting and termination of the trust, defendants' failure to deny plaintiffs' allegation as to the value of the property held not to entitle plaintiffs to the difference between such amount and the advances made by the defendants, the failure to deny the allegation appearing to be an oversight, in view of the referee's report clearly showing that the property had no such value, and the plaintiffs not having predicated their complaint upon such theory.

2. Joint adventures §4(4)—Where plaintiffs conveyed land to be sold by defendants under agreement for division of profits, the court properly terminated the contract and ordered public sale, where contract was impossible of performance.

Where plaintiffs conveyed land to defendants under agreement providing that defendants should procure money for discharge of incumbrances, advance other necessary amounts, and sell the property and divide proceeds with

plaintiffs, but where defendants were unable to dispose of the property after the lapse of a considerable period, and it appeared that liabilities were increasing and that the contract had become impossible of performance, it was proper for the court, in plaintiffs' action for termination of the trust and for an accounting, to terminate the contract and order the land sold at public auction for the satisfaction of the amount advanced by defendants in which case the plaintiffs should be given an opportunity to redeem within a specified period.

Department 2.

Appeal from Superior Court, Lewis County; D. F. Wright, Judge.

Action by Edwin Fuller Nudd and wife against Owen A. Rowe and others. Judgment for defendants, and plaintiffs appeal. Judgment modified.

Clay Allen and Edward H. Wright, both of Seattle, for appellants.

John P. Gallagher and Edward Judd, both of Seattle, for respondents.

HOVEY, J. The controversy in this case was before this court in *Nudd v. Rowe*, 111 Wash. 322, 190 Pac. 902, and reference is made to that case for a full statement of the facts up to that time. As the facts there stated show appellants conveyed to respondent Rowe a tract of ground in the city of Chehalis; the respondent agreeing to procure sufficient money to discharge incumbrances upon the property aggregating about \$15,000 and to defray the other necessary expenses and upon the property being disposed of the profits were to be divided upon certain percentages. Ample provision was made for success, but none for failure. By the former opinion both parties were denied relief. Since then respondent Rowe kept up the payments of interest on the mortgage and has been unable to dispose of the property. In an effort to extricate himself, he gave notice to appellant that he was going to sell the property within a certain time at public auction and that he reserved the right to bid the property in for himself, and thereafter at the auction sale the property was bid in by and decreed to his co-respondent Benson. Appellants in the meantime brought an action to restrain the sale, terminate the trust, and for an accounting, alleging the value of the property to be \$40,000. No restraining order was issued, and upon the trial Benson was joined as a party defendant, it being admitted that he paid nothing for the property, but merely took title in trust for the respondent Rowe. After a hearing, the trial court appointed a referee to investigate the property and report on the best manner of

handling it and held the sale to Benson to be a nullity. The referee reported showing extensive efforts to procure a purchaser but inability to secure one for the amount of the liens; he recommended a sale at public auction, or, in the alternative, he was of the opinion that if the matter can be delayed two years longer and the land platted, from \$25,000 to \$27,500 could be realized. Upon the report of the referee the court ordered a sale of the property at public auction for the satisfaction of the amount advanced by respondent Rowe. The court found the advances together with amount due upon the mortgage to be \$18,364.46. A sale was had, and the property was bid in by respondent Rowe for the sum of \$2,500.

[1] Appellants contend first that as they alleged the property to be worth \$40,000, and respondent did not deny this valuation in his answer, he should be held personally liable for the difference between this sum and the advances. The failure to deny this allegation appears to have been an oversight; the report of the referee shows quite clearly that it has no such value. As the complaint was not predicated upon the theory now advanced, we do not think that respondent should be held for his oversight in failing to deny this allegation.

[2] It was further contended by appellant that, as we suggested in our former opinion that relief might be afforded the appellants under a judicial sale and stated that respondent could not at that time ask for such relief, the trial court was not justified in adopting it at this time. We do not think this necessarily follows. Considerable more time has elapsed, and the situation is growing worse instead of better, as the liabilities are increasing and the contract has become impossible of performance. Appellants sued to terminate the contract, and, as we now view the situation, the action of the trial court was the most practical way of terminating it.

As this is a proceeding in equity, we have concluded to modify the judgment of the trial court by permitting the appellants to redeem from the sale at any time prior to January 1, 1923, upon repaying the sums found due by the trial court for advances made by respondent in the sum of \$3,465.75 as of September 12, 1921, and all sums thereafter or hereafter advanced by respondent for the discharge of taxes or interest upon the mortgage with interest upon all advances at the legal rate. The decree to stand in all other respects, and the sale to become absolute at the end of said time if redemption be not made. Neither party will recover costs on this appeal.

PARKER, C. J., and MAIN, HOLCOMB, and MAOKINTOSH, JJ., concur.

(120 Wash. 376)

AUSTERMUHL et ux. v. WOTTON et ux.
(No. 17177.)

(Supreme Court of Washington. June 12, 1922.)

Usury § 117—Agreement held sale, not usurious loan.

Where the evidence showed an agreement whereby defendants purchased a stage line for \$30,000, reselling it to plaintiffs for \$40,000, taking from plaintiffs 80 notes of \$500 each, payment of which was secured by a chattel mortgage upon the property, a finding that the transaction was a purchase and resale, and not a usurious loan, was supported by the evidence.

Department 2.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Action by David Austermuhl and wife against W. P. Wotton and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Hayden, Langhorne & Metzger, of Tacoma, for appellants.

Thos. L. O'Leary, of Olympia, for respondents.

PER CURIAM. Rossi and Wallin, on September 1, 1919, owned a stage line operating between the cities of Olympia and Tacoma, which they were willing to sell for the sum of \$30,000, and which the appellants wished to buy, but did not have the money. As found by the trial court, an agreement was entered into between the appellants and respondents whereby the respondents purchased the stage line for the sum mentioned, and resold it to the appellants for the sum of \$40,000, taking 80 notes of \$500 each, payment of which was secured by a chattel mortgage upon the property. After all these notes had been paid, the appellants began this action, claiming that the whole transaction was a loan by the respondents to them of the sum of \$30,000, for which there had been usuriously exacted \$6,464.40, being the sum of \$10,000 less interest at 12 per cent.—the highest rate allowed by law.

The case presents only a question of fact as to whether the transaction between the appellants and respondents and Rossi and Wallin is a sale by Rossi and Wallin to respondents, and a resale to the appellants, or a purchase by the appellants from Rossi and Wallin by money loaned them by the respondents. The facts as they appear in the statement clearly preponderate in favor of the finding of the trial court that it was not a loan, but a sale, and the judgment is therefore affirmed.

(120 Wash. 401)

STOCKWELL et ux. v. HAYES & HAYES.
(No. 17130.)

(Supreme Court of Washington. June 13, 1922.)

Time § 9(4)—Notice posted April 29th, announcing execution sale on May 9th of personal property valid.

Under Rem. & Bal. Code, § 582, subsec. 1, providing a written notice of the time and place of a sale of personal property under execution shall be posted "for a period of not less than ten days prior to the day of sale," posting of a notice on April 29th, announcing a sale on May 9th, was valid.

Department 2.

Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

Action by A. P. Stockwell and wife against Hayes & Hayes to have an execution sale set aside. From a judgment for defendant, plaintiffs appeal. Affirmed.

Gordon & Nolte, of Tacoma, and E. E. Boner, of Aberdeen, for appellants.

John C. Hogan, of Aberdeen, for respondent.

MACKINTOSH, J. After judgment had been obtained execution was issued and levy thereunder made on personal property, and on April 29, a notice was posted announcing the sale of the property so levied on for May 9. On that date the property was sold and the proceeds applied on the judgment. The appellants, who were the judgment debtors, seek to have the sale set aside, claiming that it was void for insufficiency of notice. A demurrer to their complaint alleging the foregoing facts was sustained, and they have appealed.

Section 582, Rem. & Bal. Code, relating to the posting of notices of the time and place of sale of property under execution, is, in subsection 1 thereof, as follows:

"In case of personal property, by posting written or printed notice of the time and place of sale in three (3) public places in the county where the sale is to take place, for a period of not less than ten (10) days prior to the day of sale."

It is appellants' contention that the notice in this case did not comply with this statutory requirement. That notice having been posted on April 29 and the sale occurring on May 9, there was a less time than 10 days prior to the sale. Counsel for appellants, of course, concede that this question is squarely passed on in *Allen v. Morris*, 87 Wash. 268, 151 Pac. 827, and adversely to their contention. Their position is that the *Allen* Case is bad mathematics and worse law. This may be so. But the case has been in the books for several years, the rule has

been familiar to the bar, and many sales have taken place in conformity with that holding. Counsel, however, encourage us from the shore to take the leap from the isolated rock of our rule into the warm current of authorities, inciting our resolution by recapitulating the numerous courageous acts of this court in reversing itself when it has found itself to be in error. Readily confessing our usual courage, we must in this instance cling shiveringly to our rock, for our hardihood hesitates before foolhardiness. Wherever an unjust or illogical rule has been laid down, announcing an incorrect principle of law, resulting in hardship, the court is, not only willing, but forward to align itself with the acceptable authorities. But wherever merely an erroneous rule has been announced, which has been accepted for a long time by the bar, and where property titles have been affected, and to change it would introduce confusion into the practice and disturb titles, the court is very loath to rectify what may have originally been an error. If there is any hardship in the instant rule—and there does not seem to be any—the remedy of proper legislation is open.

For these reasons we feel that the judgment of the trial court sustaining the demurrer must be, and it is, affirmed.

MAIN, HOLCOMB, and HOVEY, JJ., concur.

PARKER, O. J. I concur in the result, because I think the law was correctly settled by our decision in *Allen v. Morris*, 87 Wash. 268, 151 Pac. 827.

(120 Wash. 443)

DIETZ v. BARTELL et ux. (No. 17131.)

(Supreme Court of Washington. June 17, 1922.)

1. *Mechanics' Liens* §303(2)—Laborer under contractor cannot recover personal judgment against owner without establishing lien.

A carpenter cannot recover a personal judgment against the owner of premises for work done on the house while in the employ of a contractor if he fails to establish his right to a lien.

2. *Evidence* §23(2)—Court can judicially notice land as described in three different sections is contiguous.

The court can take judicial notice that land described in a complaint to enforce a mechanic's lien as being in three different sections is contiguous, so that there was no necessity for plaintiff to prove that fact or to prove the tracts were operated as one property.

3. *Mechanics' Liens* §279—Plaintiff must show land was necessary for building and what amount would satisfy lien.

A plaintiff seeking to enforce a mechanic's lien must prove what amount of ground was necessary to satisfy the lien and judgment, as required by Rem. Code 1915, § 1130, and also prove that the land, or what part of the land, was necessary for the building for which the lien was claimed, though the latter proof is no longer expressly required by statute.

4. *Trial* §377(2)—Court should reopen case to permit plaintiff to make proof of formal facts.

Under Rem. Code 1915, § 1147, providing that the Mechanic's Lien Law shall be liberally construed to effect its object, the court should permit plaintiff to reopen his case, the trial having been before the judge, when objection is first made after the case was closed that plaintiff had failed to make proof of certain formal facts essential to his right to recover.

Department 2.

Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

Action by L. L. Dietz against Jeff Bartell and his wife to foreclose a mechanic's lien. Judgment for plaintiff against defendants personally, but denying foreclosure of lien, and both parties appeal. Reversed, with directions.

James P. H. Callahan, of Hoquiam, for appellants.

F. L. Morgan, of Hoquiam, for respondent.

HOVEY, J. The parties to this action are both appealing, and we will continue to refer to them as plaintiff and defendant.

Defendant made a contract with one Nicholson for the erection of a dwelling upon acreage property. Plaintiff commenced work for Nicholson in April of 1920 as a carpenter at the rate of \$8 per day. In the latter part of June, 1920, work ceased on the house by consent of the defendants, while the contractor worked his crew on other jobs. On November 1 work was resumed on the house of the defendants, and about December 1 the contractor left suddenly, whereupon the defendants made arrangements with plaintiff to complete the building. The work was finished, and, the parties being unable to agree upon settlement, a notice of lien was filed, in which the property upon which the building is situate is described as being in three different sections.

Upon the trial the court found that there was a balance due the plaintiff of \$531.50, being in part money earned by him while he was working under Nicholson and the balance under his direct contract with the defendants, and for this sum the court granted a personal judgment against the defendants, but refused to sustain any lien for the rea-

son that no proof had been offered showing that the several pieces of ground were all a part of one tract.

The trial court first made a memorandum decision on August 26, and immediately thereafter each side moved for a new trial, and the motion of the plaintiff asked that the case be reopened, and that he be permitted to establish the fact that the tracts of land referred to in the complaint are contiguous and constitute one tract comprising a small farm under one inclosure, and that the building in question is the farmhouse located thereon. The court thereafter denied both motions, and subsequently signed findings of fact, conclusions of law, and decree.

[1] Defendants complain that the trial court was without authority to enter a personal judgment for the work performed under Nicholson, where no lien is established, and with this contention we agree. This leads to a consideration of the plaintiff's appeal.

[2] In our opinion the evidence supports the findings of the court as to the amount due the plaintiff. We think the court erred in holding that this case was governed by *Farrington v. Bushnell*, 88 Wash. 155, 152 Pac. 991. In that case the tracts of ground were noncontiguous, and there was no proof showing they were operated as one property, or upon which tract the building was situate. In this case we can take judicial knowledge of the fact that the tracts described are contiguous.

[3] Plaintiff failed, however, to fully sustain his case by introducing the proof to show this land or what part of it was necessary for the building, and he also failed to prove what amount of ground was necessary to satisfy the lien and judgment, as required by section 1130, Rem. Code. The requirement we have first mentioned does not seem to be covered any longer by statute, but though the statute fails to so prescribe we think it is a matter of substantive law on the subject of mechanics' liens. Numerous authorities are cited in the note to *Wirsing v. Pennsylvania Hotel & Sanitarium Co.*, 26 L. R. A. (N. S.) 831.

[4] By section 1147, Rem. Code, it is provided that this law shall be liberally construed with a view to effect its object. The proof lacking was of a formal character, and the objection did not arise until the case was closed. The motion made by appellant to reopen the case was prior to entry of the judgment, and, it being a trial before the judge, we see no good reason why it should not have been granted, and conclude that the trial court should have permitted plaintiff to supply this proof.

The judgment will be reversed on plaintiff's appeal, with directions to the trial court to reopen the case and permit the introduc-

tion of the proof indicated, and to enter such decree of foreclosure as the proof warrants for the entire amount of the claim, together with a reasonable sum as attorney's fees.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

(120 Wash. 291)

COLQUHON et ux. v. CITY OF HOQUIAM.
(No. 17200.)

(Supreme Court of Washington. June 12, 1922.)

1. Municipal corporations — 816(11)—Variance between notice of injury and proof held immaterial.

The variance between a notice of injury which stated that plaintiff's foot was caught under the end of a loose and raised board on the sidewalk, causing her to fall, and proof that she stubbed her toe on the board because the board on which she had just stepped tilted down, lowering it below the board ahead, did not mislead the city and was sufficient compliance with Rem. Code 1915, § 7998, requiring the notice accurately to locate and describe the defect.

2. Municipal corporations — 821(23) — Evidence held not to show contributory negligence as matter of law in using unsafe sidewalk.

Evidence that loose planks had been laid where a sidewalk had been taken up with intention to lay a concrete walk, and that a pedestrian, who was familiar with the situation, went along the walk using no more caution than she would have upon an ordinary walk, as a result of which she struck her foot against the end of a board and fell, held not to show she was negligent as a matter of law.

3. Municipal corporations — 821(26)—Choosing unsafe sidewalk not negligence as a matter of law.

It is not negligence as a matter of law for a pedestrian to use a dangerous sidewalk, even though there may be a safer way, where he uses the degree of caution that would be exercised by reasonably prudent men in traveling the dangerous way.

4. Municipal corporations — 788(2)—City granting permit for reconstruction of sidewalk must see it is properly done.

A city which grants a property owner a permit to reconstruct the sidewalk in front of his premises is charged with the duty of seeing the work is properly done, and has notice of a defective condition of the walk resulting from the undertaking of the work.

5. Municipal corporations — 791(2)—Jury can find city had notice of defect which had existed for several months.

Where there was testimony that the defective condition of the sidewalk had existed

several months prior to the plaintiff's injury, which the jury had a right to believe, the city was charged with notice of the actual condition if, in the exercise of reasonable care, it knew, or should have known of such condition.

6. Municipal corporations \S 821(16)—Whether city was negligent in not repairing sidewalk held for jury.

In action for injuries to pedestrian caused by defective sidewalk in a thickly settled residence portion of the city, the question whether the city should have known of the danger, which had existed for several months in the exercise of reasonable care, and should have repaired the defect, though it was caused by the owner of the property, are questions for the jury.

7. Damages \S 132(6)—Sixteen thousand dollars for broken knee resulting in bone cancer held not excessive.

Where plaintiff's evidence, though contradicted, showed that from plaintiff's injury, a broken knee, cancer of the knee bone had developed, in the treatment of which her husband had expended \$2,500, and which was threatening to spread and result in plaintiff's early death, a verdict awarding \$16,000 damages held not excessive.

Department 2.

Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by John Colquhon and wife against the City of Hoquiam. Judgment for plaintiffs, and defendant appeals. Affirmed.

James O. H. Callahan, of Hoquiam, and E. E. Boner, of Aberdeen, for appellant.

W. H. Abel, of Montesano, and John D. Ehrhart, of Hoquiam, for respondents.

MACKINTOSH, J. A discussion of the various assignments of error will introduce sufficient of the facts of this case to render unnecessary a detailed statement thereof. The respondent wife was injured upon a sidewalk in the city of Hoquiam and brought this action for the damages she sustained. The jury awarded her verdict, upon which judgment was entered, and from which the city has appealed.

[1] 1. The claim filed by the respondent with the city in describing the condition of the sidewalk, which is alleged to have caused the injury, used this language:

"That said boards were loose, and there were no sills, and the boards were not nailed or attached to any sills; that said defective condition had existed since said sidewalks were constructed, a period of more than seven months, and said conditions were well known to the city of Hoquiam, its officers and agents, ever since the sidewalk was constructed; that on account of said condition, while traveling along said sidewalk at said time, the said Pearl Colquhon's right foot was caught under the end of one of said loose and raised boards, causing her to fall and be thrown violently,

her right knee striking the edge of one of the boards, badly bruising and tearing the muscles and the flesh of said knee and breaking the bone or bones at said knee."

The complaint uses the same language in describing the defect in the sidewalk. The testimony as to the occurrence was that—

"There was a hole underneath the boards, and it took it down about four inches. * * * I stubbed my toe on the board ahead and tripped and fell."

It is the appellant's first assignment of error that this claim did not comply with section 7998, Rem. Code, providing that "all * * * claims for damages must accurately locate and describe the defect that caused the injury, reasonably describe the injury and state the time when the same occurred," etc., and that the respondent should have been nonsuited for the reason that the testimony was at variance with the situation described in the claim.

We see no variance. The claim was that the respondent's foot was caught in the end of the raised board, and the testimony went to the same effect, that she stubbed her toe on the board by reason of the fact that the board upon which she had just stepped tilted down, thus lowering it below the board ahead. There is nothing in the situation that misled the appellant, and there was a sufficient compliance with the provisions of the statute. *Bell v. Spokane*, 30 Wash. 509, 71 Pac. 31; *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431; *Titus v. Montesano*, 106 Wash. 608, 181 Pac. 43.

[2] 2. The appellant argues for a nonsuit on the additional ground that the respondent's wife was guilty of contributory negligence. The testimony shows that the appellant had granted abutting property owners permission to take up a worn-out wooden sidewalk and to replace it with a concrete one. The old sidewalk was removed, and dirt had been filled in to make a foundation for a new walk, but before this could be laid the rainy season had set in, and the cement walk could not be laid. On the surface of the fill, in order to provide a passageway that would be free from mud, planks 8 feet long, 8 inches wide, and 2 inches thick, taken from the old walk, were laid end to end, making the walk about 2 feet wide. The planks were loose and unnailed. The appellant claims that this situation was open and apparent, and that the duty was upon one making use of the walk to exercise a greater degree of care than when using an ordinary sidewalk. The testimony, it is claimed, shows that Mrs. Colquhon used no greater caution than she would have upon an ordinary walk, that she was using it in the daylight, and that her conduct was such that it would not have been indulged in by an ordinary person under the same circumstances. It further shows

that she was familiar with the condition of the walk, and had used it on prior occasions. Reference is made to the rule in *Shannon v. Tacoma*, 41 Wash. 223, 83 Pac. 186, that a pedestrian cannot make use of a way which he knows to be dangerous, or use the way which one, exercising the degree of care commensurate with the danger, would not have used. The situation being such, it was a question for the jury, to determine whether, under these facts and conditions, Mrs. Colquhoun used reasonable care for her safety. *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321; *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743; *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912; *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19; *Stock v. Tacoma*, 53 Wash. 226, 101 Pac. 830; and *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323.

[3] 3. This, in effect, disposes of another contention of the appellant that Mrs. Colquhoun was guilty of contributory negligence, as a matter of law, for the reason that she did not take a safer way, to wit a planked railroad track, situated in the middle of the street, which the testimony shows she had used on prior occasions, and which was largely used by the public in preference to the sidewalk. The case of *Chase v. Seattle*, 80 Wash. 64, 141 Pac. 180 is cited. That case, however, was one where there was an obstruction into which the driver drove his wagon in the portion of the street being improved, which was not open to travel, and the situation was open and apparent to any one passing along the road, whereas the other side of the street which was left open for travel was reasonably safe. It was held that the city had performed its full duty in keeping a portion of the street in safe condition. It has not been held that a person is guilty, as a matter of law, of contributory negligence when he uses a dangerous way, even though there may be a safer way, where he uses the degree of caution that would be exercised by a reasonably prudent man in traveling the dangerous way. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Jordan v. Seattle*, supra; *Shannon v. Tacoma*, supra; *Cady v. Seattle*, supra; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831; *Stock v. Tacoma*, supra.

[4] 4. It is next urged that there was no evidence that the city had notice of the defective condition before the accident. The evidence, however, shows that permission had been granted by the city to abutting property owners to lay the walk, and it therefore had notice that the work was to be done, and was charged with the duty of seeing it was properly done. *Noll v. Seattle*, 29 Wash. 28, 69 Pac. 382; *McClammy v. Spokane*, supra; *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

[5] Furthermore, the testimony shows the defective condition of the walk had existed for several months prior to the injury, and

if this were true, and the jury had a right to believe it was, then the city was charged with notice of the actual condition, if in the exercise of reasonable care it knew, or should have known, of such condition. *Suttop v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 43 Am. St. Rep. 847; *Lourence v. Ellensburg*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42; *McQuillan v. Seattle*, supra; *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394; *Devenish v. Spokane*, 21 Wash. 77, 57 Pac. 340; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583, 92 Am. St. Rep. 892; *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111; *Austin v. Bellingham*, 45 Wash. 460, 88 Pac. 834; *Billings v. Snohomish*, 51 Wash. 135, 98 Pac. 107.

[6] 5. In arguing for a directed verdict, the appellant claims that, in any event, the defect was not such a one as to render the city liable even if it had been negligent, for the reason that the city is not compelled to keep its streets in such condition that accidents cannot happen; that cities are not forced to see that their sidewalks are so perfect that no one can stub his toes thereon. It is true this sidewalk was in a thickly settled residence portion of the city where there was much travel, and the question was for the jury as to whether the sidewalk was actually unsafe and dangerous, and had been in such condition for so long that the city, in the exercise of reasonable care, either actually knew, or should have known, of the danger. As was said in the case of *McKnight v. Seattle*, supra:

"If this sidewalk rendered the street unsafe, it was the duty of the city to remove it or repair it, and its duty in this regard is not affected by the fact that it may not have constructed the walk."

And as we said in *Tait v. King County*, 85 Wash. 491, 148 Pac. 586:

"The fact that the roadway may have been constructed by a private individual does not necessarily absolve the county from any duty to keep it in reasonable repair."

These were questions of fact for the jury, and the court is not allowed to usurp the jury's function in that respect.

[7] 6. Upon motion for a new trial there was raised the most perplexing question in this case, being whether the verdict was excessive, amounting as it did to \$16,000. The testimony showed that Mrs. Colquhoun was a young woman, in good health, and that she suffered a fracture of the knee, and that her husband, at the time of the trial, had already assumed liability in the sum of \$2,500 for surgical and medical attendance. The testimony is that the doctors discovered that she was suffering from bone cancer, which the jury had a right to believe from the testimony was the result of this injury. Operations have been performed for

the removing of portions of the bone, and she is still undergoing radium treatment, looking to a cure. There was testimony of reputable doctors to the effect that bone cancer such as this is not only apt to, but is very liable to, spread to other portions of the body, and that in such event death is practically certain to result, and there was some testimony that already the malignancy is spreading. Doctors appointed by the court and testifying for the appellant disputed these findings, but a question was presented for the jury to determine as to what the true situation was, and they must have found that it was very serious, with a reasonably sure prospect of fatal event. If this is so, we cannot say that \$18,000 is an excessive compensation for the pain and suffering the woman has already endured and which she is reasonably certain to endure in the future. There is no standard measure into which we can pour the volume of her injury and say, in dollars and cents, that this much she has and will suffer and no more. After a thorough consideration of the question raised by this assignment, and several perusals of the statement of facts concerning it, we do not see our way clear to interfere with the amount of the award.

The judgment is affirmed.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 403)

JAHN et al. v. CITY OF SEATTLE.
(No. 17248.)

(Supreme Court of Washington. June 13, 1922.)

1. Master and servant ¶69—Municipal charter and ordinances prescribing minimum wages valid.

The charter provision of Seattle, that contractors for improvement work for the city shall pay employees thereon not less than the current rate of wages paid by the city for work of like character, and in no event less than a certain amount, and shall give preference to citizens who are heads of families, and ordinances to enforce such provision, are valid, even if such wages be unreasonable, the city having power to prescribe conditions on which it will permit public work to be done for it.

2. Municipal corporations ¶591—Ordinance prescribing minimum wage on public improvements not delegation of legislative authority.

Ordinances of Seattle providing that contractors for city improvement work shall pay employees thereon not less than the current rate of wages paid by the city for work of like character (in no event less than a certain amount nor greater than another amount) are not invalid as a delegation to heads of city de-

partments of the city's legislative power to fix the rate of wages; especially as the council appropriates money to pay laborers, and need not follow the recommendations of the department heads.

Parker, C. J., dissenting.

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Suit by N. F. Jahn and others against the City of Seattle for injunction. Demurrer to complaint sustained, and plaintiffs appeal. Affirmed.

Flick & Paul and Raymond G. Wright, all of Seattle, for appellants.

Walter F. Meier, Geo. A. Méagher, and Charles T. Donworth, all of Seattle, for respondent.

MACKINTOSH, J. Appellants are contractors engaged in the performance of contracts for the city of Seattle on local improvement work, and they allege in their complaint against the city that they estimated their costs on the basis of \$3.50 per day for common labor to be employed by them, and that at the time of the execution of the contracts there was in effect a charter provision of the city of Seattle, section 2 of which reads as follows:

"Minimum Wage to be Paid on Local or Other Improvement Work.—Every contractor and subcontractor performing any local or other improvement work for the city of Seattle shall pay or cause to be paid to his employees on such work or under such contract not less than the current rate of wages paid by the city of Seattle for work of like character, and in any event not less than two and seventy-five hundredths dollars (\$2.75) per day. Such contractor and subcontractor shall, on such work or under such contract, give preference to citizens of the United States who are heads of families. This article shall be enforced by the city council by ordinance. In case any provision of this section shall be held illegal and void the same shall not affect any other provision of this section."

At the same time there existed an ordinance (No. 38415) in the following words:

"An Ordinance Relating to Contractors and Subcontractors Performing Work for the City of Seattle, to Employees Thereof, and to the Wages Paid Such Employees, Providing Penalties for the Violation of This Ordinance, and Repealing all Ordinances or Parts Thereof in Conflict Therewith.

"Be it ordained by the city of Seattle as follows:

"Section 1. Every contractor or subcontractor performing any local or other improvement work for the city of Seattle, shall pay or cause to be paid to his employees on such work or under such contract not less than the current or prevailing wage paid by the city of Seattle for work of like character.

"Sec. 2. Such contractor or subcontractor shall on such work or under such contract give preference to citizens of the United States who are heads of families.

"Sec. 3. Any contractor or subcontractor who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding one hundred (100) dollars, or imprisoned in the city jail for a term not exceeding thirty (30) days, or may be both fined and imprisoned.

"Sec. 4. All ordinances or parts thereof in so far as the same may be in conflict herewith, are repealed."

The city of Seattle had no ordinances fixing the wages of laborers employed by it, other than Ordinances Nos. 41689 and 42219, which were general salary ordinances of the various departments of the city, and which, so far as we are here concerned, provided that, for common labor employed in the different departments, the heads of those departments should fix the amount of the wages, provided they did not exceed \$4.75 per day for employees just entering the city's service, and \$5.25 for those who had been in such service 90 days or more.

The complaint alleges that the charter provision and Ordinances Nos. 38415, 41689, and 42219 are unconstitutional and void, and further alleges that, during the year 1921, certain departments of the city of Seattle paid \$4.75 per day for common labor, and, by reason of the fact that the plaintiffs had been paying less than that amount, they were being arrested by the defendant, and that the defendant was threatening to make further arrests, which, if done, would irreparably injure the plaintiffs; further, that \$4.75 is an unreasonable and unwarranted amount to be paid; and an injunction was sought against the city to prevent its prosecuting any criminal action against the plaintiffs for failure to pay the rate of \$4.75 per day. To this complaint a demurrer was interposed, which was sustained, whereupon the plaintiffs appealed.

[1] The briefs in this case have taken a wide range, but the fact is that the issue presented by the demurrer to the complaint is a very narrow one, and one which had already been determined by the decisions of this court. The question of the constitutionality of state statutes and city charter and ordinance provisions in regard to hours of labor, employment of aliens, and minimum wages upon municipal work has been passed upon many times, and the rule has been established that such provisions are constitutional, for the reason, as stated by the Supreme Court of the United States in the case of *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, that:

"It belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon

which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

In other words, the state and the various municipalities within it have the right to say that public work shall be done in any manner, at any price, and upon any terms which they see fit to lay down. It is in the power of the state and of its subsidiary municipalities to say that public work shall not be done, or that it may be done, and in the latter case it can prescribe the terms and conditions upon which it will allow it to be proceeded with. These are matters which the people have the right to determine for themselves, without interference by the courts, after they have spoken their will, as here, by the adoption of a charter and the passage of ordinances by their legislative representatives. The courts no more will attempt to say what wages must be paid upon public work, what hours of employment shall prevail, or the class of people who shall perform that work, than they will attempt to interfere and prescribe the material to go into the work, the manner of construction, or other engineering details of a public improvement. This we have said in the case of *Malette v. Spokane*, 77 Wash. 205, 137 Pac. 496, 51 L. R. A. (N. S.) 636, Ann. Cas. 1915D, 225, where the whole subject of minimum wages upon public work is exhaustively considered. On the same principle the Supreme Court of the United States, in *Helm v. McCall*, 239 U. S. 175, 36 Sup. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287, and *Crane v. People*, 239 U. S. 195, 36 Sup. Ct. 85, 60 L. Ed. 218, later upheld provisions relating to the nonemployment of aliens upon public work. It is unnecessary to cite the large number of cases from federal and state courts which have sustained this principle when considering the eight-hour law, minimum wages, and alien employment provisions in regard to public work.

Counsel for appellants argue that, because of the fact that it is alleged in their complaint that the going rate of wages was less than that which they are being called upon to pay, the ordinances are invalid, for the reason that they are unreasonable. This argument is fallacious, because the validity of statutes and ordinances similar to the one here under consideration does not depend upon the exercise of the police power. The police power, of course, must be exercised in a reasonable manner, but the right of the state and its municipalities to say upon what conditions a public work shall be or not be performed is not a right arising from the exercise of the police power, and therefore the question whether the ordinances in this case prescribe

a reasonable rate of compensation does not enter into the discussion of the matter. In the case of *Malette v. Spokane*, supra, referring to this question of police power, we said:

"While cogent reasons might be advanced for sustaining legislation of this character as a proper exercise of the police power of the state, delegated by our Constitution to cities of that state, we find it unnecessary to place the decision on that ground or to discuss that question; since the state courts to which we have referred and the Supreme Court of the United States have sustained legislation which cannot be distinguished, either in principle or in effect, from the ordinance here in question, upon the simple ground that 'it belongs to the state as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.'"

The cases cited by the respondent which have held unconstitutional the fixing of minimum wages, hours of work, etc., which are applicable to private contracts because the rates, hours, etc., have been held unreasonable, have no applicability here. An entirely different question arises as to the fixing of hours, wages, etc., which shall obtain in contracts entered into for the performance of other than work of a municipality and the question before us. In such cases the right of a legislative body to pass such acts depends upon the exercise of the police power, and, as we have often said, the attempt to exercise that power is always subject to review by the courts to determine whether the attempt is a reasonable one.

[2] Appellants further argue that, although the provisions that the public contractor shall pay the going rate of wages paid by the city for similar work, and not less than \$2.75 per day, are legal, yet, the city council not having fixed by ordinances the wages which are to be paid by the city in its several departments, they are not bound to pay \$4.75 a day, for the reason that that rate has been established by the heads of some departments only, and that this was an illegal attempt to delegate to those department heads the power to fix the rates of wages. An examination of the ordinances shows that the minimum wage for labor such as we have under consideration has been fixed at \$2.75 per day, and that the maximum to be paid is \$4.75 per day (with \$5.25 for longer service), and that the heads of departments cannot pay less than the one amount nor more than the other. The provision of the charter is that the contractor upon public work shall pay the same wages as the departments pay. We cannot see how it can be said to be a delegation of the legislative power for the city council to say to the heads of the departments, "You pay your laborers an amount between \$2.75 and \$4.75

per day," without fixing the exact amount between those figures. This is nothing more than was sustained by this court in the case of *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037, and *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595, in which latter case we held that the Legislature might delegate to the industrial welfare commission the power to determine the facts upon which the minimum wage law for women would become effective, and might specify the minimum wage and standard conditions for such labor. In that case the authorities are reviewed and a quotation is made from the case of *G. O. Miller Telephone Co. v. Minimum Wage Commission*, 145 Minn. 262, 177 N. W. 841, which is that:

"The Minimum Wage Commission is an administrative body. It does not determine hours of labor or prescribe conditions of employment or work out the rights of employer or employee except in so far as its fixing of a minimum wage under conditions prescribed by the statute has such effect. Legislative power is not delegated to it nor judicial power conferred upon it. It has the administrative authority which is conferred by the statute. In performing the duties with which it had been charged, it must be permitted to proceed in a practical way so as to accomplish the lawful results intended. It must be permitted to exercise judgment and discretion in working out the details of administration and establish some sort of administrative regulations. This does not mean that it has either delegated legislative or judicial power. The Legislature determines the policy of the statute. The review by a court of the orders of the Commission is limited to such as are made without jurisdiction, or under a mistaken interpretation of the law, or are so arbitrary and unreasonable that they deprive a party of guaranteed property rights."

To the same effect is our recent opinion in *Vall v. Seaborg*, 207 Pac. 15, filed on May 11.

The validity of these ordinances, however, is not entirely dependent upon this reasoning, for it appears that the heads of city departments have no funds to pay laborers; the city council appropriates the money for that purpose, and in accordance with the recommendations of the department heads, if it follows recommendations, or it fixes the appropriation itself, and, in either event, it in reality fixes the wages which are paid.

Some suggestion is made in the briefs that the plaintiffs were unable to determine what wages were being paid by the different departments, the departments, it being claimed, paying different wages for similar work. This question, however, is not before us, for the reason that no such allegation is found in the complaint, and it is therefore not incumbent upon us to pass upon it.

For the reason that the fixing of the minimum wage upon public work is constitutional, and for the further reason that power

to fix that wage by the city of Seattle has not been delegated by the city council, but is being exercised by it, the lower court was correct in sustaining the demurrer to the complaint.

Judgment affirmed.

MAIN, HOLCOMB, and HOVEY, JJ., concur.

PARKER, C. J., dissents.

(120 Wash. 457)

MEYER v. CAMPION et al. (No. 16671.)

(Supreme Court of Washington. June 20, 1922.)

1. Gifts ⇨47(3)—Facts held to show fiduciary relationship between donor and donee, her son-in-law, casting burden on latter to show validity.

Where a widow, who had suffered a paralytic stroke, and was partially crippled, and who had only two children living, both daughters, had trusted the conduct of her affairs to one son-in-law, who was experienced in business, and at whose suggestion the business had been incorporated, a fiduciary relationship existed between the widow and the son-in-law, which imposed on him the burden of proving the validity of a gift by her of one-fourth of the stock in the corporation, since the relationship was similar to that between a mother and son, without the motive of blood relationship to support a presumption in favor of the gift.

2. Gifts ⇨47(3)—Fiduciary relationship and lack of independent advice places burden of proof on donee.

Even if the lack of independent advice is insufficient to render void a gift to a donee who stood in a fiduciary relationship, it renders it voidable, and places upon the donee the burden of overcoming the presumption of invalidity by clear evidence of good faith, full knowledge, and independent consent and action.

3. Gifts ⇨47(3)—Preparation of documents by donee casts suspicion on transaction.

Where a gift was made to a donee who stood in a fiduciary relationship to donor, the fact that all of the written documents relating to the transaction were prepared by the donee and were not even signed by the donor casts suspicion upon the transaction, even though the donor's right hand was paralyzed, since she could at least have made her mark.

4. Gifts ⇨38—Rule as to fiduciary relationship is stricter with reference to gifts than to wills.

The rule as to the validity of gifts between parties in a fiduciary relationship is applied with greater strictness to gifts inter vivos, by which the donor parts with something for which she still had a use, than to gifts by will, which are made only after the donor has no further use for the property.

5. Gifts ⇨49(1)—Evidence held not to sustain burden of proving fairness of gift to donee in fiduciary relationship.

Evidence on behalf of a son-in-law who stood in a fiduciary relationship to his mother-in-law, and who had received from his mother-in-law a gift of substantially one-fourth of her property, which evidence consisted principally of testimony of the donee's wife and of written documents prepared by the donee, held insufficient to sustain the burden cast on him to prove the fairness of the transaction.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Gretchen Ranke Meyer, as executrix of the will of Dora D. Ranke, deceased, and individually, against John T. Campion and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions to enter judgment against defendants.

Lyons & Orton, Bogle, Merritt & Bogle, and Chadwick, McMicken, Ramsey & Rupp, all of Seattle, for appellant.

McClure & McClure and Peters & Powell, all of Seattle, for respondents.

HOVEY, J. Appeal from a judgment dismissing an action seeking the surrender of shares of stock standing in the names of the several individual parties to the action.

The real controversy in this case is the actual ownership of 1,250 shares, being one-fourth of the capital stock of the Ranke Investment Company, a corporation of the nominal capitalization of \$500,000, and the actual value being approximately the same. These shares now stand in the name of the respondent John T. Campion. The corporation was organized in the year 1909 to take over the holdings of Dora D. Ranke, who was the mother of the appellant, Gretchen Meyer, and the respondent Mamie Campion, and the latter is the wife of respondent John T. Campion. The principal property of the corporation is a business corner in the city of Seattle, which was owned by Dora D. Ranke and her husband at the time of the latter's death in the year 1892, and which was estimated by the real estate experts at the time of the trial to be worth from \$320,000 to \$400,000. There is also a residence property estimated to be worth \$35,000 to \$40,000, but of a rental value which will produce a net income on a considerably smaller valuation. The balance of the corporation's holdings consists chiefly of securities valued at something over \$60,000.

Dora D. Ranke was born in Germany, but came to this country at an early age, and at the time of the death of her husband they had four children living. Two of these were boys who died subsequent to the making of the will hereafter referred to, and prior to

the death of their mother. Mrs. Ranke appears to have been a clear-headed, sensible business woman, rather careful with her money, and, as termed by one of her daughters, rather frugal in the spending of it. It is claimed that she was extraordinarily competent in business affairs, but we do not find in the record any evidence of any special capacity. She was careful to live within her income, but about the only business she had to do was to receive her rents, and for the collection of these she employed the janitor of the building up to the year 1909, when the corporation was organized. After the organization of the corporation respondent Campion took charge of the collection of rents, and for a portion of the time Mrs. Ranke kept what are the only business records of the corporation in a small book in which she posted five or six entries each month of rent received, and on the opposite page the disbursements of the corporation. These were few in number, as a rule, comprising a monthly salary paid to the respondent Campion and items for water rent, taxes, and insurance. In addition to this there was a check book. There does not appear to be any book record of Mrs. Ranke's personal transactions.

Mrs. Ranke enjoyed the friendship of several women, several of them being wives of prominent business men in Seattle and several of whom were witnesses at the trial. She was very fond of cards, and frequently had games in the afternoon or evening, in which she usually played cards for small stakes and primarily for amusement, for, as one of the witnesses said, she always stayed, whether she had anything or not. She spent several years in Europe following the organization of the corporation, and upon June 6, 1916, being a year or two after her return from her last trip, she suffered what is termed a paralytic stroke, from which she was unconscious for a short time, and which rendered her more or less an invalid for the balance of her life. The condition of Mrs. Ranke after this time is a subject of considerable dispute in the testimony. It is agreed that her right side was partially paralyzed, and practically all the witnesses testified that she could not walk without assistance, and that she became slow in her speech. She had the services of a trained nurse for several months, and was never without a companion employed to look after her. As soon as she was able to get around she resumed her card games, using a rack to hold the cards and having one of her friends to deal them for her. In addition to this diversion her companion read to her such items from the daily paper as interested her. She continued to direct her household affairs, but outside of the incident of the purchase of the automobile hereafter referred to she does not appear to have attended to any business of any moment after her illness, unless we are prepared to

accept the version of the stock distribution claimed by the respondents to have occurred in January, 1917, six months after she was stricken.

In the year 1902 Mrs. Ranke executed a will by which she devised and bequeathed all her property to her four children then living, in equal shares. This will was never changed, and was duly probated upon her death, and appellant, Gretchen Meyer, and respondent Mamie Campion are the qualified executrices under the will. The testimony shows without dispute that Mrs. Ranke in her attitude towards her two daughters and in speaking of them to her intimate friends showed an absolute impartiality. Whenever she made one a gift she either made the same gift to the other or one of equal value. She was fond of fine linen, and whenever she made a purchase of an article of that sort she usually bought two, so there would be one for each girl. She frequently made the statement that her daughters would get all that she had, and there is some testimony to the effect that she said that her sons-in-law would get none of it.

A short time before she died Mrs. Ranke expressed a desire for an automobile of the closed type, and over the opposition of the respondents purchased such a car at an expense of about \$8,500, less some credit that she received for her old car. The testimony shows that in the events leading up to the purchase of this car Mrs. Ranke occupied anything but a position of untrammelled independence in the management of her affairs, and it was only after she had been encouraged by one of her women friends and aided by the co-operation of her two grandchildren, one of whom signed her name to the contract for the car after the respondent Campion had refused to do so, that she finally secured the automobile. Mrs. Ranke died on April 30, 1919, at the age of 70 years.

The respondent John T. Campion at the time of the trial was 55 years of age, and was then general manager and treasurer of the Seattle Brewing & Malting Company, and had been its treasurer since the year 1900. He is a man of forceful and dominant character. He and his family, consisting of his wife, the respondent Mamie Campion, and their son Cyrus, resided continuously in the city of Seattle during the time material to this controversy. The other daughter, the appellant Gretchen Meyer, resided with her husband away from the city of Seattle during the most of the time, except for visits that she paid to her mother. It is alleged in his answer and admitted by appellant that there existed between Campion and Mrs. Ranke great love and affection, and that she looked upon him as her own son. Viewed from the record this seems true only in part. He was the only man in the family who lived near the mother and held the position of the favored son-in-law from whom much was

expected in the way of service without any idea of direct remuneration. He had, however, considerable incentive to promote Mrs. Ranke's welfare; his wife was a prospective heir to one-half of the estate; he made large loans to his fellow officers in the brewery and the control of ready money is not without its advantage to a business man even though, as is admitted in this case, there was no improper use of the same. Except for the time that Mrs. Ranke was away Mr. Campion visited her practically every day, and he frequently played in her card games. The evidence does not disclose to what extent he counseled her in a business way prior to the year 1909 but it is undisputed that he was at that time her sole business and confidential adviser, although uncompensated and that this relation continued until her death.

It is the contention of the respondent Campion that this corporation was organized at the request of Mrs. Ranke to relieve her of the care of the business. There is testimony in the record, however, that she regretted the organization of the corporation, as it prevented her from knowing the details of the business. It is undisputed, however, that after the organization of the corporation its entire management and control was in the hands of the respondent John T. Campion so far as we have any record evidence. It is true that for a few years Mrs. Ranke kept items in the book we have referred to, but the actual business matters were all handled by Campion and the securities both of the corporation and those held by Mrs. Ranke personally were under his personal control, and so completely was this the case that at the time of the trial among these securities was a \$5,000 bond belonging to the son of respondent, and which he had never taken the trouble to segregate from the other securities, but all were in a safe deposit box controlled by him.

The original issue of stock in this corporation was a certificate of 4,998 shares to Dora D. Ranke, a certificate for 1 share to respondent John T. Campion and another certificate for 1 share to respondent Mamie Campion. Although there is something said in the testimony about these 2 latter shares being paid for, no proof of payment was offered, and we think it sufficiently appears that these were merely qualifying shares belonging in fact to Mrs. Ranke, but issued to the shareholders named, so they could act as the other two trustees of the corporation; Mrs. Ranke being the first trustee. The corporation was organized in February, 1909. On the 1st day of July a check was issued for \$500 in favor of the respondent John T. Campion, which is entered on the account book as his June salary, and a like check was issued each month thereafter until January 1, 1915, when the amount was cut to \$250, and the latter custom was followed up to the time of Mrs.

Ranke's death. Each of these checks was immediately upon being issued either deposited to the personal credit of Dora D. Ranke, or Mr. Campion deposited to her credit his own check for the same amount. Respondent Campion alleged in his answer that this was issued to him as a salary for his services performed for the corporation, but that he made a present of this salary to Mrs. Ranke, as well as the two dividends of \$1,250 each hereafter referred to, checks for which were originally drawn in his favor. The total of these sums aggregate about \$46,000. Upon the trial he testified that he did not want to profit out of Mrs. Ranke's affairs and never had.

The fact is not disputed that the entire net income of the business of this corporation was received by Mrs. Ranke in the first instance, if we except the so-called dividend payments at the close of the years 1917 and 1918. According to Campion, shortly prior to Christmas of each of those years a dividend of 1 per cent. was declared. The undisputed facts are that a check for \$1,250 was issued directly to Dora D. Ranke, another for \$1,250 to John T. Campion, which was immediately paid over to Mrs. Ranke, another one for \$1,250 to respondent Mamie Campion, and the fourth, for \$1,250, was for the year 1917 issued to buy exchange in favor of appellant, Gretchen Meyer. This draft was forwarded along with Christmas presents, and around the envelope containing the draft was a piece of tissue paper upon which was placed in the handwriting of Mrs. Campion, "Not to be opened until Christmas." Just prior to Christmas, 1918, a check for a similar amount was sent to Mrs. Meyer along with her Christmas presents, and other sums were disbursed in the same manner as in 1917. There was no communication with either check sent to Mrs. Meyer indicating that it had anything to do with stock or dividends.

We have outlined so much of the testimony as we deem essential for the consideration of the transaction which involves the subject of this litigation.

According to the respondents on January 24, 1917, there was a meeting at the home of Mrs. Ranke; there being present only Mrs. Ranke and the two respondents. At this meeting the certificate for 4,998 shares theretofore issued to Mrs. Ranke was canceled, and four new certificates were issued, one for 1,250 shares in favor of Dora D. Ranke, one for 1,250 shares in favor of Gretchen Meyer, one for 1,249 shares in favor of John T. Campion, and one for 1,249 shares in favor of Mamie Campion. According to the respondents, this was done at the earnest request and solicitation of Mrs. Ranke.

The case of respondent John T. Campion rests upon the testimony of his wife, the respondent Mamie Campion. In her direct

examination in speaking of her mother she testified:

"She said she wanted him to have those shares and be sort of a balance wheel."

This witness subsequently testified that in a later conversation with her mother the latter said she was glad she had given the stock to Mr. Campion; that he would sort of prove a balance wheel, because he could attend to business, and she and her sister were rather ignorant of business affairs. She thought Mr. Campion was capable of taking care of her affairs.

These new stock certificates were actually written by John T. Campion, and signed by him as vice president and by his wife as secretary. The surrendered certificate for 4,998 shares had been at all times in the possession of John T. Campion, as well as were all other stock certificates ever issued in this corporation, excepting the one in favor of Gretchen Meyer. This last-mentioned certificate was first shown to Mrs. Meyer at the office of respondent Campion at the time when she was visiting her mother in the summer of 1917, at which time Campion instructed her to sign her name upon the back at a place which he had marked with a cross, and he immediately took the certificate and kept it until it was tendered to her after her mother's funeral, along with some bonds which were all returned to respondent Campion for safe-keeping, and these were all surrendered to the attorneys shortly before the trial. According to Mrs. Meyer, Campion stated to her at the 1917 interview that the stock had been divided into four parts on account of excessive income taxes. The surrendered certificate for 4,998 shares was canceled in the handwriting of the respondent John T. Campion, and bears no indorsement excepting the name of Mamie Campion, which was placed upon the certificate by mistake.

Following the death of her mother, appellant and her husband came from Chicago to Seattle, and according to her testimony discovered for the first time that respondent John T. Campion was claiming some interest in these shares other than that of a mere trustee. According to the testimony of Fred Meyer, the husband of appellant, respondent Campion at this time first stated that these 1,250 shares were in his name, and for obvious reasons could not be immediately transferred, but that after about 60 days he would transfer them through the medium of the two grandchildren, Cyrus, son of the respondents, and Dorothea, the daughter of the appellant. Later on, according to the testimony of appellant and her husband, respondent Campion modified his position by saying that he would transfer the stock or some part of it. A short time later appellant returned to Chicago, and employed the services of Mr. Creekmur, an attorney of that city, who

came to Seattle with a power of attorney from appellant and went over the affairs of the corporation with respondent Campion. Mr. Creekmur made a careful examination of the minutes, and made notes of the books of the corporation and of certain portions of his conversation with the respondent Campion with the full knowledge of the latter. According to Mr. Creekmur Campion first said:

"I did a lot for Mrs. Ranke. As to the quarter interest in the stock, I bought that and paid for it, and I began paying for it in July, 1909. I paid for it at the rate of \$500 a month."

After the witness had spent further time in going over matters and upon a subsequent interview he asked respondent Campion how it happened that he began the purchase of the stock on the installment plan, and that he got it paid for just when Mrs. Ranke died. To which respondent answered: "Oh, I just thought of it that way." He further stated that he had had no talk with Mrs. Ranke about the purchase, but just thought of it that way. Upon the witness suggesting that that would hardly constitute a purchase, respondent stated: "Well, she could have given it to me if she wanted to." And upon being further interrogated respondent told Creekmur that he had taken this stock at the earnest request of Mrs. Ranke, and upon condition that it was to be his absolutely.

Both the abstract of the testimony and the briefs in this case are voluminous, but we will content ourselves with citing only a portion of the authorities which we deem especially pertinent.

Respondents' case rests upon the testimony of each on behalf of the other, as it is admitted that each is disqualified from testifying in his and her own behalf. It is first contended by appellant that this evidence is not admissible because of the provisions of section 1211, Rem. Code, relative to testimony of transactions of deceased persons. The trial court admitted this testimony upon the authority of *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042. It is argued that the facts in this case distinguish it from the former case. We do not find it necessary to pass upon this question.

There are certain well-settled rules which are decisive of this case. We are satisfied:

[1] First. That the respondents have the burden of proof. It is admitted that a fiduciary relation existed. Respondents contend in their brief that the case must be treated under some of the five classifications which Mr. Pomeroy makes of fiduciary relations, viz. trustee and beneficiary, principal and agent, attorney and client, guardian and ward, parent and child, and discuss the case as if it fell either under that of parent and child or principal and agent. In our opinion this case is not limited to either of these

classifications. In section 955, Pomeroy's Equity, the author says in part:

"The single circumstance now to be considered is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. * * * Nor does undue influence form a necessary part of the circumstances, except so far as undue influence, or rather the ability to exercise undue influence, is implied in the very conception of a fiduciary relation, in the position of superiority occupied by one of the parties over the other, contained in the very definition of that relation."

And again in section 956:

"Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal." Pomeroy's Equity Jurisprudence (4th Ed.) § 956.

The formal relationship in this case was that of mother-in-law and son-in-law. So far as the element of trust and confidence is concerned it resembled that of parent and child. There was not, however, the element of blood relationship which distinguishes this situation from that of parent and child and removes any presumption as to the probability of a gift of this magnitude.

[2] Second. Mrs. Ranke had no independent advice either before or after the claimed transaction, and while some authorities do not go so far as to hold a transaction of this kind void under all circumstances, we think there are none but what would hold it at least voidable, and place upon the donee the burden of proof.

"The transaction is not necessarily voidable, it may be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. * * * The principle is applied with great emphasis and rigor to gifts, whether they are simple bounties, or purport to be the effects of liberality based upon antecedent favors and obligations." Pomeroy's Equity Jurisprudence (4th Ed.) § 957.

In the recent case of *Hemrich v. Hemrich* (Wash.) 201 Pac. 10, we refused to sustain a gift from son to mother and authorities in which the lack of independent advice was important are freely cited. The son was dead at the time of trial, but the transfer was clearly proven by a deed executed by the son.

While it is not necessary for us to adopt the principle of independent advice in all cases, the lack of it in this case seems to us

a very important factor. The beneficiary was a man skilled in business affairs and used to handling large transactions. He was sensitive of his reputation for personal and business integrity, and if this transaction took place as claimed, and it was intended to make an outright disposal of this stock, the natural thing for him to have done would have been to insist upon independent advice for Mrs. Ranke and for a formal contract evidencing the transaction and witnessed by third persons. A man of his business experience would naturally know that the transfer of stock worth over \$100,000, and comprising practically one-fourth of his mother-in-law's estate, would not pass unquestioned unless the legality of the transfer was well established. Even the testimony upon which he relies is not precise nor definite as to what took place at the time of the claimed transfer. We cannot escape the conclusion that this transfer of stock of January 24, 1917, was intended as a mere temporary arrangement at the suggestion of respondent John T. Campion that it had something to do with relieving the burden of taxation.

[3] Third. Another feature of the case which tells against the position of the respondent is that the documents under which he claims were entirely prepared by himself.

In *Ingram v. Wyatt*, 1 Hag. Ecc. Rep. 388, 394, it is said:

"Where that relation of confidence exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction."

[4] This was relative to the execution of a will. The rule as to gifts *inter vivos* is stricter:

"The controlling reason is, I think, because by a gift a man strips himself of that which he can still enjoy, and of which he may have been seized during his life, while by his will he disposes of that which can be of no further use to him. As he is under ordinary conditions so much the less likely to do the first than the second, courts subject gifts to the sharper scrutiny." *In re Sparks' Will*, 63 N. J. Eq. 242, 51 Atl. 118, 121.

In *Yardley v. Cuthbertson*, 108 Pa. 395, 460, 1 Atl. 765, 781 (56 Am. Rep. 218), it is said:

"It is almost unnecessary to add that this rule is a rule of general application to all kinds of instruments, the procurers of which are large beneficiaries by virtue of their operation. It is a rule of equity, and is of very ancient origin. In its ordinary statement the fact of mental weakness in the grantor does not appear, and is not at all necessary to the application of the rule in a given case."

As instances of the application of the rule in cases involving gifts *inter vivos*, see: *Rickman v. Meier*, 213 Ill. 507, 72 N. E. 1121, 1125; *Smith v. Smith*, 84 Kan. 242, 114 Pac. 245, 35 L. R. A. (N. S.) 944.

It is true that Mrs. Ranke was paralyzed at that time, and could not write with her right hand, but in a matter of this consequence she could either have written with her left hand or made her mark, or authorized some independent person to sign her name. In addition to her interest in the certificate which was canceled without any physical act on her part she was president of the corporation, and as such the proper person to sign stock certificates, particularly the one which respondent signed as vice president and issued to himself.

[5] Summarized, the case resolves itself in respondent husband claiming a gift of over \$100,000 from a mother-in-law, who trusted him with the handling of practically all her property, and who followed his advice in her business, made without independent advice, upon the production of testimony the written portion of which is prepared by himself and the oral portion of which is all interested; for it is idle to say that the wife is disinterested; granting that the gift became his separate property, outside of the natural loyalty she bears toward her husband she has the interest of prospective heirship, and what is immediately important she will naturally expect to share in his augmented income.

Aside from the evidence which directly opposes respondents' contention, and only a portion of which we have recited, we reach the conclusion that respondents have not successfully met the burden the law imposes upon them, and their defense must fail.

Whether the respondent Mamie Camplion and appellant Gretchen Meyer, continue to hold their certificates for 1,250 shares each does not change their position materially, as they are the only heirs of the estate, but with the view we take of this transaction we think these shares should also be surrendered to the representatives of the estate as such.

The judgment will be reversed, with directions to enter judgment against the defendants for the surrender of the certificates of stock held by them for 1,250 shares each in the Ranke Investment Company, and that the executrices accept the surrender of the certificate for 1,250 shares tendered by the appellant.

PARKER, C. J., and MAIN, HOLCOMB, and BRIDGES, JJ., concur.

(120 Wash. 426)

CONNER v. HODGDON et al. (No. 16616.)
(Supreme Court of Washington. June 16, 1922.)

1. Attorney and client §125—When relation of confidence terminates.

Where the relation of confidence between an attorney and his client is once established,

either some positive act or some complete case of abandonment must be shown in order to determine it, and the rule must be applied as long as the influence arising from the relationship exists, although this may extend beyond the continuation of the relationship itself.

2. Attorney and client §125—Relation of confidence continues after judgment.

The relation of confidence between an attorney and client continues on beyond the judgment and extends to the attorney's settlement with his client of the fruits of the litigation.

3. Trusts §110—Evidence held to show continuance of confidential relationship.

In an action against an attorney to have him declared trustee of lands of his client purchased at a judicial sale, evidence held to show that the relation of confidence resulting from the relation of attorney and client existed at the time of the sale.

4. Attorney and client §123(1)—Client protected from hard bargains.

Equity regards the relation of attorney and client much in the same light as that of guardian and ward, and will relieve a client from hard bargains or from any undue advantage secured over him by his attorney.

5. Witnesses §159(2)—Court properly refused to permit testimony as to transactions with deceased person.

In an action against attorney by personal representative of deceased client to have defendant declared trustee of lands of client purchased at judicial sale, court did not err in refusing to permit defendant to testify that he had taken up with the decedent the matter of the sale of the property, and that the client was satisfied that he should purchase the property, being too heavily obligated to handle it himself, in view of Rem. Code 1915, § 1211.

6. Witnesses §178(1)—Benefit of statute concerning testimony of transactions with deceased persons held not waived.

The benefits of Rem. Code 1915, § 1211, providing that in actions by legal representatives of deceased persons a party in interest shall not be permitted to testify in his own behalf as to any transaction with the decedent, were not waived by the personal representative as to statements made by decedent to defendant by calling defendant as a witness and examining him as to what he did.

7. Equity §84—Slow to hold one seeking enforcement of just claim guilty of laches.

Equity is slow to hold one seeking the enforcement of what would otherwise be a just claim guilty of laches.

8. Executors and administrators §437(1)—Action to have trust declared in land held brought within reasonable time.

An administratrix, bringing an action within a few days after the expiration of one year from incompetent's death against attorney for incompetent to have a trust declared in land, held not guilty of laches.

Fullerton and Mitchell, JJ., dissenting.

En Banc.

Appeal from Superior Court, Grays Harbor County; W. O. Chapman, Judge.

Action by Jennie Conner, administratrix of the estate of J. F. Conner, deceased against C. W. Hodgdon and wife, in which Charles W. Hodgdon, as executor of the estate of Albert S. Hodgdon, deceased, intervened. Decree for plaintiff, and defendants and intervener appeal. Affirmed.

Theodore B. Bruener, of Aberdeen, for appellants.

Wm. E. Campbell and J. O. H. Callahan, both of Hoquiam, for respondent.

TOLMAN, J. Respondent as plaintiff brought this action to recover possession of certain real estate located in the city of Hoquiam, seeking to have appellants C. W. Hodgdon and wife declared to have been trustees in acquiring and holding the legal title thereto, and asking for an accounting from them as to the rents and profits. From a decree holding Hodgdon and wife to be trustees, and ordering a reference for the purpose of an accounting, these appeals are prosecuted.

We will consider first the appeal of C. W. Hodgdon and wife. The ultimate facts in the case are singularly free from conflict, though the parties are widely at variance in the conclusions drawn therefrom. It appears that appellant Hodgdon is a reputable attorney of 30 years standing, and that he has practiced his profession at Hoquiam for many years. As early as 1903 Hodgdon was attorney for J. F. Conner in litigation involving the title to the property now in question, which litigation lasted about 4 years, and was twice before this court, *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929, and *Conner v. Clapp*, 42 Wash. 642, 85 Pac. 342; finally resulting in the establishment of Conner's title to the property. Following the final determination of that case, Hodgdon was instrumental in procuring loans to be made to Conner, secured by first and second mortgages upon the property. Thereafter as attorney for Conner, he defended an action brought for the purpose of foreclosing a lien against the property, redeemed on behalf of Conner from a judicial sale, prosecuted to a successful outcome an action for an accounting against the purchaser at such sale, and at the second sale in the same case on a deficiency judgment bid in the property in his own name, for the full amount then due, taking a certificate of sale, though he did not go into possession, and thereafter, with money coming into his hands belonging to Conner, he paid off his advances, and caused a redemption to be made for and on behalf of Conner. He likewise defended other actions brought against Conner not involving this property, one of which he so defended after he had made the purchase hereinafter referred to.

True, he on occasions accepted collections against Conner, and in one instance instituted a suit against him, but it does not appear that it was contested, or that it caused any change in their friendly relations.

In January, 1914, Conner sold a timber claim which he owned in Pacific county, and by arrangements between Conner and the purchaser the entire consideration, \$24,000 in cash, was placed in Hodgdon's hands for the purpose of paying off the liens and incumbrances thereon, and Hodgdon therewith paid taxes, judgments, liens, and mortgages, clearing the title to the timber claim, and incidentally relieving the property now under consideration from certain liens and mortgages which were incumbrances upon it, as well as upon the timber claim, and with the excess money still remaining in his hands Hodgdon redeemed for Conner from an execution sale, to himself heretofore referred to, and paid a large sum in satisfaction of accrued interest on one of the mortgages on this property. During the latter part of this time Hodgdon as attorney for Conner was defending against an action brought by Lamb & Son to recover from Conner for premiums on fire insurance policies covering this particular property. The defense was unsuccessful. Judgment was entered against Conner, from which Hodgdon as Conner's attorney prosecuted an appeal to this court. The judgment was here affirmed, and the remittitur was filed in Grays Harbor county March 20, 1915. An execution was issued against Conner and the surety on his appeal bond for the costs in this court. The surety paid the amount demanded, and Hodgdon, for Conner, reimbursed the surety, with Conner's money. In due time an execution was issued against Conner for the principal judgment in the Lamb Case, and thereunder the sheriff duly levied upon the property now under consideration, and gave notice of the sale thereof to be held on May 22, 1915. Plaintiff in the execution gave notice of an application to the court to amend the execution, and Hodgdon, as attorney for Conner, appeared in court on the morning of the day of the sale in response to such notice. At the time and place fixed for the sale there appeared the sheriff, the attorney for the judgment creditor, and Hodgdon, no one else appearing, and Hodgdon then bid in the property in his own name for \$415.56, the exact amount due on the execution. On the day of sale the sheriff issued to Hodgdon a certificate of sale, and he immediately exhibited this certificate to the tenants of the property and notified them that all rents should thereafter be paid to him, and he has ever since been in possession, collecting the rents, and claiming the property as his own.

On June 5, 1915, the sale was duly confirmed; a sheriff's deed issued to Hodgdon on January 5, 1917, which was recorded April

23, 1917. On June 1, 1915, nine days after the sale, and before its confirmation, Hodgdon collected from the tenants of the property which he had thus purchased rent amounting to \$410, leaving at that time due him but \$5.56, and a trifle of interest, and by July 1, 1915, he had collected rent in the sum of \$845; but, before collecting the July rent and on June 28, 1915, he borrowed upon his personal credit, and paid the sum of \$1,616 in redeeming from a certificate of delinquency for general taxes against the property, which certificate was not then foreclosable, and would not have been for a considerable time to come. Conner was adjudged insane on April 30, 1917, and committed to the asylum, where he remained without regaining his sanity until his death, which occurred on February 4, 1919. This action was brought on March 17, 1920.

The greatest conflict in the testimony is as to Conner's mental condition at the time Hodgdon purchased the property, and from then on until he was adjudged insane. There is testimony of medical experts to the effect that his malady existed for a year or two years, or perhaps longer, before he was committed, and also testimony to the effect that Hodgdon said, in effect, speaking of the time when the Lamb suit was tried in the superior court, and long before his purchase of the property at sheriff's sale, that Conner acted as though he had been taking "dope." From the testimony the trial court may well have found that Conner was non compos mentis when the sale occurred, and we could not say that the evidence preponderated against such finding, but, as we view the case, it makes little difference whether Conner was then actually insane or not.

[1-4] It is appellant's first contention that no confidential relation existed between Conner and Hodgdon at the time the latter bought the property at sheriff's sale; that the relation of attorney and client ceased at the time the final judgment was entered against Conner in the Lamb case, and that therefore Hodgdon had the same right to buy for his own advantage at the sale as a stranger would have. Authorities are not wanting which seemingly hold that an attorney for a defendant in a case ceases to be such when the final judgment is rendered against his client. 6 C. J. 672, and cases there cited. So far as we have examined the authorities which apparently so hold, they are cases which deny the binding force of a notice served upon an attorney after the final judgment, or deny the right of an attorney to bind his former client by any act done in the cause after the final judgment, and the like, and none, so far as we are aware undertake to announce the rule that the confidential relations theretofore existing are presumptively extinguished by the final judgment so as to permit an attorney to use in-

formation theretofore gained, by reason of such confidential relation, to his own advantage, or to the disadvantage of his former client. Indeed in 6 C. J. at page 689, continuing the discussion of "Attorney and Client," the author lays down what we consider to be the rule applicable to the facts here, in these words:

"Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The rule must be applied as long as the influence arising from the relationship exists, although this may extend beyond the continuance of the relationship itself, and this doctrine a fortiori must extend to the attorney's settlement with his client of the very fruits of the litigation."

This rule, we think, is generally followed. At any rate this court is fully committed to it. *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112. See, also, *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164, and *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272. It seems to us uncontrovertible that the confidential relationship is here shown to have existed between Conner and Hodgdon, and no abandonment of it or positive act tending towards its severance can be pointed out in the record, and none can be presumed. We are therefore forced to hold that at the time of the purchase Hodgdon owed a sacred duty to his former client whether he was sane or insane.

"Equity regards the relation of attorney and client much in the same light as that of guardian and ward, and will relieve a client from hard bargains or from any undue advantage secured over him by his attorney. But a client will be protected from such abuse of the relation at law as well as in equity." 6 C. J. 688.

The property involved is a valuable corner in the heart of the business section of Hoquiam, and by reason of his relations with Conner Hodgdon knew at the time he purchased it just what incumbrances there were against it, these then amounting to slightly more than \$17,000. It is quite possible that at that particular time the property was worth but little more than the amount of these incumbrances. It clearly appears that Conner was largely indebted, probably insolvent, and very likely he would have lost the property in any event, but that does not change the situation, or permit Hodgdon to gain a profit at the expense of his client by the subsequent appreciation of the property in value. These unfortunate facts are in no wise explained in the record, and must be accepted for present purposes as true. It should be remembered, however, that Hodgdon's mouth has been closed as to these transactions by the death of Conner. This is perhaps a great hardship upon him, and may indeed be wholly responsible for his present

unfortunate situation, but we cannot look beyond the record.

[5, 6] In this connection it is urged that the trial court committed error in refusing to permit Hodgdon, when called as a witness for plaintiff, to testify on cross-examination as to things said by Conner, on re-examination as to conversations which he had with Conner, and also in refusing Hodgdon's offer to prove by his own testimony that at and about the time of the sheriff's sale he took the matter of the sale up with Mr. Conner, fully advised him in relation thereto, and that Conner was satisfied that he (Hodgdon) should purchase the property, because Conner was too heavily obligated to handle it. We cannot find that the trial court erred in these rulings. The statute is explicit; Rem. Code, § 1211, providing in effect that where the adverse party sues as the legal representative of a deceased person then "a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person." True it is that respondent called Mr. Hodgdon as a witness and examined him as to what he did, but since no attempt was made to examine him as to any transaction had by him with, or any statement made to him by Mr. Conner, the benefit of the statute was not waived.

Coming now to intervenor's appeal: Albert S. Hodgdon, a brother of appellant C. W. Hodgdon, on June 4, 1908, loaned to J. F. Conner \$4,350, secured by a second mortgage upon the property here in controversy. Interest has been paid to some extent upon this note, but the principal has not been paid. Long after appellant C. W. Hodgdon acquired the record title to the property the first mortgage was released and intervenor's second mortgage thereby became a first mortgage, and in 1919 intervenor, at the request of his brother, released his mortgage, then a first lien on the property, in order that his brother might borrow \$5,000 upon the property and give a first mortgage as security therefor. Intervenor took back from his brother a second mortgage to secure the original note, but because of his confidence in his brother did not record the same. At about this time also he indorsed upon the note held by him a remission of the interest above 5 per cent. per annum, which he did solely because he looked to his brother as the only source of payment. All of these facts were set up by a complaint in intervention in this action. After the trial of the cause Albert S. Hodgdon died, Charles W. Hodgdon duly qualified as executor of his estate, and was substituted as intervenor. Intervenor prosecutes a separate and independent appeal, assigning as error that the trial court erred in refusing to grant any relief to the intervenor. A careful examination of the record convinces us that at this time the

intervenor has no ground for complaint. The decree from which the appeal is prosecuted is to the effect that C. W. Hodgdon purchased the property in question for the benefit of Conner, thus becoming a trustee, holding the title in trust for Conner and his heirs, and directs that an accounting be taken. It appears from the record that respondents have at no time contended that intervenor should not be paid, and the trial court in his remarks shown in the record indicated that at the proper time intervenor's rights would be fully protected. It seems to us not improper that the trial court should delay passing upon this feature of the case until an accounting be taken, and it be ascertained what, if anything, is owing from appellants, C. W. Hodgdon and wife, to the respondent on account of rents and profits not already expended in protecting and preserving the property. It may be that from this source there will be sufficient funds to pay intervenor in full. If not, intervenor's mortgage may be established in its proper rank, and made a charge against the property. It is not contended by any one that the present first mortgage on the property should be affected by this litigation, and since intervenor released his then first mortgage without apparently giving notice to the mortgagee in the present first mortgage of its nonpayment, and as he makes no attack upon the present first mortgage, we see no reason why all of his rights cannot be fully protected and established by a final decree to be entered after the accounting is had.

[7] We have purposely delayed the discussion of appellant C. W. Hodgdon's contention that if the confidential relations did in fact exist the purchase was not void, but that Conner had the right to claim the benefit of the purchase within a reasonable time thereafter only, and failing to exercise such right his acquiescence in the purchase will be conclusively presumed, for the reason that until the discussion of the appeal by the intervenor it did not clearly appear in the opinion that there is here no adverse claim based upon the intervening rights of third persons. What is a reasonable time must always be determined in the light of the facts involved, and in such a case as this, where there are no intervening rights of third persons, equity is slow indeed to hold one seeking the enforcement of what would otherwise be a just claim guilty of laches, and if one acts before he is guilty of laches then he acts within a reasonable time. It is true that the record shows no act done by Conner prior to his commitment evidencing his intention to claim the benefit of the sale, but perhaps his affairs did not then justify his acting, and it appears that after Mr. Conner was adjudged insane appellant C. W. Hodgdon refused to pay any part of the rents to his wife, and there is testimony to the effect that he then admitted giving Conner money after his pur-

chase of the property, but claimed such to have been a gift only.

[8] The action was brought within a few days after the expiration of one year from Conner's death, and from a careful examination of the record we cannot say that there was here any unreasonable delay after respondent knew, or should have known, the facts upon which her action is based.

The judgment is affirmed.

MACKINTOSH and MAIN, JJ., concur.

HOLCOMB, J. (concurring). In concurring with the majority I wish to add that, under the peculiar circumstances shown herein, the judgment herein should not be considered any reflection upon the professional conduct or personal honor of Judge Hodgdon. He was undoubtedly the attorney for Conner in the case wherein Conner became the judgment debtor, and up to the moment of the amended execution. He bid in the property at execution sale. Ordinarily in such a case the law presumes that he acted for his client, and regards him as his client's trustee. 6 C. J. 682. Unfortunately, it so happened that thereafter the circumstances conspired against the attorney. His client either then was, or shortly thereafter became incompetent, and so continued until he died. From the first Judge Hodgdon so dealt with the property openly and undisguisedly as his own as to indicate his client's consent to his purchase of the property in his own name. His lips are sealed by the death of his client, and that consent, if given, cannot be convincingly shown. The presumption of law above mentioned is against him.

The relation of attorney and client is one of the highest trust and confidence, requiring from the attorney the most scrupulous good faith toward his client; and therefore transactions between them are often declared to be voidable which would be deemed unobjectionable between other persons. 2 R. C. L. 966. In cases of doubt, therefore, equity and public policy require that the attorney be held accountable to the client.

Nor is the judgment herein burdensome financially. All that is required is that an accounting be rendered of the rents, issues, and profits of the property, and all expenditures will be credited, including, I should think, reasonable compensation for the management of the property.

PARKER, C. J., and HOVEY, J., concur.

FULLERTON, J. (dissenting). I am unable to concur in the conclusion reached by the majority. In my opinion it does a grave injustice to an able and distinguished lawyer, now in the decline of life, whose conduct as a practitioner, unless this one act be an exception, has always been above just criticism. I will not quarrel with the recitals of fact

made by the majority, although my examination of the record convinces me that if the settings of many of the facts recited were more fully detailed they would take from them much of the sting the more brief recital implies. To illustrate my meaning. I may mention the sale of the Pacific county lands. It is true that when this sale was agreed upon between Mr. Conner and the purchaser, it was a part of the agreement that the purchase price should be paid to Mr. Hodgdon, and that he should take the necessary steps to perfect title in the purchaser; the contract being that the purchaser should have an unincumbered title. This agreement was made without consultation with Mr. Hodgdon, and he first learned of it when the money was brought to him by the purchaser and the purpose of its bringing stated to him. Before paying out the money Mr. Hodgdon called in Mr. Conner, and had him verify the statements of the purchaser. He then proceeded to disburse it in accordance with the directions given him, and no contention is made that he did not faithfully perform the trust. This transaction is recited, as I understand the majority, not for the purpose of showing a sinister motive on the part of Mr. Hodgdon with relation to the land now in dispute, but for the purpose of showing an unusual relation of trust and confidence then existing between Mr. Conner and Mr. Hodgdon, and as evidence of the existence of such a relation at the time of the purchase made by Mr. Hodgdon of the land in dispute. But I cannot think it has even the remotest bearing on the question. It undoubtedly shows that Mr. Conner, in common with the purchaser, had a just confidence in Mr. Hodgdon's integrity, and selected him to do, what the parties themselves could not do, the detail work necessary to a compliance with their agreement. But aside from the fact that the transaction involved a considerable sum of money, there was nothing unusual in it. Similar transactions occur in the practice of every reputable lawyer. More than this it was the purchaser, and not Mr. Conner, who took the greater risk, if risk there was. He paid the money over to their common agent, and if the agent had failed in the performance of the trust he, and not Mr. Conner, would have borne the principal loss. I am aware that the majority have taken the pains to recite that certain of the purchase money was paid on mortgages on the very property which Mr. Hodgdon afterwards acquired. If by this the majority go further than I have assumed they intend to go, then I say they have drawn a wholly unjustifiable inference from the fact. This transaction not only occurred long prior to the purchase made by Mr. Hodgdon, but prior to the time the judgment was obtained under which the property was sold. Seemingly nothing short of prescience could then have made known

to Mr. Hodgdon that he would subsequently become the purchaser of the property. So, with the other transactions on which the majority lay stress. As I view them, they are nothing more than the usual and ordinary transactions which occur between all capable lawyers and their clients. While such relations imply trust and confidence with respect to the particular matter in hand, they do not create such a general relation as would forbid a lawyer from dealing with the client, in matters in which he is not employed as an attorney, as he would deal with strangers generally.

But the facts which seem to me to be controlling are facts which the majority do not stress. The record makes it clear that Mr. Hodgdon was never the general attorney of Mr. Conner. While Mr. Conner usually employed him when he needed the services of an attorney, the employment was always for the particular case, and always ceased with the cessation of the particular case. He was paid no regular retainer, and the record does not disclose that there was even a common understanding between them that he was to be employed when Mr. Conner needed the services of an attorney. This, as I view it, does not create a general trust relationship, such as must be found in order to hold there was a trust relationship with reference to the property in question.

Again, the record discloses that at the time of the sale of this property Mr. Conner was utterly and hopelessly insolvent. Not only was the property itself covered with mortgages up to its practical value, but Mr. Conner was otherwise indebted in large sums, a part of which had been reduced to judgments, none of which was subsequently paid. By honest conduct he could not then hope to save for himself any part of the property. Ultimately it must go to the satisfaction of his creditors. To say, therefore, that Mr. Hodgdon purchased this property in trust for Mr. Conner is to say that he conspired with him to withdraw the property from the reach of Mr. Conner's creditors; in other words, to cheat and defraud them. I can find nothing in the evidence that justifies so grave a charge. Certainly there is nothing in Mr. Conner's conduct to indicate that he so intended. During the years that he subsequently lived he made no claim to the property. At one time when rent was inadvertently paid to him by one of the tenants of the property he returned it to the payer. He told other persons who inquired concerning the property that he had nothing to do with it, and referred them to Mr. Hodgdon as the owner. He paid no part of the indebtedness against the property, either of principal or interest, and his conduct was generally the conduct of one who considered the property as wholly lost to him. As to Mr. Hodgdon, his conduct with reference to the property

has ever been that of an absolute owner. At no time has he recognized that Mr. Conner had an interest in the property, and he has dealt with it in such a manner as not only to involve seriously his own interests, but the interests of other persons who must necessarily suffer thereby if it is property held in trust. Conduct such as this is not the ordinary conduct of men conspiring to cheat and defraud others. Usually there is something in the particular transaction and in the subsequent acts of the parties which point to such a conclusion. Here there is nothing. The whole case rests upon the prior relations of the parties and in them must be found the fraudulent purpose. I cannot believe the evidence justifies such a finding.

Contrary to the conclusion of the majority, I am of the opinion that the trial court unduly limited the testimony of Mr. Hodgdon. Mr. Hodgdon was the first witness called by the representative of the estate. He was made to testify concerning his relations as an attorney with Mr. Conner, even to the fact that he represented Mr. Conner in the action in which the judgment was obtained under which the property was sold, and to the fact that he became the purchaser at such sale. When his own counsel sought to show the entire transaction concerning the sale, the objection of the statute was interposed and sustained by the trial court. In other words, Mr. Hodgdon was compelled to testify to everything which would aid the plaintiff in establishing the claim of the estate against him, and denied the right to testify to those parts of the transaction which tended in his own favor. This, as I understand it, is not the rule, and I believe is contrary to our prior holding in *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884. In that case the representative of a decedent's estate called the adverse party and had him identify certain checks drawn in the adverse party's favor; the purpose of the testimony being to show that he had received large sums of money belonging to the decedent. The court then permitted the witness to explain why the checks were drawn in his favor, and to state that he gave the money which they represented to the deceased. On the appeal this was assigned as error. We, however, held that it was not so, saying that it would be palpably unjust to permit the representative of a deceased person to use the adverse party to the extent that it might aid him in defeating a claim against or in establishing an independent claim in favor of the estate, and then claim the benefit of the statute when the adverse party sought to qualify or explain his testimony; citing a long list of cases in support of the rule. It was further said:

"A like rule applies where the cross-examination is extended beyond the scope of what the witness would have been permitted to testi-

ty in chief upon direct examination. *Pierce Loan Co. v. Killian*, 153 Mo. App. 106, 132 S. W. 280; *Edwards v. Latimer*, 183 Mo. 610, 82 S. W. 109; *Edwards v. White* (Tex. Civ. App.) 120 S. W. 914. The logic of the cases is that the party who invokes the protection of the statute must himself respect it."

But it is needless to pursue the inquiry further. In my opinion there should be a judgment in favor of Mr. Hodgdon, or, if not that, a new trial.

MITCHELL, J., concurs.

(120 Wash. 472)

KILDALL v. KING COUNTY. (No. 16834.)

(Supreme Court of Washington. June 21, 1922.)

Counties \Rightarrow 146—Court bailiffs not servants of the county, and no liability for their negligence.

Bailiffs of superior courts, appointed by the judges thereof, are not servants or employees of the county, and the county is not liable for personal injuries to jurors resulting from their negligence, under Rem. Code 1915, § 951, notwithstanding sections 349, 350, 3824, 8964, 9056, in view of Const. art. 4, § 1.

En Banc.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Mary Kildall against King County. Judgment for defendant, and plaintiff appeals. Affirmed.

Cole & Dolby and Robt. G. Cauthorn, all of Seattle, for appellant.

Malcolm Douglas and Wm. Parmerlee, both of Seattle, for respondent.

HOLCOMB, J. In a case to recover damages for personal injuries received by appellant, Mary Kildall, while serving as a juror in the superior court for King county, a demurrer was interposed to the amended complaint, and sustained by the trial court. The appellants elected to stand on their amended complaint, and judgment of dismissal was entered against them, from which they appeal.

The amended complaint charges that Mary Kildall, with 11 other jurors engaged in the trial of a cause, was, at the direction of the judge presiding, taken to dinner by two bailiffs, that they were instructed to follow the orders and directions of the bailiffs, who were ordered to keep the jurors together and separate from all other persons. It is alleged that, on the return from the place where dinner was furnished to the jurors to the courthouse, the bailiffs caused the jurors to walk two and two, preceded by a bailiff

a the head of the column, and followed by the other bailiff at the rear. So conducted, the jurors were led into that part of a busy street, where vehicles had the right of way, and pedestrians had no right to be, without opportunity to see or avoid approaching traffic, and there an automobile, moving at a very great rate of speed, ran into the column, striking down and very seriously injuring Mrs. Kildall.

Appellant's briefs range over a very wide field, and present numerous authorities thought to bear on the case. Respondent presents the single contention that the persons alleged to have been the servants of the county, and for whose acts the county is sought to be held were not, in law or in fact, the servants of the county, and that the rule of respondeat superior cannot be invoked, and that hence the complaint fails to state a cause of action.

It is insisted by the appellant that our statute (Rem. Code, § 951), by direct and positive language, gives the right of action in such case as this. The section relied on is as follows:

"An action may be maintained against a county, or other of the public corporations mentioned and described in the preceding section, either upon a contract," etc., "or for an injury to the rights of plaintiff arising from some act or omission of such county or other public corporation."

Under this statute counties have been held liable for neglects or omissions of duty in respect to their county affairs. Thus, in *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, it was held that while, at common law, a municipal corporation is not liable to an individual for neglect to keep a highway in repair, whereby he suffers an injury in using it, under this statute the county was suable. See, also, *McClung v. King County* (Wash.) 204 Pac. 1064; *Bergen v. Lewis County*, 95 Wash. 499, 164 Pac. 73; *Arishin v. King County*, 108 Wash. 176, 173 Pac. 1020; *Conger v. Pierce County* (Wash.) 198 Pac. 377.

Appellants also invoke the aid of various other statutory provisions, as section 9056, Rem. Code, which gives to every court of record power to appoint as many bailiffs as may be necessary, and section 8983, which provides that:

"Bailiffs of the several superior courts of this state, appointed by the respective judges thereof, shall be paid for their services, not to exceed three dollars per day, by the county in which the court is held."

Also section 8984, reading:

"From time to time, the superior judge of the county shall certify the amount due any such bailiff, and order the payment thereof; and thereupon the county auditor shall issue to such bailiff a warrant on the county treas-

urer, payable out of the general fund, for the amount so certified."

And also chapter 141, Laws of 1919, which reads:

"Bailiffs of the several superior courts, appointed by the respective judges thereof, in counties of this state having a population of more than one hundred fifty thousand, shall be paid for their services one hundred and twenty-five dollars per month by the county in which the court is held."

It is also asserted by appellant that, while the bailiffs are appointed by the judges of the superior court, they serve both the state and the county (State ex rel. Dyer v. Twichell, 4 Wash. 715, 31 Pac. 19; In re Salary of Superior Judges, 82 Wash. 623, 144 Pac. 929), and that by reason of being paid by the county, and having to do only with the business of the court within the county, bailiffs become county employees. There are also other statutes, which provide that the court shall direct that food be provided for jurors when kept together, and that the food be provided at the expense of the county. Sections 349 and 350, Rem. Code.

It is said in argument that a bailiff, acting under the direction and supervision of the judge of the superior court, is in no different position than that of a road or bridge supervisor or foreman, acting under the direction and supervision of the county commissioners, whose negligent act or omission will, under the cases heretofore cited, bind the county. That cannot be true. Rem. Code, § 3824, referring to the powers of the county, provides:

"Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law."

A road supervisor or bridge foreman is employed by and under the direct control of the county commissioners.

But it is argued that it is the duty of the county commissioners to provide properly for the jurors while performing their functions, and that bailiffs have authority by law to take charge of, keep separate from others, prevent communications with, and provide food, under the direction of the court, for such jurors, though the manner in which these duties shall be performed is not fixed and defined by law. Under the statutes heretofore referred to, bailiffs can only be appointed by the judges. County commissioners, who exercise the county powers and authority, have no power to hire and discharge bailiffs, or to direct their duty. Judges are public officers, and not servants or employees of the county. They are created by the Constitution. Article 4, § 1, Constitution of Washington.

"Courts generally refuse to hold municipalities responsible in damages for acts of their

officers, whose duties pertain to strictly public matters. In such cases the officer is looked upon, not as a servant of the corporation, but as a public officer, responsible directly to the laws. If such an officer commits an actionable tort, the action is against him, and not against the municipal corporation." 5 Thompson on Negligence, § 5818.

No one will contend that the judge of the superior court, who directed the jurors to be kept in the control and custody of the bailiffs, would be answerable in damages for the injuries that resulted from the negligence of either of the bailiffs; yet the bailiffs are responsible only to the judges. The judges hire and discharge them; they direct them in the performance of their duties; no other power or official has any other authority or control over them whatever.

"It may be observed, in the next place, that when it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of respondeat superior applies. But if, on the other hand, they are elected or appointed by the corporation, in obedience to the statute, to perform a public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the Legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as independent public or state officers with such powers and duties as the statute confers upon them, the doctrine of respondeat superior is not applicable. It will thus be seen, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of respondeat superior for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of and not an independent public or state officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation." 4 Dillon, Municipal Corporations (5th Ed.) § 1655.

The same work, in section 1656, says:

"Agreeably to the principles just mentioned, police officers appointed by a city are not its agents or servants in such a sense as to render it responsible for their unlawful or negligent acts in the discharge of their public duties as policemen."

The duties of bailiffs of the superior court are more like the duties of police officers or sheriffs. They are an essential part of the administration of justice. Their duties are public, and independent, except to the superior who appoints them. They are not the servants of the county, and the county cannot be held liable for their acts or omissions, except as provided by law. They are certainly not such servants or agents of a county as to render the county liable upon the principle of respondeat superior. See, also, *Smith v. Seattle School District No. 1 et al.*, 112 Wash. 64, 191 Pac. 858, and cases there cited.

The accident and injuries were very regrettable, but the right of recovery is not against the county. The demurrer was properly sustained, and the action properly dismissed.

Affirmed.

MAIN, MACKINTOSH, BRIDGES, HOVEY, and MITCHELL, JJ., concur.

(120 Wash. 378)

MEYER BROS. DRUG CO. v. CALLISON.
(No. 17190.)

(Supreme Court of Washington. June 12, 1922.)

1. Sales ⇨172—Seller held not justified in canceling order for "prompt shipment" because of buyer's reconsignment to shipping points where embargoes existed, causing delays.

A seller was not justified in canceling an order for a carload of cascara bark for "prompt shipment" because the buyer was reconsigning cars to shipping points where embargoes existed owing to congested war conditions, causing considerable delay in shipments; the term "prompt shipment" being usually understood to be more for the buyer's benefit and meaning no more than that the seller would deliver as promptly as possible, all things considered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shipment.]

2. Sales ⇨418(2)—Measure of damages for breach of contract to deliver car of cascara bark properly fixed at difference between contract price and market price at destination.

In an action for breach of contract to deliver a car of cascara bark, where there was evidence of a market price for fresh bark in eastern markets, to which cars were being re-consigned by the buyer, and evidence, including quotations from a well-known and reliable trade journal of general circulation, as to market prices thereof in New York at various times within a few weeks after the breach, the court properly fixed the measure of damages as the difference between the contract price and the market price at the eastern markets,

though the bark was sold f. o. b. place of shipment on the Pacific Coast.

3. Sales ⇨417—Assessment of damages for failure to deliver car of cascara bark on basis of average weight of carload of 31,000 pounds held erroneous.

In an action for breach of contract to deliver a carload of cascara bark, where the complaint alleged that an average car contained 26,000 pounds, the weight of other cars shipped by defendant, as shown by bills of lading accompanied by federal shipping licenses requiring cars to be loaded to maximum capacity, approximated from less than 24,000 to 26,000 pounds, and the only car which approximated 31,000 pounds, on which, as an average weight, the court based its assessment of damages, was one actually shipped to plaintiff, plaintiff was not entitled to damages based on a greater average weight than 26,000 pounds.

4. Costs ⇨231(1)—Appellant recovering more favorable judgment allowed costs of appeal.

An appellant recovering a more favorable judgment will be allowed costs of appeal.

Department 2.

Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

Action by the Meyer Bros. Drug Company against I. P. Callison, doing business under the name of Chehalis Produce Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

John C. Hogan, of Aberdeen, for appellant.
Theodore B. Bruener, of Aberdeen, for respondent.

HOLCOMB, J. This action is one for breach of contract for failure to deliver a car of cascara bark.

On July 3, 1918, after preliminary negotiations appellant accepted respondent's order for a carload of cascara bark for prompt shipment. The price stipulated was 12 cents per pound, f. o. b. shipping point, which was Aberdeen, Wash. On June 29, 1918, appellant had given respondent an option, which would expire July 3, 1918, to purchase the two cars of cascara bark, at 12 cents per pound. On July 2d, respondent exercised its option to purchase one car, and placed its order with appellant for it. On July 3d, respondent exercised its option to purchase the second car, which is the car in controversy now, and appellant accepted respondent's order. All negotiations, including the placing of the order and its acceptance, were carried on by telegraph and letter. Appellant was instructed by wire to await shipping instructions. On July 8th, without waiting for shipping instructions, appellant shipped the first car of bark, and on July 11th, eight days after the acceptance of the order, canceled the order for the second car. At the time of

the cancellation of the contract, the price of cascara bark had materially advanced.

At the time the contract was made, embargoes were in effect in certain parts of the United States, due to congestion brought about by war conditions, and permits or licenses were required to be obtained before shipments in carload lots could be forwarded to many eastern points. The drug company proceeded with due diligence to obtain the necessary shipping licenses, which were, in due course, forwarded to appellant.

The case was tried before the court without a jury, and the court, after seeing and hearing the witnesses, found all the material facts in favor of respondent, and granted judgment in its favor in the sum of \$852.50.

[1] The first claim of error made by appellant is that the court erred in holding that there was a breach of contract by appellant.

This was largely a question of fact. A reading of the telegrams and letters, however, convinces us that the trial court rightly decided that question. Appellant claims that when he offered the carload of bark for "prompt shipment" to respondent in St. Louis, he was not contemplating that the bark was to be shipped to Atlantic Seaboard points, where embargoes existed against shipments owing to congested conditions brought about by the war, causing considerable delay in shipments, and that when he found that they were reconsigning the cars to such points, and that shipping licenses were required, he was justified in canceling the order for the second car.

We do not so consider. The term "prompt shipment," as used in his offer, meant no more than that the seller would deliver as promptly as possible, all things considered. 24 A. & E. Cyc. of Law, 1074; Victor Safe & Lock Co. v. O'Neil, 48 Wash. 176, 93 Pac. 214; Hoffman v. Tribune Publishing Co., 65 Wash. 467, 118 Pac. 306.

It is usually understood to be more for the benefit of the buyer.

At the time the contract was drawn, appellant was bound to consider the conditions of commerce and of transportation throughout the country; and knew that respondent was a jobber, purchasing such commodities as appellant had for sale, and reselling for the market. There was no assurance even, had the bark been contracted to be delivered in St. Louis, Mo., that an embargo might not be placed upon such shipment so that the same regulations would have been necessary as were necessary for shipments to New York, and the use of the term "prompt shipment" could not avoid the regulations of the federal government concerning such shipments.

We therefore agree with the trial court that appellant himself wrongfully breached the contract by canceling the order for the second car.

[2] The next claim of error is that the

court erred in holding that there was any rise in the market price of cascara bark between July 3 and July 11, 1918, and that there was any evidence of the market value of cascara bark in New York except for old or cured cascara bark.

Objection is also made to the reception in evidence of copies of the Oil, Paint and Drug Reporter, of July 8, July 15, July 22, and July 29, 1918.

The evidence shows that Oil, Paint and Drug Reporter is a well-known and reliable trade journal of general circulation, and its quotations of market prices are accepted by the trade generally throughout the United States as reliable and trustworthy. The same market journal and its quotations were approved by this court in *Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation*, 109 Wash. 296, 186 Pac. 884.

The market quotation from this journal for July 8th shows the price of cascara bark in New York to have been from 17 to 20 cents. The quotation of July 15th, which was the next weekly issue of the journal, shows the price of such bark in New York at from 18 to 20 cents. There was also evidence by witnesses testifying to their knowledge of the market price of bark in New York showing that the price was not less than 16 cents in the early part of July, 1918. Appellant contends, and so testified, that there was no market price for green or fresh bark anywhere in the United States except on the Pacific Coast, where it originates. There is other evidence to the contrary, and it is unreasonable to suppose that, because there is a primary market price of raw bark at the place where it originates, there is no other or different price for the product at the place where it is to be sold to the manufacturers and trade.

The trial court was therefore right in deciding that the measure of damages is the difference between the contract price of 12 cents a pound and the market price at the time of the breach; and that the eastern market should govern, since the bark was sold to be delivered in the east, although sold on terms f. o. b. place of shipment.

[3] The trial court was in error, however, in holding that an average car of cascara bark would contain approximately 81,000 pounds, and basing damages thereon.

The allegation of respondent's amended complaint was that an average car contains 26,000 pounds. Appellant introduced a copy of the bill of lading of the car which was sold and delivered to respondent, which was shipped as containing 81,000 pounds, subject to correction, and which was corrected to show that it contained 29,400 pounds. The allegation as to the weight of an average car of cascara bark was denied by appellant, and there was no other proof as to what con-

stituted an average car, except copies of bills of lading introduced.

Respondent itself introduced in evidence a number of copies of bills of lading for the purpose of showing that appellant, at and after the time of the breach of the contract alleged in this case, had shipped other cars of cascara bark, and in almost every instance had the federal permits or shipping licenses accompany the bills of lading. Not one of these copies of bills of lading showed a car weighing 31,000 pounds. Shipping licenses required cars to be loaded to maximum capacity. Several of them approximated 25,000 pounds; several are under 24,000 pounds; one or two approximate 20,000 pounds; and only the one introduced in evidence, and which was actually shipped to respondent, approximated 31,000 pounds. We are therefore of the opinion that since there is no evidence contradicting the allegation that 26,000 pounds was the average weight of a car of cascara bark, respondent was not entitled to have its damages based on any greater poundage than 26,000 pounds.

The trial court found that the market value of fresh or green cascara bark in New York was 16 cents a pound, making a difference of 4 cents a pound between the market price and the contract price, and that the freight rate, which was $1\frac{1}{4}$ cents per pound, should be deducted, making the net damages $2\frac{3}{4}$ cents per pound upon 31,000 pounds. The judgment should have been for $2\frac{3}{4}$ cents per pound upon not to exceed 26,000 pounds, which would have been \$137.50 less than the court allowed, or \$715.

The judgment will be modified to allow respondent to recover \$715 and its costs in the court below.

[4] Appellant having recovered a more favorable judgment by appeal will be allowed costs of appeal.

PARKER, C. J., and MAIN, MACKINTOSH, and HOVEY, JJ., concur.

(120 Wash. 449)

STATE ex rel. CANAL TIRE CO., Inc., v.
HALL, Superior Court Judge.
(No. 17302.)

(Supreme Court of Washington. June 17,
1922.)

1. Execution \S 379—Service of order in supplementary proceedings may be made by person other than sheriff; "process."

Under Rem. Code 1915, \S 613, providing that in supplementary proceedings the court may order the judgment debtor to appear and be examined, and that the order shall run to the sheriff where the arrest of the debtor is desired, service of an order for appearance merely, and not for arrest, by one other

than the sheriff or peace officer was proper, though section 35 provides that all "process" shall be served by the sheriff unless otherwise provided by statute; supplementary proceedings being merely auxiliary to the original action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Process (In Practice).]

2. Statutes \S 200—Language molded to convey meaning.

In Rem. Code 1915, \S 625, subd. 2, providing that service of an order in supplementary proceedings upon a corporation may be made by leaving a copy with an officer, and, unless the officer to be served is designated in the order, service may be "by any person who can serve a summons in an action" the quoted words are meaningless unless they are made to read, "upon any person upon whom summons can be served."

3. Execution \S 379—Copy of order in supplementary proceedings must be certified by clerk of court.

Rem. Code 1915, \S 625, providing that service of an order requiring a person to appear at supplementary proceedings and be examined shall be by a certified copy of the original, implies certification by the custodian of the papers, and an order directing that the copy might be certified by the attorney of record for plaintiff was improper.

Department 2.

Original proceeding in mandamus by the State, on the relation of the Canal Tire Company, Inc., against Calvin S. Hall, Judge of the Superior Court of King County. Writ denied.

Henry Clay Agnew, of Seattle, for relator.
Ozell H. Johnson, of Seattle, for respondent.

HOVEY, J. Relator instituted proceedings supplementary to execution, and obtained an order requiring the judgment debtor to appear for examination. The order provided that service might be made by any person competent to serve summons in a civil action, and that the copy of the order might be certified by the attorney of record for the plaintiff. The judgment debtor failing to appear, the attorneys for the creditor moved the respondent judge for a bench warrant, whereupon the attorneys for the judgment debtor objected to the issuance of the warrant, upon the ground that the court had acquired no jurisdiction of the person of the defendant, by reason of the fact that the order served was not served by the sheriff or any peace officer, and was not certified as being a true copy of the original by the clerk of the court. The trial court sustained the objection, and refused to issue the warrant. Whereupon the judgment creditor applied to this court for writ of mandamus. The judg-

ment debtor appears by counsel in this court and renews the objections offered in the trial court.

[1] Respondent contends that the order in question is process as contemplated by section 35, Rem. Code, which provides that all process shall be directed to the sheriff, and by him served unless otherwise directed by statute.

We held in *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851, that proceedings supplementary to execution are not independent proceedings, but are merely auxiliary to the original action, and a continuation thereof. Our statute (section 613, Rem. Code) provides that the order shall run to the sheriff where it is desired to arrest the debtor; but there is no provision in the chapter on this subject directing that the service of the order involved here shall be made in any manner different from any other order of the court in the course of an action.

[2] Respondent contends that the provisions of subd. 2, § 625, which reads as follows:

"Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered. Where a summons is personally served upon a corporation, unless the officer to be served is specially designated in the order, the order may be served by any person who can serve a summons in an action."

—by implication excludes service by any other person than the sheriff except where service is to be made upon a corporation. We believe that upon consideration of this section it will become apparent that the language should not be construed literally as it reads. The provision first provides that service must be made upon the officer named, if one is named, and the concluding words, "may be served by any person who can serve a summons in an action," should read, "may be served upon any person upon whom summons can be served," in order to give meaning to the whole section.

We are of the opinion that the original order was proper in directing the service to be made by any one who could serve summons.

[3] By subdivision 1 of section 625, supra, it is provided that service shall be of certified copies. In the absence of other legislative direction, the proper person to certify a copy is the one having possession of the original. 11 C. J. 78; *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151. In this case the custodian was the county clerk, and we think the trial court was right in holding the service bad upon this ground.

The writ will be denied.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

NORTHERN PAC. RY. CO. v. DEPARTMENT OF PUBLIC WORKS et al.*
(No. 17157.)

(Supreme Court of Washington. June 12, 1922.)

Carriers ⇐12(6½)—State statute limiting time for filing complaint with commission for overcharges unaffected by federal Transportation Act, suspending limitations.

Federal Transportation Act, § 206(f), providing that the period of federal control shall not be computed as part of the periods of limitation in actions against carrier or in claims for reparation to the commission for causes of action arising prior to federal control, applies only to the federal rate regulating statutes, and has no effect on Rem. Code 1915, § 8626—91, requiring complaints concerning overcharges to be filed with the Public Service Commission (now Department of Public Works) within two years from accrual of cause of action, compliance with which is necessary for jurisdiction.

Department 2.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Writ of review by the Northern Pacific Railway Company against the Department of Public Works and the International Spar Company. From a judgment affirming an order of said Department in favor of the said Spar Company, said Railway Company appeals. Reversed and dismissed.

Geo. T. Reid, of Seattle, J. W. Quick, of Tacoma, and L. B. da Ponte, of Seattle, for appellant.

Lindsay L. Thompson and Raymond W. Clifford, both of Olympia, and John E. Belcher, of Tacoma, for respondents.

HOLCOMB, J. A complaint was filed before the Public Service Commission of the state of Washington, on July 14, 1917, by Miller & Murray, copartners doing business as International Spar Company, against the Northern Pacific Railway Company, for alleged discrimination in freight charges upon logs or spars, against the complainants, upon shipments between certain points within the state of Washington. That complaint alleged no specific amounts of overcharge and demanded no refund or reparation. It was dismissed by the commission upon the hearing, upon the ground that the complainant had not attacked the reasonableness of a rule and rate published by the railway company, but charged discrimination; the commission deciding that, the proper tariff rate having been charged to complainant, the railway company could not be held guilty of discrimination.

No writ of review was sued out within 30 days, or at all, and no further proceedings were had in the case before the commission.

until August 10, 1921, when there was filed with the Department of Public Works, which had succeeded to the duties of the former Public Service Commission, a petition for the reopening of cause No. 4452, the cause referred to hereinbefore. This petition refers to and repeats the statements of the first petition, and further states that, after the government assumed control of the railways about January 1, 1918, a complaint was filed with the Interstate Commerce Commission by Miller, alleging that the same rates charged him for transportation of long timbers between the same specified points on the Northern Pacific within the state of Washington were unreasonable and unjust in certain specified amounts. In that case the Interstate Commerce Commission held the rates to be unreasonable, and ordered reparation to be made by the Railroad administration for the period only of federal control. 60 Interst. Com. Com'n R. 162. Petitioner therefore prayed that cause No. 4452, Public Service Commission proceedings, be reopened for further proceedings, and that he be permitted to file an amended complaint. The railway company appeared and objected to the reopening of the cause by the department on the ground that it was without jurisdiction so to do.

On September 30, 1921, the department made an order reopening the cause, permitting an amended complaint to be filed, and ordering that the cause be set for hearing on October 7, 1921, at which time both parties might appear and offer additional evidence. An amended complaint was filed by petitioner before the Department of Public Works, answered by the railway company, and the hearing had as ordered. The acts complained of as to intrastate charges occurring prior to federal control occurred between August 24, 1917, and December 22, 1917. Petitioner alleged that the same overcharges were held to be unreasonable and excessive by the Interstate Commerce Commission, on shipments after these dates. The amended complaint alleges that petitioner was compelled to and did pay the excessive overcharges exacted prior to federal control, claimed reparations in the sum of \$1,272.66, with interest, and prayed that just and reasonable rates be prescribed by the department for the period after March 20, 1920, when federal control ceased. The department granted all the relief demanded in the amended complaint.

Within the time prescribed by law appellant sued out a writ of review of the order of the Department of Public Works to the superior court. Upon hearing upon the record, the superior court affirmed the order of the Department of Public Works awarding the reparation demanded by the shipper in the sum of \$1,272.66, with interest, and fixing future rates. Upon appeal from the judgment of the superior court the appellant

does not complain of the order prescribing rates after the period of federal control had ceased, March 1, 1920, but complains of the reparation awarded by the commission and affirmed by the trial court.

A number of questions are argued by appellant, including the finality of the former order, because no review has been had thereof under the statute providing for such review. Rem. Code, §§ 8626—86 and 8626—99. Laying all other questions aside, we are of the opinion that the order of the department awarding reparations and the judgment affirming the same must be reversed and set aside upon one ground only. No demand for reparations was made in the original complaint, in cause No. 4452 before the Public Service Commission, nor was any demand therefor made at any time until in and by the amended complaint filed September 30, 1921. It was purely a matter of intrastate rates arising before the exclusive control of the federal government, of which the state was never divested of jurisdiction to regulate and adjudicate.

It is contended by respondent that, under the Federal Transportation Act, section 206 (f), Transportation Act of 1920 (41 Stat. 456), reading as follows:

"The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to federal control."

—suspended the statute of limitations of two years of the state of Washington (Rem. Code, § 8626—91), which provides:

"All complaints concerning overcharges shall be filed * * * within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission."

Passing, without deciding, the question of whether the suspension of the statutes of limitation provided for in subdivision (f) of section 206 of the federal Transportation Act applies to any other than claims for reparation to the Interstate Commerce Commission for causes of action arising upon interstate commerce charges and rates, we are of the opinion that the two-year statute of this state above quoted was not suspended. We held in *Hewitt Logging Co. v. Northern Pacific Ry. Co.*, 97 Wash. 598, 166 Pac. 1153, 3 A. L. R. 198, that it was a condition precedent to the right to sue for reparations for overcharges that the claim be made before the regulatory commission under our statutes, within two years, and we held in the same case, and in *Belcher v. Tacoma & Eastern Ry. Co.*, 99 Wash. 34, 168 Pac. 782, that a complaint to the regulatory commission was necessary before an action for the recovery thereof in a court under section 8626, subd. 91, Rem. Code, could be main-

tained. Under the corresponding provision of the federal statutes (Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act Cong. June 29, 1906, c. 3591, § 5, 34 Stat. 590 [U. S. Comp. St. § 8584]) regulating transportation and traffic charges, which reads that "complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after," the Supreme Court of the United States, in *United States v. Interstate Commerce Commission*, 246 U. S. 638, 38 Sup. Ct. 408, 62 L. Ed. 914, held that it was jurisdictional that such complaints to recover reparations or damages for overcharges should be filed within two years. In that case the court held that the cause of action accrues to the shipper, within the meaning of the provision, when the unreasonable charges are paid, not when the shipment is received or delivered by the carrier. It was there said:

"* * * the holding of the commission was, not that, having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional, and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition to the extent it related to the overcharges paid on February 1, 1911, was dismissed. We agree with this conclusion of the commission, that the two-year provision of the act is not simply a statute of limitation, but is jurisdictional—is a limit set to the power of the commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion" citing *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608, *Phillips Co. v. Grand Trunk, etc., Ry. Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, and other cases.

There is no difference between the language of our statute, section 8626—91, above quoted, and the federal statute, except that the federal statute contains the words "and not after," after the limiting period of two years. But that constitutes no real difference in the statutes. In other words, our statute is not a mere statute of limitation, but is a statute creating a time beyond which no cause of action will lie for such overcharges, and which cannot be extended or suspended. There is nothing to the contrary in the case of *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897, all that was there held was that, during the federal control of the railroads, under the war-time federal Transportation Act, federal control was exclusive over intrastate as well as interstate rates and regulation, and state functions were suspended.

We are therefore of the opinion that the federal transportation statute, suspending the period of limitations during which an action can be brought, applies only to the federal rate-regulating statutes, and has no effect upon our statute, defining the period during which complaints concerning overcharges shall be filed. The carrier here had not estopped itself from invoking the jurisdictional bar, as was the situation in *Belchar v. Tacoma & Eastern Ry. Co.*, 99 Wash. 34, 168 Pac. 782, and *State ex rel. Tacoma & Eastern Ry. Co. v. Public Service Commission*, 112 Wash. 629, 192 Pac. 1079. It is a jurisdictional matter, and the Department of Public Works was without jurisdiction to entertain a petition for the recovery of reparation, because the claim was not made within two years from the time the right thereto accrued.

The judgment of the trial court and the order of the commission are therefore reversed, and the proceedings dismissed.

PARKER, C. J., and MAIN, MACKINTOSH, and HOVEY, JJ., concur.

(118 Wash. 629)

PUBLIC SERVICE COMMISSION et al. v. STATE ex rel. GREAT NORTHERN RY. CO. (No. 16640.)

(Supreme Court of Washington. June 20, 1922.)

En Banc.

Appeal from Superior Court, Thurston County; John M. Nelson, Judge.

On reargument. Opinion in department affirmed, and cause remanded, with directions.

For departmental opinion, see 204 Pac. 791.

Lindsay L. Thompson and Raymond W. Clifford, both of Olympia, and Cooley, Horan & Mulvehill, of Everett, for appellants.

Thos. Balmer and Edwin C. Matthias, both of Seattle, Geo. T. Reid, C. H. Winders, L. B. da Ponte, all of Seattle, Lyle, Henderson & Carnahan, of Tacoma, and Danworth, Todd & Higgins, of Seattle, for respondent.

PÉR OURIAM. This cause was reargued before the court en banc on May 31, 1922. Deeming ourselves fully advised in the premises, the court adheres to the views and conclusions announced in the decision of Department 1, rendered February 23, 1922, 204 Pac. 791; and for the reasons therein expressed the cause is remanded to the superior court, with directions as therein contained.

(115 Wash. 63)

In re HILL'S ESTATE.

HILL v. UPPER.

(No. 16638.)

(Supreme Court of Washington. June 20, 1922.)

En Banc.

On reargument. Affirmed.

For decision of the department, see 204 Pac. 1055.

Kerr, McCord & Ivey, of Seattle, and Weightstill Woods, of Chicago, Ill., for appellant.

H. D. Moore and H. N. Moore, both of Seattle, and Thos. L. Marshall, of Chicago, Ill., for respondent.

PER CURIAM. This cause was reargued before the court en banc on June 1, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department 2, reported in 204 Pac. 1055, the judgment is affirmed for the reasons therein stated and as therein directed.

(117 Wash. 351)

PUGET SOUND POWER & LIGHT CO. v.
CITY OF SEATTLE et al.CITY OF SEATTLE v. PUGET SOUND
POWER & LIGHT CO. et al.

(No. 16497.)

(Supreme Court of Washington. June 12, 1922.)

En Banc.

Appeal from Superior Court, King County; Clay Allen, Judge.

On reargument.

For decision of department, see 201 Pac. 449. Affirmed.

Walter F. Meier and Edwin P. Ewing, both of Seattle, for city of Seattle.

Malcolm Douglas and Howard A. Hanson, both of Seattle, for King county.

James B. Howe, Hugh A. Tait, Edgar L. Crider, and Norwood W. Brockett, all of Seattle, for Puget Sound Power & Light Co.

PER CURIAM. This cause was reargued before the court en banc on May 22, 1922. Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of Department 2, reported in 201 Pac. 449, the judgment is affirmed for the reasons therein stated and as therein directed.

(119 Wash. 55)

MULLINS SAW MILL CO. v. WOOLFOLK.
(No. 16777.)

(Supreme Court of Washington. June 12, 1922.)

En Banc.

Appeal from Superior Court, King County; Austin E. Griffiths, Judge.

On reargument. Departmental opinion (204 Pac. 802), affirmed.

Vince H. Faben, of Seattle, for appellant.

Raymond G. Wright, of Seattle, for respondent.

PER CURIAM. This cause was reargued before the court en banc on May 22, 1922. Deeming ourselves fully advised in the premises, and the judges being of the opinion that the cause was correctly disposed of by the decision of Department 2, reported in 204 Pac. 802, the judgment is affirmed, for the reasons therein stated and as therein directed.

(186 Cal. 79)

STOKES v. WATKINSON. (S. F. 9593.)

(Supreme Court of California. June 6, 1922.)

1. Municipal corporations ⇐572—"Refusal" to pay assessment necessary before liability for attorney's fee arises in suit on assessments for public improvements.

Under the Street Improvement Act of 1911, § 27, as amended by St. 1915, p. 1469, § 11, providing that, where personal demand has been made on the owner of property or his agent for an assessment for a public improvement, the plaintiff shall recover such sum as the court may fix as attorney's fees, and, when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, an attorney's fee of \$15 may be recovered, notwithstanding the suit may be settled or tender made before recovery, and providing that a single action may be brought irrespective of the number of lots assessed where the parties defendant are identical, and giving the court power to consolidate separate actions brought in such cases, where suit is brought on separate assessments after a demand and a refusal of payment, an attorney's fee of \$15 accrues on filing of the complaint, and the subsequent consolidation of actions would not deprive an attorney of the specified fee, but such a "refusal" must be more than neglect to pay, and must be equivalent to denial of a demand.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refuse—Refusal.]

2. Municipal corporations ⇐527—Statute permitting collection of attorney's fee for nonpayment of assessment must be strictly construed.

The Street Improvement Act of 1911, § 27, as amended by St. 1915, p. 1469, § 11, provid-

ing for the collection of an attorney's fee as a penalty for nonpayment of a tax for public improvement, must be strictly construed.

3. Municipal corporations ⚡572—**Delay in paying assessments held insufficient to show refusal to pay authorizing collection of attorney's fee.**

In separate actions to foreclose street assessment liens against 331 lots owned by defendant's testator, under the Street Improvement Act of 1911, § 27, as amended by St. 1915, p. 1469, § 11, providing for collection of \$15 attorney's fee in each suit after a demand and refusal of payment of the assessment, where the owner of the lots did not refuse to pay, and stated that he was short of money, and that he would be paid some before long, a mere delay in payment was insufficient to justify a finding of fact by the trial court that there had been a refusal to pay the assessments.

4. Municipal corporations ⚡572—**Amount of attorney's fee to be allowed plaintiff in suit on street assessments, in absence of a refusal to pay, is in discretion of trial court.**

In an action by the owner of liens for street assessments against a property owner, to foreclose the liens under Street Improvement Act 1911, § 27, as amended by St. 1915, p. 1469, § 11, the amount of the attorney's fees to be allowed plaintiff in absence of a demand and refusal of payment by the property owner is in the discretion of the trial court.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by G. H. Stokes against Henrietta P. Watkinson. From a judgment allowing plaintiff less attorney's fees than he asked, plaintiff appeals. Affirmed.

See, also, 201 Pac. 134.

Faulkner & Faulkner, of San Francisco, for appellant.

Wm. T. Kearney, of Richmond, and Edward C. Harrison, of San Francisco, for respondent.

WILBUR, J. [1] The plaintiff brought 331 separate suits for the foreclosure of assessments levied against 331 separate lots owned by the defendant's testator upon an assessment made by the street superintendent of the city of Richmond for the construction of sewers in said city, by which a separate amount was assessed against each lot as provided in the Street Improvement Act of 1911 (St. 1911, p. 730). This appeal by the plaintiff involves his right to a separate attorney's fee of \$15 in 43 of these separate cases which were consolidated by the trial court. Before the trial the defendant offered to allow judgment for the full amount of the assessment but without costs or attorney's fees. Upon the refusal of this offer the defendant filed an answer attacking the validity of the assessment. The

trial court rendered judgment in favor of the plaintiff for the foreclosure of the street assessment liens amounting to \$15.08 on each lot and costs, but only allowed \$25 as an attorney's fee, fixing the amount of 60 cents as the attorney's fee upon each separate action. Appellant contends that he should have been allowed \$15 as attorney's fee in each of the actions so consolidated, making an aggregate attorney's fee therein of \$645. The plaintiff bases his claim to an allowance upon section 27 of the Street Improvement Act of 1911, as amended in 1915 (Stats. 1915, p. 1469, § 11). This section authorizes the recovery of the unpaid assessment with interest at 10 per cent. per annum in a suit brought not less than 35 days after the date of the warrant. The provision with reference to attorney's fees is as follows:

"And in all cases of recovery under the provisions of this act, where personal demand has been made upon the owner or his agent, but not otherwise, the plaintiff shall recover such sum as the court may fix, in addition to the taxable cost as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall be entitled to have and recover the sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor."

This section also makes provision for the bringing of a single suit against the owner of a number of lots and for the consolidation of separate suits as follows:

"It shall be competent to bring a single action under any such assessment irrespective of the number of lots assessed where the parties defendant are identical, and where separate actions are brought, the same may be consolidated by order of the court."

Upon a similar but not identical provision of the Vrooman Act (Stats. 1885, p. 147, § 12, amended, Stats. 1889, p. 168, § 12) it was held in *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027, and *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924, that the plaintiff was entitled to only one attorney's fee where he included in one complaint several causes of action arising out of street assessment liens. In *Realty, etc., Mtg. Co. v. Superior Court*, 165 Cal. 543, 132 Pac. 1048, it was held that the plaintiff could bring separate actions for each assessment, and that he was entitled to \$15 attorney's fee in each action under section 12 of the Vrooman Act, and that a subsequent consolidation by the court of such actions would not deprive him of an attorney's fee in each separate action. In that regard the court stated as follows:

"While the effect of a consolidation of actions is that for the purposes of all further proceedings, such as trial, etc., the cases are to be treated as if all the causes of action had been united originally, we are entirely satisfied that the consolidation should not be held to have the effect of depriving a party of his right to recover legal costs already paid, or as to which the right of the plaintiff had accrued. Such we believe to be the situation as to the attorney fee provided for in such cases as these. The fee is one fixed by statute, and the trial court is entirely without discretionary power in regard thereto. The plaintiff is entitled to it as matter of right under the terms of the statute, in any action properly instituted by him, in the event that he ultimately recovers therein. In the cases involved here, the plaintiff had the absolute legal right to commence a separate action on each cause of action, with the result that, under the express terms of the statute, he became entitled to a fifteen dollar attorney fee in each, in the event of recovery. We are satisfied that the trial court could not impair this right by any order of consolidation, any more than it could impair it without a consolidation."

Section 12 of the Vrooman Act as originally enacted (Stats. 1885, pp. 147, 157) contained the following provision concerning attorney's fee:

"* * * And in all cases of recovery, under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars. * * *

That statute also authorized the street superintendent to receive the amount due on any assessment at any time and to give a good and sufficient discharge therefor, and enter a satisfaction of the lien upon the record of the assessment, providing, however, that, after suit was brought to enforce the lien, the lien should not be discharged without the payment of plaintiff's costs. Stats. 1885, pp. 147, 156, § 10. Thus the defendant by payment before judgment could defeat the plaintiff's claim to attorney's fees.

As amended in 1889 (Stats. 1889, p. 168) section 12 provided as follows:

"And in all cases of recovery under the provisions of this act, the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost, as attorney's fees, but not any percentage upon said recovery. And when suit has been brought, after a personal demand has been made and a refusal to pay such assessment so demanded, the plaintiff shall also be entitled to have and recover said sum of fifteen dollars as attorney's fees, in addition to all taxable costs, notwithstanding that the suit may be settled or a tender may be made before a recovery in said action, and he may have judgment therefor."

It is to be observed that the \$15 is to be recovered in every case where foreclosure is decreed. Such recovery is in the nature of a statutory penalty. *Engbreetsen v. Gay*, 153 Cal. 30, 109 Pac. 879. If, however, there had been a personal demand and a refusal

to pay the assessment, then the sum of \$15 was payable notwithstanding a settlement or a tender of payment.

The Street Improvement Act of 1911, as originally enacted (Stats. 1911, § 27, pp. 730, 746), and as amended in 1915 (Stats. 1915, § 27, p. 1469), is essentially different, in that the latter act provides that the recovery of attorney's fees can only be had where there is a personal demand, and shall be such sum as the court may fix. This statute, like the Vrooman Act, also provides that, where there has been a personal demand and a refusal to pay the assessment so demanded, the plaintiff shall be entitled to have and recover the sum of \$15 as attorney's fees, in addition to all taxable costs, etc. The attorney's fee is no longer fixed arbitrarily by the statute at \$15 in every case, but is within the discretion of the trial court, and allowable only after personal demand. The court also has the discretion to consolidate separate actions for the collection of separate assessments as was done in this case. Thus by the terms of the Vrooman Act (section 12) the right to a separate attorney's fee upon each separate assessment to the same owner depended upon the election of the lien claimant either to set forth the several assessments in separate counts in a single complaint, in which case he could recover but \$15 attorney's fee, or to bring a separate action upon each count, in which case he could recover \$15 in each action. But, under section 27 of the Street Improvement Act of 1911, supra, the court had power in the exercise of a sound discretion not only to consolidate all the separate cases, but to fix a single attorney's fee in the consolidated action when and only when a personal demand had been made upon the owner. If the demand upon the owner for payment was met by a refusal, the statute expressly provides that the attorney's fee accrued notwithstanding the suit may be settled or tender made before recovery.

Thus the statute makes a distinction between a personal demand and a failure to pay and a demand followed by a refusal to pay. As was said by the Supreme Court of Maine in the case of *Inhabitants of Cape Elizabeth v. Boyd*, 86 Me. 317, 29 Atl. 1062:

"A refusal to pay a tax is one thing. A failure to pay is another. The former may be the result of willfulness or a denial of the legality of the tax. The latter may be the result of sickness and poverty and an utter inability to pay. In the former case, an action may be expedient. In the latter, inexpedient."

For some purposes a failure to pay after demand is deemed equivalent to a refusal (*Kimball v. Rowland*, 6 Gray [72 Mass.] 224, 225); but ordinarily a refusal means more than neglect, and is equivalent to a denial of a demand (*Parish v. Wheeler*, 22 N. Y. 494, 514; *Bowen v. Young*, 75 N. Y. Supp.

1027, 1029; *Burns et al. v. Fox*, 113 Ind. 205, 14 N. E. 541; *Duffy v. State*, 37 Misc. Rep. 547, 60 Neb. 812, 84 N. W. 264; *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 105 App. Div. 88, 93 N. Y. Supp. 849; *People v. Perkins*, 85 Cal. 509, 28 Pac. 245).

[2] Under this statute the "refusal" which upon the bringing of the action vests in the plaintiff a right to an attorney's fee must be something more than a mere failure to pay resulting from an inability or unwillingness to make the payment. It must, in short, be a refusal to pay as distinguished from mere neglect. The lien is valid for two years, and the lien claimant is not compelled to bring his action for two years. If the property holder intends to contest the validity of the assessment, and for that reason refuses to pay the amount thereof, such refusal would necessitate the bringing of a suit for foreclosure, but, if the property holder merely asks for time in which to secure the money with which to pay the assessment, or promises in good faith to pay at some future time, or merely fails to pay, there has been no "refusal" within the meaning of the statute which penalizes such refusal by making the attorney's fee accrue at once upon the filing of the complaint. The statute permitting the collection of the attorney's fee as a penalty for nonpayment of tax, like all statutes imposing a tax, must be strictly construed.

In this case, if there was a personal demand without a refusal to pay, the statute provides that the court shall fix the attorney's fee, and under this statute, construed in the light of *Realty, etc., Mtg. Co. v. Superior Court*, supra, where separate actions are brought upon several assessments after personal demand and a refusal to pay, the right to at least \$15 attorney's fee would accrue in each action upon the filing of the complaint. The subsequent consolidation of the actions would not deprive the plaintiff of this attorney fee which had accrued upon the beginning of the several actions. It is claimed in this case that there was such a refusal to pay after personal demand. The court so finds the fact.

[3] The respondent claims that there is no evidence to support the conclusion of the court that the defendant refused to pay the street assessments. The evidence relied upon by the appellant to establish such refusal consists of a conversation between defendant's testator and Fred G. Meyers, the contractor in whose favor the assessment was levied, and who subsequently assigned his assessments to plaintiff for collection. He testified that he made a demand upon Mr. Watkinson, defendant's testator, some time in March, 1916, a month or two before he died; that Mr. Watkinson replied that he was short of money, and that he would see about it pretty soon. The witness testified:

"I said it should be paid, and, if it wasn't paid, I was going to sell the assessments.

* * * Q. Did he say he would pay you, if at all? A. Well, he naturally said they were a little short of money. Q. That is all he said when you made the demand upon him for the money due? A. Of course, he even said that the People's Water Company had not paid him—that he was going to get some money from them pretty quick."

On cross-examination the witness stated that Mr. Watkinson told him that he was expecting to get some money from the People's Water Company, but that he was temporarily pressed for a little money. This evidence falls far short of proof of a refusal to pay. On the contrary, it indicates a willingness to pay only defeated by a lack of funds. The failure to pay rendered the owner liable for interest and costs, and a reasonable attorney's fee, but the discretion of the court was not limited to a minimum fee of \$15 in each action, in the absence of a refusal.

It is conceded that a failure to pay after a personal demand and the lapse of an unreasonable time for payment might justify the court in concluding that there had been a refusal; but here the owner died within two or three months after the demand, and no claim or demand was made upon the executrix of his will. As the penalty for refusal to pay the assessment was greater than the assessment (if we include the costs and attorney's fee in each separate action), it would seem but reasonable that the defendant should have some notice or warning that the plaintiff intended to treat the defendant's delay in payment as a refusal to pay the assessment. However that may be, in the absence of any actual refusal, and in the presence of an implied promise to pay and the subsequent death of the owner, the mere delay in this case was insufficient to justify the finding of fact by the trial court that there had been a refusal to pay the assessments.

In this connection it may be noted that the Legislature in session at the time the decision in *Realty, etc., Mtg. Co. v. Superior Court*, supra, was under consideration by this court amended section 12 of the Vrooman Act, so as to require a written demand personally served upon the owner, and a failure to pay for 10 days after such demand as a condition precedent to the maintenance of the foreclosure action, and as a basis of a claim for \$15 attorney's fee in the action unless one year has elapsed after the date of the assessment. The amended section required the court to consolidate separate actions, and to allow only \$15 attorney's fee in the consolidated action "unless otherwise ordered by the court," and permitted such allowance of attorney's fees upon settlement or tender (*Stats. 1913, pp. 402, 408, § 12, approved June 6, 1913*). The amendment of 1915 to the Improvement Act of 1911 (*Stats. 1915, pp. 1464, 1469, § 27*), retained the pro-

visions of the law of 1911 (section 27) now under discussion, but the amendment of 1921 (Stats. 1921, p. 218, § 1) provides for the recovery of a reasonable fee after a personal demand in the foreclosure or upon settlement or tender where demand and refusal to pay has been shown, and also provides:

"That if the court finds an unnecessary number of actions have been brought, where the parties are identical, it may allow the costs of one action only."

These amendments show the continued effort of the Legislature to distinguish between a mere failure to pay after a constructive demand, a failure to pay after a personal demand, and a refusal so to do after a personal demand. Our reference to amendments to the Vrooman Act in 1913 and to the Improvement Act of 1911 in 1921 are only relevant in this action to emphasize the distinction already pointed out between the language of section 27 of the act of 1911 and the provisions of section 12 of the Vrooman Act of 1885, as amended in 1889, construed in the cases relied upon by the parties and hereinbefore cited.

[4] The matter of the amount of the attorney's fees to be allowed plaintiff, in the absence of a refusal to pay on the part of the owner after a personal demand so to do, is in the discretion of the trial court.

Judgment affirmed.

We concur: SHAW, C. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLIFF, J.

(57 Cal. App. 470)

LEDESMA v. STANLEY. (Civ. 3832.)

(District Court of Appeal, Second District, Division 1, California. April 27, 1922.)

Parent and child — 12—Widow acquiescing in benefits of exchange of property assignable to her cannot maintain action for conversion thereof.

Where son of decedent, whose estate consisted solely of a team and wagon of the value of \$500, exchanged it in part payment for interest in a truck which he used for support of his mother and family, and the mother had knowledge of the use of the truck, held that under Code Civ. Proc. § 1469, the mother as widow of decedent could have had the property assigned absolutely to her, and could not maintain an action for conversion of the property, when on default of the payments on truck vendee recovered it.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Margarita Guzman de Ledesma, as administratrix of Odilon Ledesma, deceased, against Clarence E. Stanley. From a judgment for defendant, plaintiff appeals. Affirmed.

Scott McReynolds, of Ventura, for appellant.

Drapeau, Orr & Gardner, of Ventura, for respondent.

JAMES, J. This action was brought to recover damages for the alleged conversion of a team of horses, a wagon, and a set of harness, which it was alleged were of the value of \$500. Judgment was for the defendant. The plaintiff has appealed.

Plaintiff was the widow of her intestate. The husband died November 19, 1919, leaving surviving him, besides plaintiff, several minor children, the eldest of whom was a son about the age of 18 years. The only property owned by the husband at the time of his death was that mentioned in plaintiff's complaint. The team and wagon had been used by the husband and father to aid in providing support for the family, in which endeavor he was assisted by the son mentioned. After his death the boy assumed the responsibility of earning a livelihood for the family, and continued to use the team and wagon for such purpose. About the 1st of February, 1920, he arranged with two men, close relatives of his, to enter into a business partnership to do hauling. It was agreed that they should purchase a motortruck. It was further arranged that the team and wagon hereinbefore referred to, together with a similar outfit owned by his associates, should be lumped together and delivered to the defendant, who was a dealer in motortrucks, as an initial payment on the purchase of a truck. The purchase price of the truck was in excess of \$3,000, and the horses, wagons and harness were taken in at a credit value of about \$950. The boy and his associates took the truck, used it in conducting the business of hauling merchandise and products, and divided the income received therefrom. That portion of the income received by the boy he delivered to his mother for use in support of the family. More than four months elapsed, and, the vendees having failed to make payments required of them, the vendor, exercising the right expressed in the contract, recovered the truck. On August 25, 1921, plaintiff received letters of administration in the matter of the estate of her husband, and on September 19, 1921, commenced this action. As it was asserted by her in her testimony that the deceased possessed no other property at the time of his death than the property described in her complaint, it is evident that the sole purpose of instituting the probate proceedings was to obtain the necessary authority to commence this suit in the representative capacity indicated. The position taken by the administratrix is that there was no authority in the son to transfer title to the property in the absence of some order in probate authorizing him so to do. Re-

spondent's answer to this contention is that, as the value of the property was less than \$1,500, appellant, as the widow of the deceased, had the right under the provisions of section 1469, Code of Civil Procedure, to have the property assigned absolutely to her, and that any act committed by her showing an acquiescence in or an adoption of the transaction as made by the son would effectually estop her from denying effect to the contract. That contention seems to be fully sustained by the pleadings, evidence, and the findings made by the court. The widow was entitled to have the property set apart to her as a matter of right and wholly free from the claims of creditors. *Estate of Palomares*, 63 Cal. 402; *Estate of Atwood*, 127 Cal. 427, 59 Pac. 770. While she testified that she did not consent to the plan of her son to exchange the team and wagon as part payment for the truck, she admittedly was fully informed of the transaction, knew that the son was using the truck in earning money for the support of the family, and received and used those earnings. She at no time prior to the bringing of this suit (which was commenced nearly 2 years after the truck was purchased) notified the defendant that she disclaimed any agency in her son to act in the transaction.


The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 620)

WIXOM v. DAVIS. (Civ. 3802.)

(District Court of Appeal, Second District, Division 1, California. May 5, 1922.
Rehearing Denied June 1, 1922.)

Chattel mortgages  **162—Mortgagees held entitled to possession on default of mortgagor.**

In view of Civ. Code, §§ 2927, 2967, 3005, and Code Civ. Proc. § 694, a chattel mortgagee is entitled to possession of the mortgaged goods on default by mortgagor.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Bertha E. Wixom against George Herrick Davis. Judgment for defendant, and plaintiff appeals. Reversed.

H. E. Gleason, for appellant.

J. F. Seymour, of El Centro, for respondent.

CONREY, P. J. This is an action brought by the owner of a chattel mortgage to recover damages for conversion of the mortgaged property. Judgment having been entered in favor of defendant, plaintiff appeals therefrom.

The mortgage, which was recorded in the office of the county recorder of Imperial

county on the 13th day of February, 1920, covered an undivided one-third interest in 16 bales of cotton of the value of \$1,442. The mortgage notes matured May 1, 1920. The balance unpaid thereon at the time of the alleged conversion exceeded one-third of the value of the cotton. The court found that during the months of October and November, 1920, the defendant took and carried away said cotton, and sold and disposed of the same to his own use, pursuant to the terms of a certain agreement dated October 25, 1920, entered into between the defendant and certain other parties, one of which was one of the makers of the notes held by the plaintiff. It is found that, under this agreement, the makers of the notes held by plaintiff were to work on the defendant's ranch and raise cotton. The defendant was to furnish all moneys for the planting, cultivation, and raising of the cotton, and the title of all cotton raised on the land was to remain in the name of the defendant. After payment of all expenses, the makers of the notes were to receive three-fourths of the profits, if any there were, and the defendant one-fourth. There were no profits. The court further found "that the defendant expended in the matter of expense connected with said crop herein referred to the sum of \$2,511.74; that there was received from the sale of the cotton from the first picking \$1,405.15; that there was no deficiency, but there was a loss and no profit." From these facts the court concluded "that the defendant did not convert the said cotton to the plaintiff's damage" in any sum whatever, and that the defendant was entitled to judgment for costs.

On the facts found, it is manifest that the 16 bales of cotton could not have been any part of the cotton referred to in the agreement of October 25th. The cotton taken and sold by the defendant in October and November could not have been planted and raised in five weeks. The facts found concerning the agreement of October 25th, even if the plaintiff had not been a stranger thereto, were immaterial to the plaintiff's cause of action.

The plaintiff alleged, and the answer denied, that at the time of the alleged conversion the plaintiff was entitled to possession of the mortgaged property. Upon this issue the findings are silent. Section 2927, Civil Code, reads as follows:

"A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration."

Having in view that section of the Civil Code, the decisions usually have defined the mortgagee's right of possession as one de-

pending solely upon said express agreement. 5 Cal. Jur. p. 115. We think that there is a necessary exception in the case of a chattel mortgage after the debt secured thereby has become due. This was tacitly recognized by the Supreme Court in *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 542, 78 Pac. 243, 247, when the court said:

"A chattel mortgage does not pass title to the mortgagee or give him a right to possession of the mortgaged property before the debt becomes due, unless the mortgage so provides. *Bank of Ukiah v. Moore*, 106 Cal. 680."

The reason for the exception arises out of the statutory provisions defining the remedy of the mortgagee on nonpayment of the debt.

"A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the title on 'pledge,' or by proceedings under the Code of Civil Procedure." Civ. Code, § 2967.

A pledgee's sale must be made by public auction, in the manner of a sale of personal property under execution. That mode of sale, where the personal property is capable of manual delivery, requires that the property be within view of those who attend the sale. Civ. Code, § 3005; Code Civ. Proc. § 694. It follows that, to make a valid sale of personal property, it must be present at the sale, whether it be sold as a pledge or under order of sale upon a decree of foreclosure. Therefore it is necessary that the mortgagee, or some one acting on his behalf, shall obtain such possession in order that the property may be applied to the payment of the debt secured thereby. *Ely v. Williams*, 6 Cal. App. 455, 457, 92 Pac. 393. We conclude that, from the facts found in this case, it necessarily followed that the plaintiff was entitled to possession of the mortgaged property at the time of defendant's conversion thereof.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 515)

PEOPLE v. BARNES. (Cr. 877.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1922.)

1. Larceny §22—Bringing automobile stolen without jurisdiction within jurisdiction is a felony.

Under Pen. Code, § 27, providing that all who commit any offense without the state which, if committed within the state, would be larceny, robbery, or embezzlement, and bring

the property stolen or embezzled or are found with it or any part of it within the state, are liable to punishment, and section 497, providing that a person who in another state or country steals or embezzles property, or receives it knowing it to have been stolen or embezzled, and brings it into the state, is liable to punishment as if the larceny, embezzlement, or receiving had been committed within the state, where the accused stole an automobile in a foreign country and brought it within the state, the offense committed was a felony.

2. Larceny §55—Evidence held sufficient to sustain conviction of bringing stolen property into the state.

In a prosecution for bringing an automobile stolen by the accused in a foreign country into the state, evidence held sufficient to sustain a conviction.

3. Criminal law §564(1)—Evidence held sufficient to prove jurisdiction of offense was in the court in which the case was tried.

Under Pen. Code, § 789, providing that the jurisdiction of a criminal action for stealing or embezzling in any other state the property of another or receiving it knowing it to have been stolen or embezzled, and bringing it into this state, is in any county into or through which such stolen or embezzled property had been brought, evidence held sufficient to prove jurisdiction of the court of the county in which the case was tried.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

William A. Barnes was convicted of bringing a stolen automobile into San Diego county, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CONREY, P. J. [1] The information charged that the defendant, having first stolen a Ford touring car at Tia Juana, Lower California, Mexico, the same being the personal property of one M. L. McKelvey, brought the same into the county of San Diego, state of California. The described offense is a felony. Pen. Code, §§ 27 and 497. Having been convicted of this offense, defendant was sentenced to imprisonment in the state prison, and now appeals from the judgment.

The evidence establishes the following facts: Mrs. McKelvey, owner of the car, permitted her son to drive the car, and he went with it to Tia Juana. He saw the defendant standing near the place where he parked the car. When McKelvey returned for the car it had disappeared. This was on the 27th day of July, 1921. The car was a touring car, model 1920, and carried the license number 369341. On the next following day appellant arrived at the home of one F. J. Knight, in the county of San Diego, driving a late

model Ford touring car, and remained there about four days. There is no further direct identification of the car that was in his possession at that time. On the 19th day of August appellant came to the place of business of one Green, near Bakersfield, in Kern county. He came there in a car which was identified as the car of Mrs. McKelvey. He had taken out the certificate of registration, which later was found in the bedding of the room assigned to him on Green's premises. The license plates bearing the number 369341 were on that car when he arrived there. He told Mr. Green that his name was J. McKelvey and that he had bought the car at El Paso, Texas.

Appellant was arrested at Green's place in Kern county, and was brought back to San Diego county by J. H. Kilby, a deputy sheriff of that county. Appellant told Kilby that he bought this car at Ensenada, in Lower California, on the 28th day of July; that on that night he camped at the junction of the highway and Rose Canyon road. Kilby testified that the Rose Canyon road joins the state highway on the north side of La Jolla, in San Diego county.

[2] In support of his appeal, appellant claims that the evidence is insufficient to sustain the conviction, in that there is no evidence, beyond the mere possession of the stolen car by him in Bakersfield, which in any way connects him with the theft of the automobile. But there is something more proved than such mere possession. The facts that appellant concealed the certificate of registration; that he claimed to have bought a car which was in fact stolen, and that he assumed the family name of the true owner, and made other false statements which we need not specify, constitute circumstances which, together with the possession of the car, were sufficient to connect the defendant with the larceny committed at Tia Juana and to warrant the conclusion that he was the guilty party. *People v. Lang*, 142 Cal. 482, 76 Pac. 232; *People v. Majors* (Cal. App.) 190 Pac. 636.

[3] Next it is contended that the evidence is not sufficient to prove jurisdiction of the superior court of San Diego county over the offense charged. "The jurisdiction of a criminal action for stealing or embezzling, in any other state, the property of another, or receiving it knowing it to have been stolen or embezzled, and bringing the same into this state, is in any county into or through which such stolen or embezzled property has been brought." Pen. Code, § 789. The evidence which we have stated is clearly sufficient to have warranted the jury in finding it to be the fact that after stealing Mrs. McKelvey's car at Tia Juana, which is near the San Diego county line, the defendant did bring the car into San Diego county.

The only other point suggested is that the court erred in giving a certain instruction, in that by such instruction the court improperly assumed that the automobile had been shown to have been stolen, whereas such a conclusion was a question at issue for determination by the jury. A single sentence of this instruction is quoted in the brief of appellant. Reading the entire instruction in connection with that sentence, it is manifest that the court made no such assumption, but left the fact entirely to the determination of the jury.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 563)

KRUG v. SINCLAIRE. (Civ. 3891.)

(District Court of Appeal, Second District, Division 1, California. May 3, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Quieting title \S 44(4)—Proof of foreclosure deed to plaintiff and plaintiff's possession held sufficient to establish title in him.

In action to quiet title, proof of recorded mortgage foreclosure sale deed to plaintiff, and plaintiff's possession of the property subsequent to execution of such deed, held sufficient proof of plaintiff's title without proof of the chain of title precedent to the foreclosure decree under Code Civ. Proc. § 1928.

2. Judgment \S 682(1)—Determination as to invalidity of deed on street assessment foreclosure in purchaser's action against owner conclusive in owner's subsequent action against purchaser's grantee.

Determination as to invalidity of deed given on foreclosure of a street assessment in purchaser's action against owner was conclusive as to invalidity of deed in owner's action to quiet title against purchaser's grantee.

3. Pleading \S 291(4) — Plaintiff's failure to deny under oath "genuineness and due execution" of instrument set up in answer held not an admission of the validity thereof.

Under Code Civ. Proc. § 448, providing that, where a defense is founded upon a written instrument which is copied into the answer, "the genuineness and due execution of such instrument are deemed admitted" unless there is an answer under oath denying the same, a plaintiff, by failure to deny the genuineness and due execution of deeds set out in answer, did not admit validity thereof, but merely that the party who appears to have made deeds attached his signature thereto, and caused it to be delivered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Genuineness.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Frank J. Krug against M. N. Sinclair. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

JAMES, J. From a judgment entered in favor of the plaintiff, intervener, Sinclair, has appealed.

[1] This action was to quiet title to certain real property. Plaintiff exhibited in evidence a deed from the sheriff of Los Angeles' county made pursuant to a decree foreclosing a mortgage lien against the property in question. This deed was dated the 21st of July, 1916, recorded in the office of the county recorder on July 26th of the same year. It appeared that during all the time subsequent to the making of said deed plaintiff had been in possession of the property described therein, and claimed to have title thereto. This proof was sufficient prima facie to prove ownership. It furnishes sufficient proof of title upon which to base a decree favorable to the plaintiff, without making it necessary that the chain of title precedent to the decree of foreclosure be established. Section 1928, Code Civ. Proc.; *Zillmer v. Gerichten*, 111 Cal. 73, at page 77, 43 Pac. 408. The only interest claimed to be possessed by the intervener was such as he might have obtained by reason of a deed issued to his grantor, one Warden, who had made a purchase under a sale had for a delinquent assessment against the property on account of street improvement work. Sinclair in this action set forth in full in his answer: (1) The deed of the tax and license collector of the city of Los Angeles, dated the 2d day of September, 1915, purporting to convey the interest of Robert H. Punter (the alleged owner) to Julia P. Warden; and (2) a quitclaim deed dated the 13th day of January, 1920, from said Warden to said intervener. In a former action (*Warden v. Bittleston Law & Collection Agency et al.*, 41 Cal. App. 1, 181 Pac. 834), in which the plaintiff here was a defendant, it was held that the first-mentioned deed was void and of no effect because of the failure of the vendee to give sufficient notices to the owners of the property of the fact that application had been made for a conveyance. The judgment in the action last entitled was reversed because an affirmative judgment in favor of the defendant was not sustained by the findings. After a reversal was ordered in the case cited, plaintiff, Warden, dismissed the action, and

made her quitclaim deed to the intervener, Sinclair.

[2] The determination of the court as to the invalidity of the deed in question must be taken as establishing the law affecting that instrument, and it must, of course, affect also any conveyance attempted to be made by the said Warden. As against the plaintiff's proof of title, we then find that the intervener rested upon nothing better than the conveyance from the person whose title was supported only by the void deed.

[3] The intervener insists that, because of the fact that he set forth the deeds in full, and no affidavit was filed by the plaintiff denying the genuineness and due execution thereof, the deeds must be taken as transferring whatever they purport on their face to convey. This contention results from a mistaken idea regarding the effect of the provisions of section 448, Code of Civil Procedure. That section provides only that, where a defense is founded upon a written instrument which is copied into the answer, "the genuineness and due execution of such instrument are deemed admitted," unless there is an answer under oath denying the same. That an instrument is genuine and has been duly executed can mean only that the party who appears to have made it has attached his signature thereto knowingly, and caused it to be delivered. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. Plaintiff could not deny that the deeds had been signed by the purported parties or delivered. It was admissible, however, for him to prove that the conveyance to Warden was void. This he did by showing the insufficiency of the notices which by the former decision had been held to render the deed void. He showed, too, that at the time the former action was pending he had offered to pay the amount of the assessment charges, and all costs and penalties, which were less than the sum of \$10, and made a continuing offer to pay the same to the defendants in this action, and particularly to the intervener. A tender of these amounts made before a deed had been legally applied for had the effect of extinguishing the assessment lien, and that lien thereafter would have only an apparent existence—apparent because the books of the tax collecting office would not show a discharge of the debt. This condition would create a cloud upon plaintiff's title which he would be entitled to have removed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 449)

PEOPLE v. WHITNEY. (Cr. 907.)

(District Court of Appeal, First District, Division 1, California. April 25, 1922. Hearing Denied by Supreme Court June 24, 1922.)

1. Criminal law §1167(1)—Insurrection and sedition §2—Indictment charging criminal syndicalism need not allege name of organization, and omission held harmless.

An indictment charging a violation of the Criminal Syndicalism Act by organizing and becoming a member of an organization to teach criminal syndicalism is sufficient without alleging the name of the organization which defendant is charged with joining, and defendant is not prejudiced by such omission where she was fully advised upon examination of the jurors and by the opening statement of the district attorney of the name of the organization involved.

2. Insurrection and sedition §2—Evidence of character of affiliated organizations admissible in prosecution for criminal syndicalism.

In a prosecution for criminal syndicalism by organizing and joining the Communist Labor Party, evidence of the character and pernicious activities of other organizations with which Communist Labor Party was affiliated or regarding which it had from time to time expressed its approval and sympathy was competent.

3. Criminal law §24—Insurrection and sedition §2—Defendant, knowing aims of organization, charged with knowledge they were unlawful; Intent presumed from unlawful act.

A defendant who joined the Communist Labor Party and participated in drawing the resolutions adopted by it, which were in violation of the Criminal Syndicalism Act, cannot rely as a defense on a claim that she did not realize she was aiding disloyalty, and, under Code Civ. Proc. § 1962, a guilty intent is conclusively presumed from the deliberate commission of an unlawful act.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Charlotte A. Whitney was convicted of criminal syndicalism, and she appeals. Affirmed.

Hearing denied; Lawlor and Lennon, JJ., dissenting.

Nathan C. Coghlan, John Francis Neylan, and J. E. Pemberton, all of San Francisco (William F. Herron, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., Ezra W. Decoto, Dist. Atty., John U. Calkins, Asst. Dist. Atty., and Myron Harris, Deputy Dist. Atty., all of Oakland, for the People.

RICHARDS, J. This appeal is from a judgment of conviction of the defendant for the alleged violation of the provisions of the Criminal Syndicalism Act (St. 1919, p. 281).

The information filed by the district attorney against the defendant consisted of five separate counts based upon the several subdivisions of said act. The jury found the defendant guilty as to the first count in the information, but disagreed as to the other counts therein, and dismissals as to these were subsequently filed. The charging part of the first count in said information upon which the conviction of the defendant was had is in the language of the statute and reads as follows:

"The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. 1919, at the said county of Alameda, state of California, did then and there unlawfully, willfully, wrongfully, deliberately, and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group, and assemblage of persons organized and assembled to advocate, teach, aid, and abet criminal syndicalism."

[1] The first contention of the appellant herein is that said first count in said indictment, of which the foregoing excerpt is the charging part, was insufficient to state a public offense; the alleged particular insufficiency therein being its omission to specifically designate the name of the organization, society, group, or assemblage of persons which she is charged with having organized and assisted in organizing and which were organized and assembled to teach, aid, and abet criminal syndicalism. Since the original submission of this cause the Supreme Court has decided the case of *People v. Taylor* (Cal. Sup.) 203 Pac. 85, covering the precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial thereon in the trial court. In each case the defendant was fully advised upon the voir dire examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so, we are bound, in conformity with the decision in *People v. Taylor*, supra, to hold that the appellant's first contention is void of merit.

The next contention which the appellant urges upon this appeal is that the evidence is insufficient to justify her conviction upon said count in the information. The record is voluminous, and no useful purpose would be subserved by a detailed review of the evidence which it contains. Upon the main question, however, as to the part which the defendant took in organizing and assisting

to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an "admitted fact that the defendant became a member of the so-called Communist Labor Party, attended a party convention November 9, 1919, and was one of the committee on resolutions which reported the platform herein above set forth." In addition to the foregoing admission the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization. Notwithstanding this admission and these proofs, the appellant insisted upon the trial of the cause and now insists that said organization was not of such character and purposes as to bring it within the class of organizations forbidden and condemned by the terms of the Criminal Syndicalism Act. It was upon this branch of the case that the larger part of the evidence adduced on behalf of the prosecution upon the trial of this cause was presented.

[2] It is the appellant's contention that the admission of a very large portion of such evidence designed to show the pernicious activities of other organizations with which the Communist Labor Party of California was affiliated, or regarding which, or the membership of which, it from time to time by resolution or otherwise expressed its approval and sympathy, was highly prejudicial to the defendant's case, particularly in view of the fact that, as is claimed, her knowledge of and participation in these baneful activities was not sufficiently shown. As to the propriety of the admission of such evidence as tending to show the character and purposes of the Communist Labor Party of California there can be no further doubt, in view of the very full discussion of this subject in the case of *People v. Taylor*, supra, and of the determination of the Supreme Court therein. As to the knowledge which the defendant had and of her participation in the aims, expressions, and activities of the Communist Labor Party of California there can also be no doubt, in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself.

[3] That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason is not only past belief, but is a matter with which this court can have no concern, since it is one of the con-

clusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. Code Civ. Proc. § 1962.

As to the appellant's only remaining contention with relation to the alleged misconduct of the district attorney upon the examination of a juror, we have examined the record, and do not find that the episode complained of was of such prejudicial character or consequence as to justify a reversal of the case.

Judgment affirmed.

We concur: TYLER, P. J.; KERRIGAN, J.

(57 Cal. App. 477)

RILEY v. SOUTHERN PAC. CO. et al.
(Civ. 2430.)

(District Court of Appeal, Third District, California, April 27, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Carriers ⇨318(8) — Passenger's testimony held to show carrier's liability for injury in attempting to board train.

Testimony by a passenger that the train stopped at the station but an instant, and started again while the passenger was in the act of stepping onto the step, as a result of which the passenger fell with his feet under the cars and was injured, which testimony was substantially corroborated by another witness to the accident, was sufficient to establish liability of the carrier for the injury.

2. Carriers ⇨247(3)—One injured while attempting to board train to become a passenger is a "passenger."

A person who, intending to board a train and become a passenger thereon, was injured while in the act of mounting the steps of the train, was a "passenger" within the definition that one is a passenger from the time he puts himself in the care of the carrier or directly within the carrier's control with the bona fide intention of becoming a passenger and is accepted as such by the carrier.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

3. Jury ⇨67(3)—Rules governing disqualification of jurors governs disqualification of sheriff to summon.

The same rule governs the disqualification of a juror and the disqualification of the sheriff to summon the jury; the theory of the law being that a biased and prejudiced officer will select biased and prejudiced jurors.

4. Jury ⇨67(3) — Sheriff's affidavit held to show he did not have such opinion as to disqualify him to summon jurors.

Where the sheriff, at the request of plaintiff's attorneys, went to the railroad station and made certain observations with respect to the speed of the cars, the view of the operatives

thereof, and reported the result of his observations to plaintiff's attorneys, and testified to them at the trial, but his affidavit that he had no knowledge of the facts in the case except a general statement made by plaintiff's attorneys and had formed and expressed no opinion as to the merits was uncontradicted, the trial court was justified in finding he had no such opinion as would disqualify him as a juror, under Code Civ. Proc. § 602, subd. 6, and therefore was not disqualified to summon the jury.

5. Jury ¶67(3)—Fact sheriff testified to material matters does not establish disqualification to summon jurors.

The fact that the sheriff gave testimony in the case as to matters which the jury might find to be material does not alone show that he was disqualified to summon the jurors.

6. Jury ¶110(9) — Disqualification of sheriff to summon jurors is waived by failure to object at first opportunity.

Where defendant learned during the course of the trial of the facts which it claimed showed the sheriff was disqualified to summon the jurors in the case, but made no objection at the time and no motion to discharge the jury, and chose to take its chances with that jury, it thereby waived its right to object thereafter to the disqualification of the sheriff.

7. Appeal and error ¶170(1)—Disqualification of sheriff was not prejudicial, where jurors were summoned by deputies.

Even if the sheriff was disqualified by reason of his opinion to summon jurors for the trial of a case, and his disqualification technically extended to his deputies, a party was not prejudiced thereby where in fact the jurors were summoned by deputy sheriffs without consulting the sheriff, who had no voice in their selection, and they were fairly and impartially chosen from the citizens of the county, so that the sheriff's disqualification does not require reversal under Const. art. 6, § 4½.

8. Jury ¶110(9)—Method of selecting jurors is not a constitutional right.

The manner and method of summoning a jury is a matter of legislative control rather than a constitutional provision, so that objections thereto may be waived.

9. Appeal and error ¶170(1) — Invasion of constitutional right does not require reversal if it was immaterial.

Even if a constitutional right was invaded, the error should be disregarded on appeal under Const. art. 6, § 4½, if it appears from an examination of the record that there was no miscarriage of justice.

10. Appeal and error ¶1004(3) — Judge's statement in requiring remittitur held not to show entire verdict was result of passion.

A statement by the trial judge in requiring a remittitur of a portion of the damages awarded by the verdict as a condition of denying a motion for a new trial that the amount of the verdict was excessive, and the excess was the result of passion and prejudice, does not show that it was the trial court's opinion that the

entire verdict was the result of passion and prejudice, and therefore does not require a reversal of the judgment rendered after remittitur for an amount which was not excessive.

11. Appeal and error ¶758(3)—Particular error in instruction must be pointed out.

A suggestion that an instruction given by the trial court was erroneous may be disregarded by the appellate court where there was no attempt to point out any error in the instruction.

12. Carriers ¶321(2)—Instructions held not to state plaintiff was passenger while waiting at station.

Where one of the instructions stated that the plaintiff was not a passenger while the train was standing at the station unless actually attempting to board the train or so near the train and in such a position as to indicate his intention to board it, an objection that the instructions as a whole stated that plaintiff was a passenger from the time he went upon the station platform was untenable.

13. Appeal and error ¶1066 — Instruction plaintiff was passenger while waiting at station held not prejudicial.

An erroneous instruction that plaintiff was a passenger while waiting for the train at defendant's station was not prejudicial, where there was no evidence that plaintiff received any injury until he actually attempted to board the train.

14. Carriers ¶348(4) — Omission from requested charge on contributory negligence held not erroneous.

An omission from a requested instruction that, if the train had started, and plaintiff attempted to board it while it was in motion or while the gates were closed, he was contributorily negligent, of a portion stating that the rule was true whether the train stopped for a reasonable time at the station or not, because, if it did not stop or the stop was unreasonably short, plaintiff was not thereby justified in attempting to board it while it was traveling at a high rate of speed or while the gates were closed, was not erroneous, since the omitted statement added nothing to the instruction.

15. Carriers ¶348(13)—Statement requiring plaintiff to prove freedom from negligence was properly omitted from instructions.

A requested instruction requiring plaintiff to establish negligence of defendant unmixed with any negligence on his own part proposed to put on plaintiff the burden of proving freedom from contributory negligence, as to which the burden of proof was on defendant, and the omission therefrom of the reference to contributory negligence was proper.

16. Trial ¶295(7) — Instructions, considered as a whole, held not to eliminate contributory negligence.

Where the trial court inserted in many of the hypothetical questions given at plaintiff's request the phrase "without plaintiff's fault," and on defendant's request fully instructed on the law of contributory negligence, the instructions as a whole were not subject to the objec-

tion that they eliminated from consideration the issue of contributory negligence.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Guy Riley against the Southern Pacific Company and James C. Davis, substituted as Director General of Railroads. Judgment for plaintiff, and defendant Davis appeals. Affirmed.

W. I. Gilbert, of Los Angeles, and Power & McFadzean, of Visalia, for appellant.

Russell & Heid, of Tulare, and Farnsworth, McClure & Burke, of Visalia, for respondent.

BURNETT, J. At Vine street station in the city of Berkeley, while attempting at night on May 5, 1919, to board an electric train operated by appellant, plaintiff was seriously injured, and the appeal is from a judgment in his favor for the sum of \$41,200. No objection is made to the sufficiency of the complaint, nor do we understand it to be seriously disputed that the evidence supports the verdict. However, that the peculiar feature of the case may be portrayed, we quote the following from the testimony of plaintiff:

"We (referring to a Miss Paiva and himself) took the street car down to the ferry building in San Francisco and took the ferryboat between 11 o'clock and 12 o'clock, and we ferried across the Bay. At the Oakland mole we took the Southern Pacific train and got off at Vine street station. We didn't know just exactly when the train came back, but we did know that was the last train I could go back on. Miss Paiva lived a distance of about four or five blocks from this station, so we decided to sit there and wait for this train to go back. * * * We went over to the side of the station and sat down and waited for this train to come back, because it was the last train I could get to San Francisco. It wasn't very long until it came back, and I immediately, when I saw the train coming around the curve here (indicating on the diagram), got up from my seat and walked straight out to the first track and waited for it to come on. When I saw this train coming around the curve it was coming at a pretty good rate of speed. I walked straight out from this seat here to the first track and stood there and the train was still coming on. It wasn't slowing down very much, and I stood there for a second and walked over to the second track. I didn't get clear over to the second track, but in about halfway between the two tracks, and the train was going at a speed that I didn't think it would stop where I expected it to right opposite the seat, so I turned and walked diagonally out there south, thinking that the train would go a little past my expectation and I would be that much further ahead. I got down there and walked right on down to the train, and I got just about to it and the train stopped, and I took and grasped the rear handle of the left-hand gate of the first car going toward San Francisco, and the train was stopped, and I grasped the handle,

and it was still stopped when I stepped my left foot up on the lower step. As I did that, the train started; it just stopped a second, and threw my feet both to the ground. Then I was trying to get my balance, but in doing that I was half dragged and half ran along the side of the train still holding the handle with my right hand, and I must have gone that way 15 or 20 feet, or maybe further, trying to get up speed. I thought when I could get enough speed pushing I would throw my feet out and swing up around on this step, and when I thought I reached that rate of speed I swung, and, instead of my feet going on the step, they were swung back between the step and they lodged in the mechanism of the second car, the car behind the one I was trying to get on. And when I was gradually being dragged under the car and such pressure being brought on my hands, in time I would have to let go and slip right back under the car. Instead of waiting for that, I swung my whole body and arms away from the rail I was holding to and dropped. As I dropped, my feet were caught and held so they didn't swing clear of the track, and when I dropped both trucks of the last car ran over my feet and limbs. The gates on the last car were shut, so I walked immediately right down to the car ahead of it. That was the rear end of the first car, and the gate on my side was open, and the train stopped still. * * * Just as I stepped with my left foot the train jerked out, and jerked my foot off and I fell to the pavement. Just the start of the train jerked my foot off, and I lost my balance."

[1] His testimony was substantially corroborated by that of Miss Mary Paiva, who witnessed the accident, and there is no doubt that a case is thus presented against appellant within the undisputed and well-established principle of liability of common carriers for the safety of their passengers. 10 Corpus Juris, 948; Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 Pac. 413; Franklin v. Visalia Electric Ry. Co., 21 Cal. App. 270, 131 Pac. 776; Raub v. Los Angeles T. Ry. Co., 103 Cal. 473, 37 Pac. 374; Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243; Cody v. Market St. Railway Co., 148 Cal. 90, 82 Pac. 666.

[2] In the light of plaintiff's testimony we must, of course, regard him as a passenger and entitled to the highest degree of care on the part of defendant. This conclusion is in accordance with the definition of a passenger contained in an instruction to the jury given by the court on request of defendant as follows:

"A passenger is one who undertakes, with the consent of the carrier, to travel in a conveyance furnished by the carrier otherwise than in the service of the carrier, as such. The relation of carrier and passenger depends upon a contract of carriage, expressed or implied, between the carrier and the passenger, made by themselves, or their respective agents. The relation begins when the person puts himself in the care of the carrier, or directly within the

carrier's control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier."

But, as before stated, there seems to be no serious controversy between the parties as to this feature of the case. Indeed, at the oral argument, while not waiving any of the points made in the briefs, the learned counsel for appellant confined himself to a discussion of two considerations which he deemed of sufficient importance to merit the careful attention of the court.

The first of these relates to the supposed disqualification of the sheriff of Tulare county to summon the jury which tried the case. It seems that on June 27, 1920, more than a year after the accident happened, said sheriff, Court Smith, delivered some prisoners to the state penitentiary at San Quentin, and on his return went to San Francisco to attend the National Democratic Convention that was then in session. While there he met two of respondent's attorneys, and at their request, on the evening of June 29, 1920, he accompanied them to said Vine street station in Berkeley, where he made certain observations with respect to the speed of the cars and powers of observation of operatives and others upon said cars. At the trial, in rebuttal, Mr. Smith testified, without objection, to the results of these observations. He completed his testimony on the afternoon of the day preceding the submission of the case to the jury, and immediately thereafter a recess was taken, at which time counsel for appellant claim that they learned for the first time the facts that constituted the disqualification of the sheriff. No suggestion, however, of such asserted disqualification was made to the trial court until the argument of the motion for a new trial. At said hearing affidavits were presented by both parties, and wherein there is any conflict as to the facts we must, of course, be controlled by the showing in favor of respondent. In his affidavit the sheriff deposed:

"That while at said Vine street station he was requested by said Messrs. Russell & Heid to make certain observations and inform them the result thereof, the exact nature and extent of which more fully appears from affiant's testimony as given at the trial of the above-entitled action; that said Messrs. Russell & Heid did not discuss with affiant the merits of the plaintiff's contention or the defendant's defense in the above-entitled action other than to state to him in a general way their understanding of how an accident occurred wherein one Guy Riley, the plaintiff in said action, was injured; that after making said observations and informing said Messrs. Russell & Heid the result thereof affiant returned to San Francisco and paid no further attention to said case until he was called as a witness to testify therein on behalf of the plaintiff.

"That affiant was not familiar or acquainted with, either on the 8th day of July, 1920, when said special venire was issued and said jury

summoned as aforesaid, or on the 9th day of July, when he testified as a witness in said case, or at any other time, the merits of the plaintiff's claim, or of the defendants' defense, and did not entertain any opinion or conclusion with respect thereto, and particularly he did not entertain any opinion or conclusion that the plaintiff should recover any damages in said case. Affiant further states the fact to be that he was not acquainted with and did not even know Guy Riley, the plaintiff in said action, by sight or otherwise."

After denying that he made certain purported statements to appellant's counsel he proceeded:

"Affiant states the fact to be positively and absolutely that he did not state to W. I. Gilbert, E. L. Barnes, or any other person, or persons, at any time, that plaintiff ought to recover in said case, and affiant further states that he made no statement and used no words of similar import, or that could be construed to have that meaning.

"Affiant further states that he did not at any time said jurors were so summoned, or at the time of the trial of said case, or at any other time, have an unqualified or other opinion or belief as to the merits of the action, either founded upon knowledge of its material facts, or some of them, or otherwise, and further that there was not a state of mind in affiant evincing either enmity against or bias to either party."

There were other affidavits lending support to the contention of respondent that there was no legal disqualification on the part of the sheriff, but it is entirely unnecessary to go further to show a complete justification for the court's ruling.

[3] It is not disputed that the same rules govern the disqualification of a juror and the summoning officer; the theory of the law being that a biased and prejudiced officer will select biased and prejudiced jurors. *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517.

[4] The disqualification, if any, therefore in the present case must fall within the specification of subdivision 6 of section 602 of the Code of Civil Procedure, as follows:

"Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them."

The leading case upon the question, as it deals with criminal cases, is *People v. Reynolds*, 16 Cal. 129, wherein is discussed with great learning the character of the opinion that will disqualify a juror for implied bias. It was said that—

The statute implies "that, to exclude the juror, he must have a settled conviction of the guilt or innocence of the party, or has expressed such a conviction. * * * A mere suspicion or inclination of the mind towards a conclusion is not enough; the state of mind must be more decided. He must have reached a conclusion like that upon which he would be willing to act in ordinary matters. In other

words, we repeat, the effect upon his mind must be more than an impression; it must amount to a conviction, in order to exclude him for implied bias."

This decision was approved in *People v. Symonds*, 22 Cal. 349, and subsequent cases, but, as the principle is undisputed, we need cite no further. Manifestly the rule would be no more strictly applied in civil than in criminal cases, and as thus applied, it is quite apparent that no serious objection could be made to the qualification of the sheriff. According to his affidavit, he had no knowledge of any of the material facts connected with the accident, nor had he been informed, except in a very general way, of the nature of the case. The trial judge was therefore warranted in believing his verified statement that he had neither formed nor expressed any opinion as to the merits of the action, and that he entertained neither prejudice nor enmity against either party.

It cannot be disputed that the question of the disqualification of the sheriff was one in the first instance for the trial judge to determine, and the showing was not such as to compel a finding in favor of appellant's contention. *Graybill v. De Young*, 148 Cal. 421, 80 Pac. 618.

[5] Of course it will not be argued that the mere fact that the sheriff testified as to some matters that might be considered of importance by the jury would disqualify him within the contemplation of the statute. This would be a strained and unreasonable construction of the law and would tend to interfere greatly with the practical administration of justice.

The *Le Doux* Case, *supra*, was entirely different, for therein it appeared that the sheriff "had an unqualified opinion of the guilt of the defendant, based upon his own activity in gathering evidence for the prosecution and founded upon his direct investigation of the facts."

[6] Moreover, it is equally plain that, if any disqualification existed, it was waived by the failure of appellant to make timely objection. As before stated, appellant became aware of the supposed disqualification a day before the conclusion of the trial, and there is no reason shown why it did not immediately seek to arrest the proceedings. It chose, however, to take chances upon receiving a favorable verdict; and in such cases the just and well-established rule is that, after the case goes against him, he cannot object to the validity of the verdict because of circumstances within his knowledge which he has declined to seasonably urge.

The principle is clearly stated in 24 Cyc. 316, from which we quote:

"It is well settled that a failure to challenge or object operates as a conclusive waiver if the ground of objection is known to the party at the time the jury is impaneled, is discovered

during the progress of the trial, if he has knowledge of facts sufficient to put him upon inquiry, or is otherwise chargeable with knowledge of the ground of objection."

Many cases are cited by respondent illustrating this doctrine in various phases, of which we may mention the following: *People v. Hamilton* (Cal. App.) 192 Pac. 467; *Monaghan v. Rolling Mill Co.*, 81 Cal. 190, 22 Pac. 590; *Ipswitch v. Fernandez*, 84 Cal. 639, 24 Pac. 298; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 Pac. 92.

The authorities, indeed, seem to be uniform that a known cause of challenge is waived by withholding it until after verdict, "since such practice is incompatible with good faith and fair dealing which should characterize the administration of justice."

[7] Again, if it be conceded for the sake of argument that the sheriff was disqualified and that timely objection was made, what answer is there to the contention of respondent that no prejudice resulted to appellant? The special veniremen were summoned by deputy sheriffs without consulting the sheriff, who had no voice in the manner of selection or in naming the persons to be selected, and the jurors selected were fairly and impartially chosen from the citizens of Tulare county by persons entirely unbiased and unprejudiced and who knew nothing whatever about the facts of the case. In other words, the jurors were summoned in exactly the same way, and we must assume that persons of the same type and qualifications were obtained as though the coroner or an ellor had served the process. While, therefore, if the sheriff was disqualified, the disqualification would technically affect his deputies, it would not follow that the error was prejudicial. In fact, in view of the showing made on the hearing of the motion for a new trial, we can safely say that, if any error was committed, the case is one for the application of section 4½ of article 6 of the state Constitution.

[8] As to the contention of appellant that the question involves a constitutional right which cannot be reached by said section 4½, it is sufficient to quote the following:

"The manner and method of summoning a jury is a subject-matter of legislative control rather than of constitutional provision, * * * the benefit of which may be waived." *People v. Nakis*, 60 Cal. Dec. 433, syllabus (184 Cal. 105, 193 Pac. 92).

[9] But, even if it were a constitutional right that was invaded and it appeared from an examination of the record that there was no "miscarriage of justice," the error should be disregarded on appeal. *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042.

It may be added, as pointed out by respondent, that when the trial was completed

and the jury were about to retire to deliberate upon their verdict, the sheriff was sworn to take charge of them, and no objection whatever was made to the proceeding. This constituted not only a waiver, but evidence that appellant was satisfied that he had suffered no prejudice by reason of the alleged irregularity.

[10] The other point emphasized at the oral argument is, in our judgment, also entirely without merit. It is based upon the opinion of the trial judge expressed in determining the motion for a new trial as follows:

"(1) That the amount of the verdict rendered by the jury was and is excessive, and in that respect was not justified by the evidence; (2) that the excessive amount of the verdict was the result of passion and prejudice on the part of the jury."

It was further stated that the amount of the verdict was greatly in excess of any verdict allowed to stand in any of the courts of this country for a similar injury, and the court concluded that \$20,000 should be remitted or else a new trial granted. Respondent consented to the reduction, whereupon the court denied the motion for a new trial, reciting that—

"Judgment in favor of plaintiff and against defendant in the said sum of \$41,200 and costs is supported by the evidence."

It is not disputed that it was within the discretion of the trial court to make such conditional order, but it seems to be the claim of appellant that, in the opinion of the trial judge, the whole of the verdict was tainted with passion and prejudice, and therefore it was his duty to set it aside and grant the motion for a new trial. This view would rather imply a serious reflection upon the good faith of the trial judge, although we are satisfied that no such charge was contemplated by the capable and courteous counsel who argued the cause. The record shows conclusively that by the use of said terms the court simply meant that to the extent of \$20,000 the verdict was not supported by the evidence, and to that extent only it might be said to be the result of passion or prejudice. If the trial judge had believed that the whole of the verdict was the product of passion or prejudice, he would not have recited in the order that the balance was supported by the evidence, and he would, of course, have set the verdict aside.

Indeed, in the use of said expressions the trial judge probably had in view the decisions holding that said language is in legal contemplation equivalent to a declaration that the amount of the verdict is not supported by the evidence. In *Kinsey v. Wallace*, 36 Cal. 462, the Supreme Court declared "that a verdict for a sum so greatly disproportionate to the actual damage of the plaintiff, under the facts of the case, is of it-

self sufficient evidence that it was rendered under the influence of passion or prejudice," but this circumstance was not deemed sufficient to vitiate the entire verdict, as the Supreme Court made a conditional order allowing the plaintiff the privilege of remitting a part of it with the alternative of a reversal of the judgment.

In *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 Pac. 774, it is said:

"To say that verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial. *Harrison v. Sutter Street Ry. Co.*, 116 Cal. 158. Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that when there is material conflict of evidence regarding the extent of damage the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict."

It may be added that appellant expressly admits that the amount of the verdict as allowed by the trial judge is not at all disproportionate to the extent of the injury suffered by plaintiff, and this admission virtually nullifies the force of his criticism of said action of the trial judge.

The other objections urged in the briefs deserve, we think, but scant consideration.

[11] Appellant, while intimating that instruction No. 7 as given by the court is erroneous, has not attempted to point out any error, and we might therefore disregard the suggestion. It embodies, we may add, however, a generally accepted principle of liability on the part of common carriers for the safety of one attempting, without fault on his part, to board a train, and was undoubtedly applicable to the facts as related by plaintiff.

[12] Appellant is mistaken in the claim that the court instructed the jury that "from the time the plaintiff in this case went upon the cement platform adjacent to Vine street station, as it is called, he was to be considered a passenger, and that the defendant was in duty bound to use the utmost care and caution for his protection." We think no such inference can be fairly drawn from the consideration of the various instructions upon the subject which were given by the court. We are satisfied the jury must have understood the law to be as admitted by appellant that a person "does not become the object of the utmost care of the railroad company

until he actually starts to make his entry upon the train." Indeed, it is made to appear clearly by the various instructions of the court that the utmost care was required of appellant only in case plaintiff was a passenger, and there was a specific direction that "plaintiff in this case was not a passenger and cannot be considered by you as such while the train mentioned in the pleadings was standing at Vine street station, unless plaintiff, in the exercise of reasonable care and prudence on his part, was actually attempting to board defendant's said train, or was so near to said train, and in such a position as to indicate his intention so to board the same," etc. It is not at all probable that the jury was misled as to this feature of the case.

[13] Moreover, if any error was committed in that respect, it was entirely without prejudice, for the reason that there was no evidence or no contention that any act of appellant contributed to the injury except the negligence in starting the train while plaintiff was attempting to board it. The care required of appellant toward plaintiff while he was sitting or standing on the platform was entirely foreign to the issues and could not have been regarded by the jury. There were only two theories presented by the pleadings and the evidence. The one urged by plaintiff which we have already indicated and the other by appellant that plaintiff attempted to board the train while it was in motion and while the gates were shut, and the jury were instructed with great particularity and precision as to the law applicable to each of these theories. There was no room for confusion or misunderstanding as to what was required of each party upon either hypothesis.

[14] Appellant complains because the trial court omitted from a requested instruction the following:

"This statement holds true, whether the train stopped for a sufficient or reasonable time at Vine street station to allow passengers to board the same or not, because, if the stop made at Vine street station was unreasonably short, or if said train did not stop at Vine street station at all, the plaintiff would not have been justified in attempting to board it while it was traveling at a dangerously high rate of speed, or while the gates were closed, regardless of the rate of speed at which it was traveling or whether it was moving at all or not."

It is perfectly apparent that this clause added nothing to the portion of the proposed instruction which was given by the court as follows:

"If the car or train described in the complaint had started away from Vine street station, and if the plaintiff, seeing that it had started, ran after it and attempted to board it while it was in motion, and was injured because of the rate of speed at which said train was traveling, or if plaintiff attempted to board

said train when the gates thereof were closed regardless of the rate of speed at which it was traveling or whether the train had started at all or not, in either event he (the plaintiff) did not exercise and was not exercising that reasonable care and caution which he should have exercised in protecting himself from injury, and such failure to so exercise reasonable care and caution for his own safety was the direct and proximate cause of the injury he received, and plaintiff cannot recover."

Beside, these various contingencies were specifically covered by other instructions given by the court, and the rejected clause was also argumentative, and misleading by reason of the suggestion that the train might not have stopped at said station, whereas the evidence all showed to the contrary.

[15] There was no error in striking from defendant's proposed instruction No. 21 the phrase "unmixed with any negligence on his own part contributing directly and proximately to such injury." The instruction as proposed put upon plaintiff the burden of proving not only that the negligence of defendant contributed to the injury, but that he was free from contributing negligence; whereas the law is well settled that the duty is cast upon defendant to prove such contributing negligence, and the plaintiff is not required to anticipate such defense. Besides, this identical phrase is contained in a similar instruction, No. 17, given by the court on plaintiff's request. It was more favorable to appellant than he had a right to expect, but of this he cannot complain.

[16] It is entirely a misapprehension of the situation to say that the issue of contributory negligence was eliminated from the case by the instructions of the court. In many of the hypothetical instructions given at the request of plaintiff the modification "without plaintiff's fault" was introduced by the court, and on appellant's request the doctrine was fully presented. It is sufficient to quote the following:

"If it should appear to you from the evidence that the plaintiff in this case neglected those precautions for his own safety indicated in and required by these instructions, and you should further find that said conduct directly or proximately contributed to his injury, you must find in favor of the defendant, even though you may believe that the employes of the train were guilty of negligence while engaged in operating said train."

We fail to see any contradiction in any material respect in the instructions. As we have stated, they presented the law applicable to the different theories of the parties. It was the duty of the court to so instruct the jury, leaving it to them to determine which theory was in consonance with the facts. There was no invasion of the province of the jury, but there would be cause for complaint if the court had failed to ac-

commodate and adapt the instructions to any rational inference that might be derived from the evidence.

The fact is that a careful examination of the record justifies the statement that the case was tried with extraordinary care, the rights of both parties were apparently guarded with scrupulous concern, and we have not been able to discern any error in the proceedings from beginning to end.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

(57 Cal. App. 509)

Ex parte TOSELLO. (Cr. 1057.)

(District Court of Appeal, First District, Division 2, California. April 29, 1922.)

1. Municipal corporations § 111(4) — Section of ordinance not unconstitutional because another section was invalid.

One section of a city ordinance, which prohibited keeping saloons, etc., where intoxicating liquors were sold or given away was not rendered invalid by another section which permitted intoxicating liquors to be given to guests in homes, and to be sold under certain conditions, contrary to Const. U. S. Amend. 18.

2. Intoxicating liquors § 13, 132 — Neither Eighteenth Amendment nor the Volstead Act was intended to affect local prohibitory laws.

Neither Const. U. S. Amend. 18 nor the Volstead Act was intended to nullify prohibitory state or local laws.

Application of John Tosello for a writ of habeas corpus, prayed to be directed to the Sheriff of Santa Clara county to secure the release of the petitioner from custody. Writ denied.

H. A. Gabriel, of San Jose, for petitioner.

Archer Bowden, City Atty., of San Jose, for respondent.

NOURSE, J. [1] The petitioner alleges that he is unlawfully confined by the sheriff of Santa Clara county under color of a commitment of the police court of the city of San Jose after his conviction of a violation of an ordinance of that city approved November 6, 1917, entitled, "an ordinance pertaining to and providing for limiting and regulating the sale of spirituous, malt, vinous or other alcoholic liquors, * * *" and that the conviction and confinement are void because the ordinance is unconstitutional as contravening the Eighteenth Amendment to the Constitution of the United States, in that it regulates, limits, and permits the sale of intoxicating liquors under certain conditions.

The first section of the ordinance provides as follows:

"On and after January 1, 1918, no person, either as principal, agent, servant or employee, shall open, establish, keep, maintain or carry on within the corporate limits of the city of San Jose any tippling house, dramshop, cellar, saloon, bar, barroom, sample room, buffet or other place where spirituous, vinous, malt or other alcoholic liquors are sold or given away, except as provided in section two (2) hereof."

The second section provides that it shall not be unlawful under the ordinance to serve alcoholic liquors in the home to members of the family or to guests without compensation, to distribute wine at sacramental service, for any registered pharmacist to sell or dispense alcoholic liquors at a pharmacy for medicinal purposes only, to sell or serve vinous and malt liquors with meals in any hotel, restaurant, or club under a permit obtained from the city council, or to sell alcoholic liquors in sealed or corked packages under a license for that purpose obtained from the city council. Section 4 of the ordinance authorizes the city council to grant permits to sell liquors in accordance with the terms of the ordinance.

The complaint on which the petitioner was tried and convicted charges that he did "at the time and place aforesaid, willfully and unlawfully open, establish, keep, maintain, and carry on within the corporate limits of the city of San Jose * * * a tippling house, dramshop, sample room, and place where spirituous, vinous, malt, and other alcoholic liquors were sold and given away, contrary to the provisions of said ordinance of said city."

In brief, the position of the petitioner is that, inasmuch as section 2 of the ordinance permits the city council to license a sale of intoxicating liquors contrary to the provisions of the Eighteenth Amendment to the Constitution of the United States, and as the provisions of that section cannot be segregated from the provisions of section 1, the whole ordinance must fall. Cases are cited to the proposition that, where the constitutional and unconstitutional provisions of the statute are so inseparably blended together as to make it clear that either clause would not have been enacted without the other, the whole act is void. The weakness of this argument is that the ordinance was not unconstitutional in any respect when it was enacted. We are not, therefore, concerned with what the people intended when they enacted the ordinance, or whether they would have enacted the provisions of section 1 without the exceptions contained in section 2. The fact is that they enacted it just as it reads today, and they alone can repeal it. The ordinance having been constitutional when enacted, and not having been repealed by the city, the question is: How far did the constitutional amendment No. 18 suspend its operation? The first section is plainly a prohibition against the

sale or giving away of intoxicating liquors in any tippling house, dramshop, saloon, or similar place of business. To this extent the ordinance is prohibitory, and is in harmony with the provisions of the constitutional amendment. The petitioner is charged with doing this very thing. The exception relates only to the "other place" where spirituous, vinous, malt, or other alcoholic liquors are sold or given away, such as private homes, churches, pharmacies, hotels, restaurants, clubs, and places where alcoholic liquors are sold in sealed or corked packages. As the constitutional amendment (Const. U. S. Amend. 18) and the Volstead Act (41 Stat. 305) which followed it were designed to prohibit the manufacture, sale, and distribution of intoxicating liquors for beverage purposes, certain portions of the provisions of section 2 of the ordinance were, of course, rendered inoperative. This does not, however, affect the prohibitory features of section 1.

A similar question arose in *People v. Capelli* (Cal. App.) 203 Pac. 837. In that case the appellant had been convicted of violation of the Wylie Act (St. 1911, p. 599), and based his appeal upon the ground that, because section 11 of that act authorizes the electors of any subdivision which had become no license territory to vote upon the question of licensing the sale of alcoholic liquors therein, the whole act was rendered void by the adoption of the constitutional amendment. The appellate court held that, though the provisions of section 11 of the Wylie Act were inoperative because of the constitutional amendment, this did not affect the prohibitory features of the act as a whole. To the same effect is *Ex parte Crookshank* (D. C.) 269 Fed. 980, 987.

[2] To the point that neither the constitutional amendment nor the Volstead Act were intended to affect or nullify prohibitory state or local laws, see *In re Volpi* (Cal. App.) 199 Pac. 1090; *People v. Collins* (Cal. App.) 202 Pac. 344; *In re Polizzotto* (Cal. Sup.) 205 Pac. 676; *Woods v. City of Seattle* (D. C.) 270 Fed. 315; *State v. District Court*, 58 Mont. 684, 194 Pac. 308; *State v. Turner*, 115 Wash. 170, 196 Pac. 638.

The writ is discharged, and the prisoner remanded to the custody of the sheriff.

We concur: LANGDON, P. J.; STURTEVANT, J.

(57 Cal. App. 609)

SORAN v. HARRIS. (Civ. 3814.)

(District Court of Appeal, Second District, Division 1, California. May 5, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Detectives §5—Evidence held to sustain an allowance to plaintiff on his account for money paid out for defendant.

In an action on account to recover balance due plaintiff for salary, commissions, and ex-

penses arising out of employment of plaintiff by defendant, a detective, evidence by defendant that he told plaintiff that if F., another employee of defendant, got a sum of money paid for handling a case, it should be charged to defendant, and testimony of plaintiff that he paid the money to F., held sufficient to sustain the allowance of that amount of money to plaintiff in his account.

2. Detectives §5—Evidence held sufficient to sustain finding under which an amount was allowed detective on an account.

In an action by detective to recover the balance due on a mutual account for salary, commissions, and expenses arising out of the employment, evidence held sufficient to sustain findings allowing plaintiff part of customary final charge for handling case.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by W. T. Soran against Nicholas B. Harris. From judgment for plaintiff, defendant appeals. Affirmed.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for appellant.

Howard F. Shepherd, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff brought this action to recover a balance claimed to be due to him on mutual account for salary, commissions, and expenses arising out of the employment of the plaintiff by the defendant, whose business was that of a detective. The plaintiff recovered judgment, and the defendant appeals therefrom. The sole ground of appeal is that the evidence is insufficient to sustain the findings, in this, that certain items were improperly allowed to the plaintiff.

The amount of the judgment is \$431.96. Appellant concedes that the items constituting this amount are sustained by the evidence to the extent of \$173.66. This leaves a disputed balance of \$258.30.

[1] The first disputed item is the sum of \$125 paid by the plaintiff to one Fuentes out of a certain sum of \$250 which plaintiff received from Mrs. D'Aleria in the course of certain business transacted by defendant for Mrs. D'Aleria. Plaintiff was in charge of the D'Aleria case at San Diego, and Fuentes was another employee of defendant who had been sent to San Diego to assist the plaintiff. Appellant, in his testimony, admitted that he told the plaintiff that if Fuentes got the \$125, it should be charged to appellant. Respondent testified that he did pay that amount to Fuentes. The evidence is sufficient to sustain the allowance of this amount to the plaintiff in his account.

[2] Next it is contended that, under the evidence, the plaintiff is not entitled to a credit of \$125 for "closing the D'Aleria

case." The plaintiff testified to a long-standing arrangement under which, upon the making of a special charge for the closing of a case, and where there were two "operators," the operators received 50 per cent. of this closing charge. He therefore claimed 25 per cent. of the closing charge of \$500 which was made and paid in that case. The defendant testified that the reason, and the only reason, why the plaintiff was not entitled to this item, was that the plaintiff was in a drunken condition at the time when the case was closed. He stated that in this particular case, if the plaintiff had not been drunk, he would have been entitled to share in the fee. There is testimony, by a witness who was present on the occasion in question, that the plaintiff was not intoxicated at that time. The evidence is sufficient to sustain the findings under which this item was allowed. There is a group of items stated in the testimony, and referred to in the brief for respondent, which satisfactorily covers at least \$8 of the \$8.30 of disputed items. We have not made an extended search for the other 30 cents.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 442)

HELMS et al. v. PACIFIC MILL & TIMBER CO. (Civ. 2407.)

(District Court of Appeal, Third District, California. April 25, 1922. Hearing Denied by Supreme Court June 22, 1922.)

1. Pleading \S 398—Where plaintiffs' names in title of complaint appeared as individuals and in the body as partners, and the court found a partnership, variance immaterial.

Under Code Civ. Proc. \S 469, providing that a variance is not to be deemed material unless it has actually misled, and section 470, providing that where the variance is not material the court may direct the fact to be found according to the evidence, where a trial court found that a contract was executed by plaintiffs as copartners, where plaintiffs' names appeared in the title of a complaint as individuals and in the body of the complaint they were alleged to be copartners and that each became owner of one-half of certain goods manufactured by them and that an agent acting for both of plaintiffs sold the goods to defendant, the complaint was not prejudicially defective.

2. Appeal and error \S 174—The objection that complaint failed to allege partnership name cannot be first raised on appeal.

In an action by copartners against a purchaser of goods to recover the price agreed to be paid therefor, in which defendant urged on motion for nonsuit that the cause of action is a partnership demand and the action was prosecuted in their individual names, the ob-

jection that the partnership name was not alleged in the complaint, and if the partnership was fictitious and no certificate had been filed as required by Civ. Code, \S 2466, the matter would have been delayed until the filing and publication of the certificate if plaintiffs elected so to act, not being raised at the trial, cannot be raised for the first time on appeal.

3. Sales \S 82(4)—Seller under contract held entitled to payment upon each delivery of the goods as ordered.

Where contract for the sale of 100,000 grape stakes consisted of an accepted order from the buyer to "ship to ourselves at instructions to follow," and in pursuance thereof six carloads, amounting to about half of the total order, were shipped as ordered by the buyers during a period of 17 days, held, that the seller was entitled to payment upon each delivery as ordered, so that the seller was not in default in not shipping more stakes until those already shipped were paid for.

4. Sales \S 82(4)—Contract of sale held to entitle seller to payment on delivery of goods.

Where a seller contracted to sell all railroad ties he made during a certain year, with a specified minimum quantity to be delivered by the end of the year, which were to be delivered from time to time as made throughout the year, in view of seller's inability to furnish a bond as required in the contract of sale and of the fact that the buyer advanced \$500 on the contract price, the contract held to contemplate payment on delivery of each shipment.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by J. F. Helms and another against the Pacific Mill & Timber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sterling Carr, of San Francisco, and E. W. Wilson, of Eureka, for appellant.

Puter & Quinn and H. L. Ford, all of Eureka, for respondents.

FINCH, P. J. Plaintiffs, alleging that they were copartners, sued for the recovery of the agreed price of certain grape stakes sold to defendant. In appellant's opening brief it is argued that the court erred in denying defendant's motion to strike out the fourth amended complaint, but in the reply brief it is admitted that such objection is not tenable on this appeal.

[1] It is urged that there is a fatal variance between the allegations of the complaint and the proofs, in that plaintiffs sue as individuals and allege a contract made by them as individuals while the evidence shows that the contract was executed by the partnership. Plaintiffs' names appear in the title of the complaint as individuals merely, but in the body of the complaint it is alleged that the plaintiffs, as copartners, manufactured the grape stakes; that thereupon each became the owner of one-half thereof; and

that Helms, acting for both, sold them to defendant. While the pleading is not a model, it is difficult to see in what manner defendant has suffered prejudice from any defect therein. A variance is not "to be deemed material, unless it has actually misled the adverse party to his prejudice." Code Civ. Proc. § 469. "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence." Code Civ. Proc. § 470. The court found that the contract was executed by plaintiffs as copartners.

[2] In appellant's brief it is said that if the partnership name had been alleged, and "if the same was fictitious and no certificate had been filed as required by the Civil Code" (section 2466), the defendant could have alleged such failure "and the matter would then have been delayed until the filing and publication of such certificate, if plaintiffs elected so to act." The answer in no manner raised the question here urged, and the evidence does not show under what name the partnership business was conducted or whether any certificate was filed. The record does not disclose that such objection was made at any stage of the case in the trial court; the contention there urged, on motion for nonsuit, being that the cause of action proved "is a partnership demand, and the action is prosecuted in their individual names." The question cannot be raised for the first time on appeal.

[3] It is contended that the plaintiffs failed to perform their part of the contract. The contract consisted of a written order by the defendant and its acceptance on behalf of plaintiffs. The order reads as follows:

"Ship to ourselves at instructions to follow. Prices are f. o. b. Humboldt points Eureka rate. 100,000 2x2x6 No. 1 split redwood grape stakes pointed 23.00. Please sign and return promptly to us at San Francisco."

Six carloads of grape stakes, amounting to a total of 50,490, were shipped as ordered from time to time during a period of 17 days, from September 25 to October 11, 1917. The shipments were made direct to defendant's customers as ordered by its agent at Eureka. It does not appear when defendant next ordered a shipment of the stakes, but its president testified that he made several demands for delivery after October, 1917. Plaintiffs refused to make further deliveries until paid for the stakes furnished, and defendant declined to make payment, claiming that no payments were due until the entire 100,000 stakes were delivered. Nielson testified:

"We made a contract with the defendant for the sale of 100,000 redwood grape stakes, and there was present Helms, myself and Herrick. * * * I don't remember when they were to be delivered, but not all at once. They were to be delivered at several times, we could not deliver all at once."

Herrick was the Humboldt county representative of defendant. Nielson testified relative to the failure of defendants to make payment as follows:

"They said they would send money up time and again, but it failed to come. * * * I was present when Helms and Herrick talked over the failure of the defendant to pay. The amount of the conversation was that Herrick told Helms not to ship any more until they made him a payment. * * * Herrick said nothing to the effect that they would not pay anything till they got the other part of the shipment."

Witnesses for the defendant contradicted much of Nielson's testimony, but it was for the trial court to decide whom to believe.

The written contract provided for shipments "at instructions to follow." This provision, construed in the light of the attending circumstances and the manner in which the contract was carried out by the parties in so far as performed, justifies the inference that the parties understood at the time the contract was executed that a considerable time might elapse between the first and the last deliveries thereunder. The defendant might, at its discretion, have postponed the last delivery for months. Under the circumstances shown, it would be unreasonable to hold that the parties intended to make the time of payment dependent upon the will of the purchaser. It must be held that the plaintiffs were entitled to payment upon each delivery as ordered. *Veerkamp v. Hulburd C. & D. Co.*, 58 Cal. 229, 41 Am. Rep. 265; *United Canneries Co. v. Seelye* (Cal. App.) 192 Pac. 341; *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409; *Dees v. Self*, 165 Ala. 229, 51 South. 735; *Press v. Vandergrift*, 165 App. Div. 180, 150 N. Y. Supp. 238; *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848; *People v. Grant*, 138 Mich. 60, 100 N. W. 1006.

By way of counterclaim, the defendant alleged damages in the sum of \$198.04 by reason of plaintiffs' failure to deliver the remainder of the grape stakes. Since the plaintiffs were justified in refusing to make further deliveries until paid for the stakes furnished, the defendant had no just cause of counterclaim.

[4] The defendant filed a cross-complaint against plaintiff Helms, praying for damages alleged to have been suffered by reason of his failure to deliver certain railroad ties in accordance with the terms of a contract between them. By written contract, dated January 15, 1917, Helms agreed to sell to the defendant "all the 6x8 split Rwd. railroad ties I make during the year 1917 at 36c apiece, * * * minimum quantity to be delivered 30,000 by January 1st, 1918." The contract further provided:

"The Pacific Mill & Timber Company agree to advance \$1,300.00 to be deducted from the

first shipment. I agree to put up a bond of \$2,000 which will be satisfactory to the Pacific Mill & Timber Company."

Helms was unable to furnish the required bond, and on August 13, 1917, Helms and defendant agreed to reduce the number of ties to 5,000 and defendant agreed to advance \$500 on the contract and took an assignment of Helms' right in and to all 6x8 ties owned by him at that time, Helms agreeing to promptly manufacture and deliver to defendant such additional ties as, added to those on hand, would, "at the price listed in the contract already entered into as aforesaid, fully compensate party of the second part for said advance of \$500.00." Helms delivered 1,605 ties under this contract which, at the contract price, amounted to more than the \$500 advanced. He thereupon refused to make any further deliveries unless defendant would pay for each carload as delivered. What has been said relative to the contract for grape stakes is equally applicable here. From the provisions of the contract it appears that the ties were to be delivered from time to time as made throughout the year. Helms' inability to furnish a bond and the provision for an advancement to him of \$500 on the contract price indicate that the parties understood that his financial ability to carry out his part of the contract was dependent upon receipt of payment on delivery of each shipment.

The evidence supports the court's findings in favor of the plaintiffs on their complaint and against the defendant on its counterclaim and cross-complaint.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 553)

SCOTT v. AUSTIN. (Civ. 4136.)

(District Court of Appeal, First District, Division 1, California. May 3, 1922. Hearing Denied by Supreme Court June 29, 1922.)

1. Husband and wife \S 270(8)—Evidence in action by guardian of insane wife held to prove husband's transfer of community property to third person without consideration.

In an action by guardian of insane wife to require defendant to account for one-half of certain personal property constituting community property transferred to defendant by the husband shortly before his death without the wife's consent, in which it was claimed that the husband gave third party a gift of community property in violation of Civ. Code, \S 172, evidence held to justify conclusion that the transfer of the property was not supported by any valuable consideration.

2. Husband and wife \S 265—Guardian of insane wife could not recover one-half of sum given by husband to third party and used by him to pay husband's debts and funeral expenses.

Where the husband shortly before his death gave third party a certain sum of money for payment of the husband's debts, and third party spent the money partly for such purpose and partly to defray the funeral expenses of the husband, the guardian of the insane wife could not recover one-half thereof from third person on the ground that it was community property.

3. Husband and wife \S 265—Husband could make gift of community property without wife's consent, where acquired before marriage or prior to amendment of statute prohibiting such gifts.

Where community property was acquired either before marriage or prior to amendment of Civ. Code, \S 172, prohibiting gifts of community property by a husband without wife's consent, the husband could make a gift of such property without the wife's consent.

4. Husband and wife \S 262(1)—Property acquired by either husband or wife other than by gift, bequest, devise, or descent presumed to be community property.

Property acquired by either party to a marriage other than by gift, bequest, devise, or descent is presumed to be community property, but there is no presumption as to the time of such acquisition.

5. Husband and wife \S 262(1)—No presumption as to whether community property given away by husband was acquired before marriage or when gift valid.

In action by guardian of insane wife to compel third party to account for one-half of community property transferred to third party shortly before death on the ground that the husband gave the third party a gift of community property without the wife's consent, in violation of Civ. Code, \S 172, as amended, there is no presumption as to whether such property was acquired before marriage or prior to the amendment of such statute so as to make the statute applicable.

6. Husband and wife \S 270(10)—Judgment awarding wife one-half of community property as against donee of deceased husband free from claims of creditors and expenses of administration held erroneous.

In an action by insane wife's guardian to compel defendant to account for one-half of the personal property transferred to defendant by husband shortly before his death, in which it was claimed the husband made a gift to the defendant without the wife's consent, in violation of Civ. Code, \S 172, it was error to award the wife one-half the property free from the claims of creditors and expenses of administration, but under section 1402, the court should merely have limited its judgment to declaring the wife the owner in an undivided one-half interest in the property, subject in common with the remaining property of the estate to the payment of the husband's debts,

the family allowance, and expenses of administration.

7. Husband and wife \S 270(10)—Wife's share of community property on husband's death subject to debts, family allowance, and charges and expenses of administration.

The court will at the instance of a wife set aside a voluntary conveyance by the husband of community property so far as it affects the interest therein to which she succeeds at his death, but the right to have such relief does not free her recovery of the property from the burden imposed upon it by Civ. Code, \S 1402, providing that on husband's death the wife's share in the community property is equally subject to the debts, family allowance, and charges and expenses of administration.

Appeal from Superior Court, Monterey County; Pat R. Parker, Judge.

Action by Emma Scott, an insane person, by J. A. Cornett, guardian of her person and estate against Milton W. Austin, as administrator of the estate of Horace W. Austin, deceased, substituted instead of Horace W. Austin, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

C. F. Lacey, of Salinas, for appellant.

Wyckoff & Gardner, of Watsonville, and Daugherty & Theille, of Salinas, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action brought by her guardian to compel the defendant to account for one-half of certain personal property consisting of cash in the sum of \$450, and a stock of merchandise, and the fixtures of a drug store, which had been transferred to him by John B. Scott, the husband of plaintiff, a few days before Scott's death.

Plaintiff and her deceased husband intermarried May 14, 1873, and continued to be husband and wife until the death of the former on February 18, 1920. Plaintiff is a patient in the state hospital for the insane at Stockton, Cal., and has been such for over 30 years. Prior to Scott's death he transferred to the defendant the stock and fixtures of his drug store and \$450 in cash; he also conveyed to him certain real property, in consideration of which conveyance the defendant entered into an agreement in writing whereby he undertook to pay for the support and maintenance of the plaintiff herein "such amounts as from time to time may be fixed or required by the public authorities," and to furnish her with necessary clothing. The court found that the money and personal property was community property of the deceased and plaintiff, and that the turning over of said money and personal property constituted a gift amounting in value to about \$6,450, and that the plaintiff had no knowledge and did

not consent to said transfer. As matter of law the court concluded that plaintiff was entitled to judgment for one-half of said personal property, and one-half the income and profits thereof from the date of the death of deceased. Interlocutory judgment was rendered accordingly, and the defendant was ordered to account to plaintiff for said cash, personal property, and profits. A referee was appointed for the purpose of rendering such an account. It was further ordered that upon the filing of said referee's report final judgment in favor of plaintiff be entered for one-half of the value of said personal property and one-half of said income and cash, together with costs. From this judgment defendant appeals.

The first contention of the appellant is that the finding of the court that the transfer to him of the fixtures and stock of merchandise was a gift is not supported by the evidence. On this subject the evidence shows that this transfer was made by a written assignment dated January 31, 1920, and executed by John B. Scott less than three weeks before his death. The day preceding the transfer said Scott conveyed to the defendant a parcel of real property of the value of \$20,000, and on the same day the defendant executed and delivered to Scott the following writing:

"Salinas, Cal., January 30, 1920.

"In consideration of a deed of conveyance this day made to me by John B. Scott I hereby agree that from and after the death of said John B. Scott I will pay towards the care and support of his wife, now confined in the asylum for the insane at Stockton, California, such amounts as from time to time may be fixed or required by the public authorities, and will likewise furnish her with necessary clothing.

"This obligation is to continue until the death of the said wife of John B. Scott, and is to bind my heirs, executors and administrators.

"In witness whereof," etc.

[1] The defendant undertook to testify that this agreement on his part was also the consideration for the transfer to him of the personal property; but in this connection he also testified that at the time of the execution and delivery of such assignment nothing was said, either by Scott or himself, with reference to it. It will be observed that the written agreement recites that the consideration therefore was the conveyance of the real estate made and delivered on the day of the execution and delivery of said agreement, and makes no mention of the transfer of the personal property. It is also significant that at the very time of its transfer to the defendant he was the holder of a note for \$2,000 against Scott, which, notwithstanding said transfer and conveyance was not surrendered to the maker nor agreed to be regarded as paid, and at the time of the trial of this action was still retained by the de-

fendant as an existing obligation against the estate of the deceased. In view of this state of the testimony we think the trial court was amply justified in concluding that the transfer of the personal property was not supported by any valuable consideration.

[2] As we have seen, the judgment awards to the plaintiff one-half the sum of \$450, treating it as money given by the decedent to the defendant. The only testimony on this point, however, is that John B. Scott turned over this money to the defendant three or four weeks before his death for the purpose of paying bills against the drug store, and that it was used partly for that purpose and partly to defray the funeral expenses of the deceased. Under these circumstances, while it would be the duty of the defendant to account to the personal representatives of the deceased for this sum, we do not perceive how this fact entitles the plaintiff to a judgment against the defendant for one-half thereof. To this extent the judgment of the trial court is erroneous.

[3] The third contention of the appellant must also be sustained, namely, that the court erroneously made its judgment cover the fixtures in the drug store. The record is totally devoid of evidence as to when this particular property was acquired. It is admitted that the community existed from the year 1873 down to the death of the deceased. If these fixtures were acquired either before marriage or prior to the amendment of section 172 of the Civil Code, prohibiting gifts of community property without the wife's consent, a gift thereof was within the power of the husband without such consent. *Spreckels v. Spreckels*, 116 Cal. 339, 349, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Clavo v. Clavo*, 10 Cal. App. 447, 449, 102 Pac. 556.

[4, 5] While it is well settled that property acquired by either party to a marriage other than by gift, bequest, devise, or descent is presumed to be community property, there is no presumption as to the time of such acquisition; and a wife makes no case for the setting aside of a gift by the husband of community property, unless she shows that it was acquired subsequent to the going into effect of said amendment.

[6, 7] The appellant's final contention is that the judgment in favor of plaintiff is incorrect in form, because it awards to her one-half of the community property in question free from the claims of creditors and the expenses of administration. This contention also we think to be correct. Section 1402 of the Civil Code provides that the share of the wife in the community property is equally subject to the debts, family allowance, and

charges and expenses of administration. Although the court will at the instance of the wife set aside a voluntary conveyance by the husband of community property so far as it affects the interest therein to which she succeeds at his death, the right to have such relief does not free her moiety of the property from the burden imposed upon it by the provision of the Code cited. We think, therefore, that the court should have limited its judgment to declaring the plaintiff to be the owner of an undivided one-half interest in the property in question, subject in common with the remaining property of the estate to the payment of the debts of the decedent, the family allowance and expenses of administration. It is true that in the case of *Dargle v. Patterson*, 176 Cal. 716, 169 Pac. 360, the judgment in terms declared the wife to be the "owner of an undivided one-half interest in the property in question," without this qualifying clause; but in that case the evidence disclosed that such property was but a very small part of the estate, and that there remained ample property to meet such debts and expenses. That it was not intended by the opinion in that case to lay down the rule that the wife may recover her community interest freed from such burden we think is evident from other language used by the court in the same case, namely:

"The privilege of avoiding the gift is conferred upon her [the widow] as a means of protecting her interest in the community property. We see no reason why in assailing the gift she should enjoy greater rights than she would have had if the gift had never been made."

The respondent points out that in the case cited the widow was held to be entitled to recover an undivided one-half interest in certain property voluntarily conveyed by the husband "without regard to the amount or condition of the estate remaining in his hands at the time of his death," but the language quoted was used in disallowing a contention made in that case that the conveyance ought not to be set aside, since there was ample property in the estate from which the widow could recoup the loss of her community interest in the property conveyed, and had no reference to the condition of the estate with regard to debts and expenses of administration.

For the errors adverted to, we think the judgment should be reversed; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, Justice pro tem.

(57 Cal. App. 504)

BOYD v. PENDEGAST et al. (Civ. 3888.)

(District Court of Appeal, Second District, Division 1, California. April 28, 1922.)

1. Officers §77—Possession of office creates no vested property right in officers.

The possession of an office, or the enjoyment of employment with the government, or under any of its agencies, does not confer a vested property right of any quality whatsoever; the ancient offices to which the common law attached the property character of incorporeal hereditament finding no legal counterpart under the political systems of government in this country.

2. Constitutional law §277(2)—Lack of due process of law not involved in removal from office.

Under whatever procedure is adopted to work the removal of a person from office, the constitutional question as to lack of due process of law cannot be involved.

3. Officers §66—May be removed without cause.

Whether for cause, or without cause, when the removal of an officer is accomplished, after full compliance with the existing regulations affecting the matter, no ground is left on which to found any action against the removing power.

4. Officers §70—Procedure on removal from office.

In the absence of regulations fixing the procedure for removal from office, the law defining the term may be looked to in deciding the question.

5. Officers §50, 72(1)—Appointments during pleasure terminated at any time without notice.

Appointments to hold office during the pleasure of the appointing power may be terminated at any time and without notice.

6. Officers §66, 72(1)—Appointments during good behavior terminated only for cause.

Appointments to office, "to continue during good behavior or for a fixed term of years," cannot be terminated, except for cause, and the office holder is entitled to notice and an opportunity to be heard.

7. Officers §66, 72(1)—Right to remove for cause permits removal without hearing.

A right to remove an officer "for cause," with no right of appeal or review, where the statute does not specify the particular causes, leaves the determination of the cause and its sufficiency to the removing power, which may act summarily and without according a hearing to the officer.

8. Municipal corporations §185(4)—Police officers held entitled to hearing on application.

Los Angeles Charter, as amended in 1911 (St. 1911, p. 2107, art. 9, § 93), makes findings of police commissioners as to cause for removal of officer final and conclusive, regardless of any defect or deficiency in the evidence, but contemplates that a police officer, ordered to

be suspended or removed, shall be accorded a hearing before the commissioners, if he applies for it within five days after the chief of police has given him notice of the order.

9. Municipal corporations §185(4)—Notice of suspension by chief of police need not contain description of acts making delinquency charge.

Notice by chief of police of the city of Los Angeles to a police officer that he was suspended for "neglect of duty" was sufficient, without setting out the acts making up the delinquency charge; it being presumed that the commissioners, on request, would acquaint him with the details, under Los Angeles Charter, as amended in 1911 (St. 1911, p. 2107, art. 9, § 93).

10. Municipal corporations §185(3)—Notice of suspension in effect a removal.

A police officer, removed from the force of the city of Los Angeles, cannot complain that the notice was only to the effect that he was suspended; the suspension, not stating the time for reinstatement, being in effect a removal, under Los Angeles Charter, as amended in 1911 (St. 1911, p. 2107, art. 9, § 93).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Certiorari by Ambrose Boyd against Lyle Pendegast and others, to review an order of the Board of Police Commissioners of Los Angeles County. From a judgment denying certiorari, petitioner appeals. Affirmed.

Abrahams & D'Orr, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Robert L. Hanley, Deputy City Atty., both of Los Angeles, for respondents.

JAMES, J. Appellant, having been removed from his position as a member of the police force of the city of Los Angeles, brought this proceeding in the superior court, asking that a writ be issued requiring defendants to certify for review the record of the proceedings had and evidence taken upon which the order of removal was made. A demurrer was interposed to the petition, and sustained. Judgment dismissing the proceeding followed. From that judgment petitioner has appealed.

By the demurrer of defendants several objections to the petition were urged, only one of which need be here considered. The general ground that sufficient facts were not stated to entitle petitioner to the writ sought presents questions which are determinative to this appeal.

The charter of the city of Los Angeles, as amended in 1911 (section 93, art. 9, p. 2107, Stats. 1911), makes provision for the appointment of police officers by the chief of police subject to the approval of the police commission and such civil service regulations as may be existent. It is then provided that:

"The chief of police shall have the power to suspend or remove any officer or employee in the police department; but no such suspension or removal shall be made except for cause, which shall be stated in writing and filed with said board, with certification that a copy of such statement has been served upon the person so suspended or removed, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing the suspension or removal shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion may, or upon written application of the person so suspended or removed, filed with said board within five days after service upon him of such statement, as above provided, shall, proceed to investigate the grounds for such suspension or removal. If, in the case of a removal the said board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, and also finds in writing that the person removed is a fit and suitable person to fill the position from which he was removed the said board shall reinstate him in such position; and if, in the case of a suspension the board, after such investigation, shall find in writing that the grounds stated were insufficient, or were not sustained, the said board shall restore the person so suspended to duty. The order of said board with respect to such suspension or removal shall be final and conclusive."

The petition of appellant, as filed herein, set forth that petitioner was served with a notice by the chief of police that he was suspended from his position for (as stated in the notice) "neglect of duty"; that within five days thereafter he applied for a hearing before the board of police commissioners. He alleged, further, that said board did not, nor did the chief of police, serve him with a statement of any specific charges and did not confront him with any witnesses; that the board, however, "permitted" petitioner to appear before it and relate "the history of his work in the police department for the many years that he had served as such member"; that the board on a later date made an order peremptorily removing petitioner from his position; and that the chief of police gave him written notice of the making of said order.

[1-3] The possession of an office, or the enjoyment of employment with the government, or under any of its agencies, does not confer a vested property right of any quality whatsoever. The more ancient offices to which the common law attached the property character of incorporeal hereditament find no legal counterpart under the political systems of government in this country. *Connor v. City of New York*, 5 N. Y. 285; *Trimble v. Phelps*, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; *Matter of Carter*, 141 Cal. 316, 74 Pac. 997. It is not necessary here to consider whether, as between the office holder, and a stranger to the appointing power, there may be, in abstract contemplation, a qualified

property right which may be subject to damage. In general, then, it follows necessarily that, under whatever procedure is adopted to work the removal of a person from office, the constitutional question, as to lack of due process of law, cannot be involved. Whether for cause or without cause, where the removal of an officer is accomplished after full compliance with existing regulations affecting the matter, no ground is left upon which to found any action against the removing power.

[4-7] In the absence of regulations fixing the procedure on removal from office, the law defining the term may be looked to in deciding the question. Appointments to hold during the pleasure of the appointing power may be terminated at any time and without notice; appointments to continue "during good behavior" or for a fixed term of years, cannot be terminated except for cause, and the authorities are generally to the effect that in the latter cases the office holder is entitled to notice and an opportunity to be heard. *Dillon on Municipal Corporations* (5th Ed.) vol. 2, § 473; *Mechem on Public Officers*, p. 454; In the *Matter of Carter*, supra; *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 608; *Ex parte Hennen*, 13 Pet. 227, 10 L. Ed. 138; *Reagan v. U. S.*, 182 U. S. 419, 21 Sup. Ct. 842, 45 L. Ed. 1162. There are cases holding that the right to remove "for cause," with no right of appeal or review, where the statute does not specify the particular causes, leaves the determination of the cause and its sufficiency to the removing power, which may act summarily and without according a hearing to the officer. *Trimble v. People*, 19 Colo. 187, 34 Pac. 981, 41 Am. St. Rep. 236; *People v. Martin*, 19 Colo. 565, 36 Pac. 543, 24 L. R. A. 201. Observing the generally accepted rule, the question to be determined here is whether the procedure outlined by the charter provision was in the case of petitioner substantially followed. That provision makes the findings of the police commissioners final and conclusive, which means that such findings must be so accepted, regardless of any defect or deficiency in the evidence.

[8-10] However, it seems clear that it is contemplated that a police officer ordered to be suspended or removed shall be accorded a hearing before the commissioners, if he applies for it within five days after the chief of police has given him notice of the order. The provision does not in terms require that there be stated in the notice of the chief of police a description of the acts which make up the delinquency charged against the officer, although it will be presumed that, if an investigation is had, the commissioners will, upon request of the officer, acquaint him with such details. The manner in which the investigation is to be conducted and the class of evidence to be heard is left with the commission. It is imperative only that a

hearing be accorded the officer upon his request, and that he be permitted to produce his evidence. The commission acts in a quasi judicial way (*Speed v. Common Council*, 98 Mich. 360, 57 N. W. 407, 22 L. R. A. 842, 39 Am. St. Rep. 555), and may be required by appropriate writ to accord a hearing to the person affected by a removal order. When such a hearing has been had, the decision, by the very terms of the charter, is placed beyond the reach of any review by the courts.

The petition in this case shows that the petitioner was permitted to appear before the commission and that he narrated a history of his work in the police department. There is no allegation in the petition of any request that a more particular statement of the charge against him be furnished, or that a demand was made that he be allowed to produce witnesses. It may well have been that the commission, upon petitioner's own statement, was satisfied that the order of suspension should stand. In the final notice given by the chief of police, advising petitioner that he was removed from his position, was contained the statement that there was attached a "copy of findings of police commission." Whatever the contents of these findings were, the petition does not show. The fact that the chief of police in his subsequent notice advised the petitioner that he was removed from his office, whereas the first notice advised him that he was suspended, is of no moment, for a suspension without a time stated for reinstatement, would be in effect a removal. Upon the petition, as it represented the facts of appellant's case, the ruling of the trial court was right.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(35 Idaho, 514)

WOODLAND v. HODSON. (No. 3463.)

(Supreme Court of Idaho. June 1, 1922.)

1. Appeal and error §1011(1)—Finding, supported by conflicting evidence, will not be disturbed.

Where the evidence is conflicting, and there is substantial evidence to support a finding, it will not be disturbed on appeal.

2. Boundaries §37(5)—Evidence held to show that parties agreed to abandon boundary fence line, and establish it on the true division line.

Held, that there is substantial evidence in the record to support a finding by the trial court that appellant and respondent agreed, about the year 1909 or 1910, to abandon the boundary and fence line between their respective tracts of land as theretofore established, and to establish their boundary and fence line on the true division line.

Appeal from District Court, Bingham County; F. J. Cowen, Judge.

Action by J. T. Woodland against T. H. Hodson, to quiet title to real property and enjoin removal of crops therefrom. Judgment for defendant, and plaintiff appeals. Affirmed.

A. S. Dickinson, of Blackfoot, for appellant.

G. F. Hansbrough, of Blackfoot, for respondent.

BUDGE, J. This is an action to quiet title to a small tract of land and to enjoin the removal of crops therefrom by respondent. From the record it appears that appellant is the owner of the N. E. $\frac{1}{4}$ of section 6, township 3 S., range 36 E. B. M., and that respondent is the owner of the N. W. $\frac{1}{4}$ of said section; that said tracts were formerly owned by John Gray and Jacob Keeney, respectively, who in 1880, or thereabouts, established a division line and jointly constructed a fence between these properties, according to which the lands were claimed and occupied, not only by them, but also by appellant and respondent, after they became the owners thereof, until in 1909, when, both parties doubting the correctness of the original line, a surveyor, James Young, was employed to locate the true boundary line, but, not being satisfied with the line so established, in July, 1910, the then county surveyor, A. E. Christensen, was employed by these and other parties to establish the line here involved, as well as certain other lines in the neighborhood; that appellant interested himself in having this latter survey made, called upon respondent several times, insisting that the survey should be made and the true line established, was present at the making of the survey, and paid a part of the cost thereof; that these parties then agreed that appellant should have the first crop of alfalfa from the land in 1910; and that respondent took the second crop in 1910, both crops in 1911, and the first crop in 1912, after which this action was instituted. From a judgment in favor of respondent an appeal was taken to this court, resulting in a reversal of the judgment and the granting of a new trial (*Woodland v. Hodson*, 28 Idaho, 45, 152 Pac. 205), inasmuch as it appeared that the Christensen survey did not fix the true line between the lands of appellant and respondent, and there was not sufficient evidence to show whether the present owners had agreed that the line established by Gray and Keeney should be abrogated and the original government survey be re-established for the purpose of marking their boundary. Prior to the new trial, by leave of court appellant filed an amended complaint, to which respondent filed an amended answer, and the

cause was again tried to the court, with the aid of a jury.

Appellant makes seven assignments of error, which present two questions: First, did the parties agree to abandon the line established by their predecessors and to adopt the true government line as the boundary between their properties? and, second, was the true line established by substantial evidence upon the trial? As to the latter question, however, appellant in his brief states:

"We are frank to concede that, if the agreement between Gray and Keeney is not binding on the plaintiff and defendant in this action, then the action of the court in ascertaining and enforcing the true line was correct."

We will therefore limit our discussion to the first question. The jury made the following special findings upon the trial:

"Q. Did the plaintiff and defendant at any time agree to abandon the boundary and fence line between their respective tracts of land established there by Keeney and Gray? A. Yes.

"Q. If you answer the foregoing question in the affirmative, did they also agree to establish their boundary and fence line on the true line? A. Yes.

"Q. If you find such agreement was made, about when was the same made? A. About 1909 or 1910."

[1, 2] These findings were adopted by the court and incorporated in its findings of fact. While there is a sharp conflict in the evidence, we are satisfied that there is substantial evidence in the record to support the finding by the court that appellant and respondent agreed, about the year 1909 or 1910, to abandon the boundary and fence line between their respective tracts of land as established by Gray and Keeney, and to establish their boundary and fence line on the true division line. Without setting out the testimony at length, it is sufficient to observe that the evidence tends to show that the parties, not only agreed to adopt the true line when it should be ascertained, but that respondent took possession of the disputed tract and removed four crops therefrom without interference on the part of appellant. The rule is well established that, where the evidence is conflicting and there is substantial evidence to support a finding, it will not be disturbed on appeal. *Olson v. Caulfield*, 32 Idaho, 308, 182 Pac. 527; *Independence P. M. Co., Ltd., v. Knauss*, 32 Idaho, 269, 181 Pac. 701.

The judgment in this case, therefore, must be affirmed; and it is so ordered. Costs are awarded to respondent.

RICE, C. J., and McCARTHY and DUNN, JJ., concur.

LEE, J., sat at the hearing, but took no part in the opinion.

(35 Idaho, 517)

**HAFFNER et al. v. UNITED STATES
FIDELITY & GUARANTY CO.
et al. (No. 3428.)**

(Supreme Court of Idaho. June 1, 1922.)

1. Venue \S 11—Acts "virtute officii" and "colore officii" defined and distinguished.

Acts done "virtute officii" are those within the authority of the officer, when properly performed, but which are performed improperly; acts done "colore officii" are those which are entirely outside or beyond the authority conferred by the office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, By Virtue of; Color of Office.]

2. Venue \S 11—Complaint in stating one cause of action based on act done by virtue of office and another not by virtue of office must be tried in county where the cause or some part thereof arose.

When a complaint contains two causes of action, one of which is based upon an act done by a public officer in virtue of his office, the other of which is based upon an act done by him not in virtue of his office, the case properly falls within the provisions of C. S. \S 6862, subd. 2.

Appeal from District Court, Bannock County; Robt. M. Terrell, Judge.

Action by Christian Haffner and another against the United States Fidelity & Guaranty Company, D. B. Jeffries, as Sheriff of Power County, as well as individually, and another, to recover damages for the taking of property and making of arrest by the Sheriff. Motion for change of venue was denied, and the defendants other than the Guaranty Company appeal. Order affirmed.

W. G. Bissell, of Gooding, and O. R. Baum and W. O. Loofbourrow, both of American Falls, for appellants.

O. O. Benting, of Pocatello, for respondents.

McCARTHY, J. The complaint contains two causes of action. The material facts alleged in the first are that appellant Jeffries, while sheriff of Power county, with the assistance of appellant Allred, took from respondents' possession in Bannock county certain of their personal property, representing that appellant Jeffries had the right so to do by virtue of power vested in him as such sheriff, and by virtue of a warrant for the arrest of respondent Christian Haffner. Respondents seek to recover of appellants as damages for the taking of said property the sum of \$1,100. The second cause of action is for false arrest and imprisonment. Respondents allege that on July 30, 1917, appellant Jeffries, as sheriff of Power county, with the aid of appellant Allred, arrested respondent Christian Haffner at his home

in Pocatello, Idaho, and took him to American Falls, Power county, Idaho, where they placed him in jail; that they failed to present him before the justice of the peace by whom the warrant of arrest was issued, or before any magistrate, but detained him in jail for 24 hours, and then released him; that they arrested said respondent for the purpose of obtaining possession of the property mentioned in the first cause of action. Respondents seek to recover \$3,000 damages on the second cause of action.

The action being brought in Bannock county, Idaho, the defendants filed a motion for change of venue to Power county, Idaho, upon the ground that appellants Jeffries and Allred were residents of the latter county. From an order of the district court denying said motion, this appeal is taken.

[1] Appellants Jeffries and Allred have a right to a trial in the county of their residence unless the nature of the action brings it within the provisions of C. S. § 6662, subd. 2, which reads as follows:

"Section 6662. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

"2. Against a public officer, or person specially appointed to execute his duties, for any act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer."

The phrase "the like power of the court to change the place of trial" refers to the provisions of C. S. § 6666. These are not involved in this case. Appellants contend that the acts of appellant Jeffries in taking possession of the property and arresting Christian Haffner were not done by him in virtue of his office; that the acts of appellant Allred in assisting him were not done by him in aid of the sheriff in a matter touching his duties as such officer. They cite a line of decisions involving the liability of sureties on official bonds, holding that they are liable for acts of the principal *virtute officii*, but not for acts *colore officii*. They rely upon these decisions for a definition of the phrase "any act done by him in virtue of his office," as used in our statute. Acts done "*virtute officii*" are those within the authority of the officer when properly performed, but which are performed improperly; acts done "*colore officii*" are those which are entirely outside or beyond the authority conferred by the office. *People v. Schuyler*, 4 N. Y. 187; *Burrall v. Acker*, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *Feller v. Gates*, 40 Or. 543, 67 Pac. 416, 56 L. R. A. 630, 91 Am. St. Rep. 492. Appellants argue that neither the arrest of Christian Haffner nor the tak-

ing of the property was an act done by appellant Jeffries in virtue of his office, and that appellant Allred did not aid the sheriff in a matter touching the duties of his office. The Supreme Court of Montana has said:

"Where the defendant, as warden of the state penitentiary, wrongfully ordered the plaintiff, while a convict, to be manacled, assaulted, and placed in solitary confinement, and unlawfully retained him in custody for a period after his sentence had expired, such unlawful acts were done 'in virtue of his office,' within Revised Codes Mont. § 6502, providing that an action against a public officer, for an act done by him in virtue of his office, shall be tried in the county where the cause of action arose." *State ex rel. Stephens v. District Court*, 43 Mont. 571, 118 Pac. 268, Ann. Cas. 1912C, 343.

"If he could commit only legal acts in virtue of his office plaintiff would have no cause of complaint." *Id.*

We conclude that the act of the sheriff in making the arrest was an act committed in virtue of his office within the meaning of the statutory language. He had a warrant of arrest issued out of a justice court of the county of which he was sheriff. A warrant issued by a justice of the peace, directed to the sheriff of the county in which it is issued, may be executed by any sheriff to whom it is directed in any county of this state. C. S. § 8718. We conclude that the act of appellant Allred in assisting to make the arrest was an act committed by him in aid of the sheriff in a matter touching his duties. We therefore conclude that the second cause of action is one falling within the provisions of C. S. § 6662.

The arrest took place in Bannock county, and, the cause of action being based in part upon the arrest, it is thus clear that part of it arose in Bannock county. The cause of action is based in part also upon the imprisonment which took place in Power county. It appears, therefore, that part of it arose in Power county.

We reach a different conclusion as to the first cause of action. It is not alleged that the sheriff had a writ or any process authorizing him to take possession of the property. It was not the improper exercise of an authority conferred upon him by law, but an arbitrary, wholly unauthorized act on his part. We conclude that this act does not fall within the provisions of section 6662.

[2] We thus have a case in which one of the causes of action is based upon an act done by a public officer in virtue of his office, and an act of a third person assisting him, and another cause of action is based upon an individual act not done in virtue of office. We conclude that such a case falls within the provisions of section 6662, *supra*. Since the arrest occurred in Bannock county, and the imprisonment in Power county, some part of the second cause of action arose in each of these counties. Under C. S. §

6662, the venue could properly be laid in either county. The court in Bannock county had jurisdiction, and the statute did not require that the cause be removed to Power county.

The order is affirmed, with costs to respondents.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

(35 Idaho, 498)

GRAVES v. BERRY et al. (No. 3455.)

(Supreme Court of Idaho. June 1, 1922.)

1. Appeal and error ⇨781(1)—Appeal dismissed where only moot question remains.

Where only a moot question remains to be determined, an appeal will be dismissed.

2. Appeal and error ⇨799—That only moot question remains must be shown by convincing proof to justify dismissal.

In order to justify a dismissal of an appeal on the ground that only a moot question remains, the fact that the controversy has ceased to exist must be shown by clear and convincing proof.

3. Appeal and error ⇨799—Court will not presume that cause of action has disappeared on motion to dismiss.

The court, in support of a motion to dismiss an appeal, will not indulge in presumptions to the effect that a cause of action has disappeared.

4. Appeal and error ⇨781(7)—When question on appeal from order denying injunction pendente lite to prevent collection of tax becomes moot stated.

Upon appeal from an order denying an injunction pendente lite to prevent collection of a tax upon the ground that it was void because levied in excess of the power of the governing authorities of the municipal corporation, unless appellant has paid the tax in such a way that he has no further recourse, or the time for redemption has expired, the question has not become moot.

5. Municipal corporations ⇨968(1)—Preparation and publication of estimated probable amount necessary conditions precedent to levy of municipal taxes.

Preparation and publication of an estimate of the probable amount of money necessary to be raised for all purposes and the passage of an appropriation bill by a municipal corporation organized under the general laws are conditions precedent to the exercise of the power to levy municipal taxes under C. S. § 3940.

6. Taxation ⇨609—Tender of portion of tax levy not condition for invoking equitable relief where tax levy is totally void.

A plaintiff is not required to make a tender of any portion of a tax levy as a condition for invoking the power of a court of equity to relieve him therefrom when the tax levy is totally void.

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by L. A. Graves against R. C. Berry and others. From an order denying a temporary injunction, the plaintiff appeals. Reversed and remanded, with instructions.

Wilkie & Wilkie, of Ashton, for appellant. Thos. B. Hargis, of Ashton, and C. Redman Moon and H. W. Soule, both of St. Anthony, for respondents.

RICE, C. J. This action was brought to obtain a decree to the effect that a tax levy of the village of Ashton for the year 1919 is null and void, and to obtain an injunction restraining respondents and their agents from certifying or placing upon the tax roll or collecting the tax.

The allegation of the invalidity of the tax is based upon the fact, admitted for the purposes of this case, that the village trustees did not during the first quarter of the fiscal year, or at any time, prepare or publish an estimate of the probable amount of money necessary for all purposes to be raised for the village as required by C. S. § 4055, and also that such trustees did not, within the first quarter of the fiscal year, or at any time, pass an ordinance termed "annual appropriation bill," as required by C. S. § 4053, and that on account of the failure of the village trustees to make and publish such estimate of expense and pass such appropriation bill, the tax attempted to be levied is null and void.

Upon filing the complaint an order was issued to respondents to show cause why a temporary injunction should not issue. Respondents appeared and demurred to the complaint, and upon the hearing a temporary injunction was denied. The appeal is from this order.

Respondents have moved to dismiss the appeal upon the ground that the questions involved are moot, by reason of the fact that all the acts sought to be enjoined have been performed, and any action the court might take would be unenforceable and the decision upon the questions involved would be only upon a mere abstract question of law.

[1, 2] In *Abels v. Turner Trust Co.*, 31 Idaho, 777, 176 Pac. 884, it is held that, where only a moot question remains to be determined, the appeal will be dismissed. *Coburn v. Thornton*, 30 Idaho, 347, 164 Pac. 1012; *Roberts v. Kartzke*, 18 Idaho, 552, 111 Pac. 1; *Wilson v. Boise City*, 7 Idaho, 69, 60 Pac. 84; *City of Wallace v. Deane*, 8 Idaho 344, 69 Pac. 62. In order to justify a dismissal on this ground, however, the fact that the controversy has ceased to exist must be shown by clear and convincing proof. 4 C. J. p. 577, § 2383.

[3, 4] No affidavit was filed in support of the

motion to dismiss. Upon the argument, however, it was not questioned but that the tax levy was placed upon the tax roll, and that most of the residents of the village have paid the same. The court, in support of a motion to dismiss an appeal, will not indulge in presumptions to the effect that a cause of action has disappeared. It does not appear that appellant in this case has paid the tax, or, if so, that he did not pay it under protest. If appellant has not paid the tax, the time for redemption has not expired. Unless he has paid his tax in such a way that he has no further recourse, or the time for redemption has expired, the question has not become moot. *United Real Estate & Trust Co. v. Barnes*, 157 Cal. 515, 108 Pac. 306, is similar to the case at bar. Upon a motion to dismiss the appeal the court said:

"The motion to dismiss is based upon the ground that the payment of the assessment, etc., put an end to the controversy and leaves only a moot case. It is not, however, by any means clear that it is a moot case, for evidently the claim of the plaintiff to recover the money paid under protest involves the same questions that are involved in this appeal. * * *"

See, also, *Boise City Irr. & Land Co. v. Clark*, 65 C. C. A. 399, 131 Fed. 415.

The motion to dismiss is denied.

The Legislature has provided a carefully prepared and fairly comprehensive scheme for municipal finance. By C. S. § 3225, it is provided that prior to the commencement of the fiscal year the county auditor shall certify to the governing authorities of every city, town, and village the total assessed valuation of such municipality for the preceding year, for the purpose of aiding them in the determination of the tax rates to be levied for the current year. Within the first quarter of the fiscal year the trustees of a village must prepare an estimate of the amount of money necessary for all purposes for the village during the fiscal year for which an appropriation is to be made, and cause the same to be published for four weeks in some newspaper of general circulation within the village. C. S. § 4055. Thereafter, and during the first quarter of the fiscal year, the board of trustees of the village shall pass an ordinance to be termed the "annual appropriation bill," in which they may appropriate such sums of money as are deemed necessary to defray all necessary expenses and liabilities of the corporation, not exceeding in the aggregate the amount of tax authorized to be levied during the year. It is also provided that no further appropriation shall be made at any other time within such fiscal year, unless such appropriation has been first sanctioned by a majority of the legal voters of the village. C. S. § 4053. The appropriation bill determines the amount necessary to be raised for general revenue purposes. The village trustees shall ascertain from the books or as-

essment roll of the tax collector of the proper county the amount of taxable property within the limits of their jurisdiction. This, of course, cannot be done until after the county and state boards of equalization have completed their labors and certified the results to the proper authorities. The village trustees shall then levy taxes for general revenue purposes not to exceed 15 mills on the dollar in any one year on all taxable property within the limits of the municipal corporation. C. S. § 3940.

[5] The question is whether the previous preparation and publication of an estimate of the probable amount of money necessary to be raised for all purposes and the passage of the appropriation bill constitute a condition precedent to the authority of the board of village trustees to levy taxes. It is true that the statute does not in express terms require that the tax shall be levied for the amount so ascertained, or that it shall be based upon the appropriation bill as was provided in the statutes referred to in the following cases: *People v. McElroy*, 248 Ill. 574, 94 N. E. 81; *People v. Florville*, 207 Ill. 79, 69 N. E. 623; *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Waggoner v. Maumus*, 112 La. 229, 36 South. 332. Nevertheless we have reached the conclusion that it was the legislative intent to so restrict the power of taxation in villages organized under the general law.

In the case of *French v. Edwards*, 13 Wall. (80 U. S.) 506, 20 L. Ed. 702, it is said:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In the case of *Mayor, etc., of City of Baltimore v. Gorter*, 93 Md. 1, 48 Atl. 445, this language is found:

"It is not meant by this that the courts are to determine any question of construction according to their notions of the wisdom or expediency of the means adopted to secure the purpose, or of the policy that dictated their adoption. These are considerations that are properly addressed only to the law-making de-

partment of the government. Where, however, this department has indicated a purpose to be accomplished and in its wisdom has provided the means of its accomplishment, a proper respect for its judgment and a proper recognition of its independent function of government require the courts in passing upon its act in this regard to have in view the effectuating of the main purpose. In this view the considerations mentioned must have influence in determining the meaning and effect of every part of the legislative act, because the Legislature must have intended the means to be in harmony with the purpose."

The Legislature must have had some purpose in view in requiring an estimate of the expenses to be published for four weeks. Obviously it was to enable the inhabitants and taxpayers of the municipality to become informed as to the purposes for which and the amounts which it was proposed should be levied against their property by the process of taxation. The appropriation bill was intended to limit the expenditures for the fiscal year, except in certain cases of casualty or accident. See C. S. § 4056. If the power to levy taxes under C. S. § 3940 is unrestricted, save by the maximum limit therein provided, and an appropriation bill can be passed after the levy, it is quite conceivable that the larger part or even all of the revenue raised for general purposes might be devoted to some improvement or the construction of some public work not made known to the taxpayers, and contrary to their wishes. We think it is equally true, in view of the legislation outlined above, that it was not intended that the trustees of a village should have the power to levy a substantial amount in excess of that called for by the appropriation bill, since it would permit extravagant expenditures for objects not contemplated by the taxing public, and without their knowledge or assent. If the acts of our Legislature were not designed to prevent the accomplishment of such results, it is difficult to imagine what purpose was to be subserved by the publication of the estimate of expenses and the passage of the annual appropriation bill. In this case, therefore, the levy of the tax by the village authorities was not a mere irregularity, but was in excess of their powers.

[6] Counsel for respondents suggest that, the proceeding being one in equity, appellant must do equity. This rule would require in some cases that the plaintiff tender the portion of a tax which is actually due as a condition of invoking the power of a court of equity to relieve him from that portion thereof which was not justly due. The principle can have no application in regard to a tax which is totally void. *Chi., etc., R. Co. v. Kootenai County*, 33 Idaho, 234, 192 Pac. 562.

Respondents suggest that there is a defect

of parties, in that the village of Ashton was not made a party to this suit. If the court shall find that there is a defect of parties, or that there is a defective allegation of the corporate existence of the village of Ashton, such defects in the complaint may be corrected by amendment.

The order appealed from is reversed. The cause is remanded to the district court for such further proceedings as in view of the changed conditions may be equitable. Costs awarded to appellant.

DUNN and LEE, JJ., concur.

(35 Idaho, 557)

DUMAS v. BRYAN et al., State Board of Education. (No. 3885.)

(Supreme Court of Idaho. June 1, 1922.)

1. Statutes ~~286~~—Recitals of journals of Senate and House held conclusive as to compliance with constitutional requirements in passage of bill.

Where the journals of the Senate and House of Representatives show respectively that a bill was regularly passed by the Senate, transmitted to the House, where it received a constitutional majority in that body, was thereafter returned to the Senate unchanged, was there enrolled, signed by the President of the Senate, again transmitted to the House and signed by the Speaker, and thereafter duly approved by the Governor, it is conclusive that the constitutional requirements with reference to the passage of the bill were complied with.

2. Statutes ~~6~~—Bill levying a tax for erection of normal school buildings held a "bill for raising revenue" within requirement that such bills originate in House.

Where an act originates in the Senate which, among other things, assesses upon all taxable property in the state for a given period a tax of one-eighth mill on the dollar, the proceeds of such levy being thereby appropriated for the purpose of erecting buildings for one of the state's normal schools, which the bill proposes to move to a new location, it is a bill for raising revenue, and must originate in the House of Representatives, and, if it does not so originate, the method of its enactment is in contravention of article 8, § 14, of the Constitution, and such act is void.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill for Raising Revenue.]

3. Statutes ~~64~~(8)—Invalidity of portion of act for levying tax to erect buildings held to invalidate entire statute.

Where an act directs the state board of education to erect suitable buildings for one of its state normal schools, in time for the commencement of the school year of 1922, out of a tax levy of one-eighth mill, which the bill assesses upon all of the taxable property of the state, and such tax levy is void because of

being a revenue measure not having originated in the House of Representatives, the entire bill falls; there being no other provision for the construction of the necessary buildings.

McCarthy, J., dissenting.

Appeal from District Court, Cassia County; T. Bailey Lee, Judge.

Action by Charles O. Dumas against E. A. Bryan and others constituting the Board of Education of the State of Idaho. Judgment of dismissal, and plaintiff appeals. Reversed and remanded, with instructions.

Walters, Hodgins & Bailey and R. P. Parry, all of Twin Falls, for appellant.

Roy L. Black, Atty. Gen., Dean Driscoll, First Asst. Atty. Gen., and Morris & Griswold, of Burley, for respondents.

LEE, J. The Albion State Normal School was established at Albion, Cassia county, in 1893, L. 1893, pp. 179-183, and has since been maintained and operated at that place. By chapter 110, L. 1921, p. 256, the Sixteenth Session passed Senate Bill No. 298, which authorizes and directs the state board of education to remove this school to the city of Burley, in the same county. Acting under and by virtue of this act, said board has accepted a site of approximately 40 acres in the vicinity of Burley, and is about to move this school to the new location. Appellant commenced this action in the district court of the Eleventh district, in and for Cassia county, to enjoin the board from so doing, upon the ground that said Senate Bill No. 298 is unconstitutional and therefore void. After a hearing, the district court dismissed the bill, from which judgment this appeal is taken.

The grounds upon which the constitutionality of this removal act is challenged are: (1) That it was not enacted as required by article 3, § 15, of the Constitution; (2) that it being a revenue bill and having originated in the Senate, is in contravention of article 3, § 14, of said instrument; (3) that it is in violation of article 10, § 7.

The provisions of said act which are particularly drawn in question by this action are:

"Sec. 1. That the state board of education is hereby authorized and directed to remove the normal school heretofore established at the town of Albion in the county of Cassia and called the Albion state normal school, to a site to be selected and acquired by said board at the city of Burley in Cassia county; provided, that prior to May 1, 1921, there shall be donated to the state of Idaho for the use of said normal school a tract of not less than 40 acres of land within or contiguous or adjacent to the city of Burley. * * *

"Sec. 2. The state board of education is hereby authorized and directed to cause the Albion normal school to be conducted during the school year of 1921 at its present location,

and, in the event of its removal as herein provided for, to thereafter make such disposal of the buildings and grounds at Albion belonging to the school as may be deemed by the board to be to the best advantage of the state, and the said board may, in its discretion, remove said buildings or any part or portion of them, or any of their contents or equipment, or any part thereof, and use the same in constructing, furnishing and equipping buildings to be provided or erected on the new site of said school: Provided, that if such buildings, furniture, fixtures, grounds, or any part thereof, shall be sold, the proceeds of such sale are hereby appropriated to and for the use and benefit of the Albion normal school. * * *

"Sec. 3. The state board of education is hereby authorized and directed to cause to be erected on the above mentioned tract of land at Burley, when the same shall have been donated and conveyed as herein provided for, in time for the commencement of the school year in September, 1922 suitable buildings for the purposes of said school, and at that time to remove said school from its present location to the new location herein provided for, and that hereafter said school shall be conducted in said new location under the name of the Albion state normal school. * * *

"Sec. 5. That there is hereby assessed upon all taxable property within the state of Idaho, for the years 1921-22, a tax of one-eighth mill on the dollar, and the proceeds thereof are hereby appropriated for the purpose of erecting the buildings herein provided for."

[1] Appellant's first contention is that said Senate Bill No. 298 was not passed by the Legislature in accordance with the requirements of article 3, § 15, of the Constitution, which requires that—

"No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each House previous to the final vote thereon."

The contention being that because there were lodged with the Secretary of State two engrossed bills, one of which differs from the enrolled bill, it is conclusive that the act was not passed in accordance with this provision of the Constitution. This contention is without merit. The Senate journal shows that this bill was regularly passed by the Senate and transmitted to the house. Senate Journal, 16th Session, p. 612. The House journal shows that it received a constitutional majority in that body, and was thereafter returned to the Senate unchanged. House Journal, 16th Session, p. 573. The respective journals then show that it was referred to the enrolling committee, reported enrolled, signed by the President of the Senate, transmitted to the House and signed by the Speaker, and thereafter duly approved by the Governor. This is conclusive upon the courts that the proceedings with

reference to the passage of this bill were according to the constitutional requirements. *Burkhart v. Reed*, 2 Idaho (Hasb.) 503, 22 Pac. 1; *Cohn v. Klingsley*, 5 Idaho, 416, 49 Pac. 985, 38 L. R. A. 74; *In re Drainage District No. 1*, 26 Idaho, 311, 143 Pac. 299, L. R. A. 1915A, 1210.

The validity of this act is also denied on the ground that it is a bill for the raising of revenue, and it having originated in the Senate, contravenes article 3, § 14, of the Constitution, which reads:

"Origin and Amendment of Bills.

"Sec. 14. Bills may originate in either House, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the House of Representatives."

Counsel for respondents insists that appellant not having raised this question or presented it to the court below for consideration, it may not now be considered upon this appeal. It appears from the record that the question is being raised for the first time in this court. However, where an action seeks to enjoin the performance of any act upon the ground that the law authorizing the doing of such act is unconstitutional and void, the validity of the law in question is before the courts until finally determined, for as said by Justice Field in *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

See, also, *State v. Candland*, 36 Utah, 406, 104 Pac. 285, 24 L. R. A. (N. S.) 1260 and note, 140 Am. St. Rep. 834; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. 469, 30 L. Ed. 588; *Threadgill v. Cross*, 26 Okl. 403, 109 Pac. 558, 138 Am. St. Rep. 964; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061; *Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562; *Chicago I. & L. R. Co. v. Hackett*, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. 966; *State v. Rice*, 115 Md. 317, 80 Atl. 1026, 36 L. R. A. (N. S.) 344, Ann. Cas. 1913A, 1247.

It is held by all of the authorities that an unconstitutional law is in legal effect no more than a blank page, and therefore the question of its validity or of any rights sought to be exercised under it is never waived, but may always be raised at any stage of the proceedings wherein the power conferred or the right sought to be exercised under the act is drawn in question. The constitutionality of Senate Bill No. 298 is directly drawn in question by this action, and

therefore any ground upon which it is claimed to be in contravention of the fundamental law of the state is before us, and is pertinent to this inquiry.

Article 3, § 14, is a provision common to most of the states, and in effect is found in the federal Constitution. The purpose of incorporating it into the fundamental law is that laws for raising revenue are an exercise of one of the highest prerogatives of government, and confer upon taxing officers authority to take from the subject his property by way of taxation for the public good, a burden to which he assents only because of it being necessary in order to maintain the government, and the people have accordingly reserved the right to determine this necessity by that body of the Legislature which comes most directly from the people, the House of Representatives.

Section 5 of this removal act levies upon all of the taxable property within the state for the years of 1921-22 a tax of one-eighth of a mill on the dollar, the proceeds of such levy being appropriated for the purpose of erecting new buildings made necessary by this change of location. Counsel for respondent urge that the provisions of this act for raising revenue are merely incidental to the main object or purpose of the act, such main purpose being the removal of the normal school from Albion to Burley, and direct our attention to many cases holding that where the revenue part of an act is merely an incident and not the principal purpose for which it was enacted, the fact that it contains a provision for raising revenue as an incident to such purpose does not make it a revenue law within the meaning of this constitutional provision.

Thus in *Chicago, B. & Q. R. Co. v. School District No. 1*, 63 Colo. 159, 165 Pac. 260, an act amending a former law which established a system of public schools, and, as an incident to such amendment, provided for the raising of revenue to meet the requirements of the law as amended, was properly held not to be an act for the raising of revenue, which, under the Constitution must originate in the House of Representatives.

So in *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462, it is held that an act authorizing the establishment of county free high schools, and providing for a tax to supply funds for the current expenses of such schools and for bond issues to raise money for building or purchase of school property, authorizing the commissioners to make a tax levy upon all of the property for the support thereof, and limiting the funds so raised exclusively to this purpose, does not fall within the purview of this constitutional provision.

It is generally held that acts creating incorporated towns or other political subdivisions of the state, with certain restricted governmental powers, including the right to

levy taxes for the purposes for which such subdivisions are created, are not acts for raising revenue within the meaning of this constitutional provision. *Harper v. Commissioners*, 23 Ga. 566.

Bouvier's Law Dictionary, vol. 3, p. 2953, defines "revenue" as being "the income of the government, arising from taxation."

United States v. James, 13 Blatchf. 207, Fed. Cas. No. 15,464, defines a "revenue bill" as being one that draws money from a citizen, and gives him no direct equivalent in return, and that in respect to such bills, it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate the same.

In *Perry County v. Railroad Co.*, 58 Ala. 547, it is said that a bill for raising revenue, as termed in the Constitution, is a bill providing for the levy of taxes as a means of collecting revenue—hence a bill for reducing taxes, if it provides for collecting revenue, is still a bill for raising revenue.

In *Millard v. Roberts*, Treasurer of the United States, 202 U. S. 429, 28 Sup. Ct. 674, 50 L. Ed. 1090, it is said that bills for other than tax purposes, but which may incidentally create revenue, are not revenue bills, which under U. S. Const. art. 1, § 7, must originate in the House of Representatives. This opinion approves Story on Constitutional Law, wherein he lays down the rule that revenue bills are those which levy taxes for governmental purposes in the strict sense of the word, and are not bills for other purposes, which may incidentally create revenue.

"Either one House or the other of a legislative body is sometimes clothed with powers not conferred upon the other. Under the Constitution of the United States, and of many of the states, all bills for the raising of revenue must originate in the House of Representatives, or the lower House as it is called. Bills of revenue are those which draw money from the people to the state, without giving direct equivalent in return therefor. They do not include bills permitting the taxation of real property mortgages as land in the county where recorded, bills seeking a local object for the accomplishment of which it is necessary to raise money by tax upon the locality affected, bills permitting municipalities to impose license taxes for municipal purposes. * * * The precise meaning of the clause 'to raise revenue' is to levy a tax as a means of collecting revenue." 36 Cyc. 946.

In *Hubbard v. Lowe* (D. C.) 226 Fed. 135, the court had under consideration the question of the constitutionality of an act which was passed primarily for the purpose of suppressing or destroying every form of contract for the future delivery of cotton, except that marked out by the statute. It was conceded that this was the purpose of the act, and not the raising of revenue. But the court said that it was immaterial what was the intent behind the statute; it was enough that a tax was levied, and therefore

it was a bill for raising revenue within the meaning of the federal Constitution, which required that such bills originate in the House.

[2] Section 5 of this act is a measure for raising revenue; that is, it is a revenue bill, or money bill, as those terms are usually used. It provides for levying a direct tax against all property in the state, for governmental purposes. It requires no argument to prove that the state maintains the Albion normal school in its governmental capacity. It will not do to say that this tax represents a mere incident to the main purpose of the bill, for this would be a mere evasion. Most revenue bills could in the same manner be made incidental. The amount of the tax levied is immaterial, for the Constitution requires that all bills for raising revenue shall originate in the House. This is as truly a tax levied for governmental purposes, as it would be if levied for the construction of a capitol building, an insane asylum, or for the support of any department of the state government, and therefore falls within the inhibition of article 3, § 14, of the Constitution.

It is further contended that this act is in derogation of article 10, § 7, of the Constitution, which reads:

"Sec. 7. The Legislature for sanitary reasons may cause the removal to more suitable localities of any of the institutions mentioned in section one of this article."

But in view of the conclusion already reached, it is unnecessary to discuss this further assignment.

[3] Therefore the only remaining question necessary to be considered is whether the other provisions of this act are so connected in subject-matter, dependent upon each other, and designed to act for the same purpose, or are otherwise so dependent in meaning, that it cannot be presumed that the Legislature would have passed one without the other, that if one part is unconstitutional, the entire act is void. *Cunningham v. Thompson*, 18 Idaho, 149, 108, Pac. 898; *Epperson v. Howell*, 28 Idaho, 338, 154 Pac. 621.

By section 5 of said act, the state board of education is authorized and directed to cause to be erected in time for the commencement of the school year in September, 1922, suitable buildings for the purposes of said school, and at that time to remove said school from its present location. It is therefore clear that unless the board is furnished with funds to erect these buildings, the school cannot be moved, for while the preceding section authorizes the board to dispose of the buildings and grounds at Albion to the best advantage of the state, or remove said buildings or any portion of them, or any of their contents or equipment, this can only be done, by the terms of the act, after the removal of the school. Hence the revenue section being-

void, the entire bill falls, there being no other provision for the construction of the necessary buildings.

The judgment of the lower court dismissing the bill is reversed, with instructions to reinstate the cause of action and issue a permanent injunction against respondents as prayed for in the bill, and it is so ordered. No costs awarded.

RICE, C. J., and BUDGE and DUNN, JJ., concur.

McCARTHY, J., dissents.

(35 Idaho, 532)

ABRAMS v. JONES, Commissioner of Department of Law Enforcement. (No. 3667.)

(Supreme Court of Idaho. June 1, 1922.)

1. Physicians and surgeons ¶11(1)—Dental Act held not to authorize the state department of law enforcement to revoke dental licenses issued prior to its passage.

The Dental Act of this state (C. S. c. 91) contains no provision which, either expressly or by necessary implication, authorizes the state department of law enforcement to revoke dental licenses issued prior to the passage and approval of the act.

2. Physicians and surgeons ¶2—Statute regulating practice of dentistry held highly penal so that it must be strictly construed.

While legislation of the character embraced within the general scope of the Dental Act of this state may be sustained upon the ground that the Legislature has authority under the police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals, such an act is in its nature highly penal and must be strictly construed.

3. Physicians and surgeons ¶11(1)—Dental license issued prior to passage of law held not subject to revocation by department of law enforcement.

Held, that respondent's license is not subject to revocation by the department of law enforcement, upon the grounds and in the manner provided in the present Dental Law, the license having been issued prior to the passage and approval of said law.

4. Pleading ¶8(1)—Accusation or complaint must contain positive statements of the essential facts in issue, and not conclusions.

In any judicial or quasi judicial proceeding a pleading in the nature of an accusation or complaint must contain positive statements of the essential facts in issue, and is to be deemed insufficient where it merely states conclusions.

5. Physicians and surgeons ¶11(3)—Charges brought against dentist held indefinite and uncertain, requiring bill of particulars.

Held, that the charges brought against respondent as a practicing dentist by the depart-

ment of law enforcement were indefinite and uncertain, and that he was entitled to a bill of particulars or to have such charges set out specifically, in order that he might have an opportunity to prepare his defense.

6. Constitutional law ¶277(1)—Licenses ¶38—License to practice profession becomes right which cannot be denied or abridged except after due notice and hearing.

Where the state confers a license upon an individual to practice a profession, trade, or occupation, such license becomes a valuable personal right, which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

7. Physicians and surgeons ¶11(3) — Dentist's rights may not be regulated by tribunal acting in capacity of accuser, prosecutor, and judge.

Respondent being entitled to a hearing before an impartial tribunal upon the charges which had been preferred against him, held, that this right was denied when he was required to submit himself for trial before a body which was acting in the capacity of accuser, prosecutor, and judge.

Appeal from District Court, Ada County; Chas. F. Reddoch, Judge.

Action by A. M. Abrams against Robert O. Jones, as Commissioner of the Department of Law Enforcement, to enjoin the revocation of a license to practice dentistry and dental surgery. Judgment for the plaintiff, and the defendant appeals. Affirmed.

Roy L. Black, Atty. Gen., and Dean Driscoll, First Asst. Atty. Gen., for appellant.

Chas. M. Kahn and Karl Paine, both of Boise, for respondent.

BUDGE, J. This action was brought by respondent to enjoin the commissioner of law enforcement from revoking a license theretofore issued to respondent to practice dentistry and dental surgery in this state.

From the record it appears that on January 3, 1920, the commissioner of law enforcement, hereinafter referred to as the commissioner, addressed and caused to be delivered to respondent the following communication:

"January 3, 1920.

"Dr. A. M. Abrams, Boise, Idaho—Dear Sir: Since March 31, 1919, under the provisions of chapter 17, sections 333 and 334, Compiled Statutes of the State of Idaho, the department of law enforcement of the state of Idaho has been in charge of all matters relative to dental licensure, which were formerly administered by the state board of dental examiners of the state of Idaho.

"As commissioner of this department, regularly appointed by Governor D. W. Davis, under commission dated April 1, 1919, and upon the action and written report of the dental examining committee, being five persons designated

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by me for the dentists on July 8, 9, 10, 1919, I am hereby notifying you to appear and show cause why your license to practice dentistry and dental surgery in all their branches in the state of Idaho should not be revoked for the following specific charges: That you are

"1. A person who published and circulated by means of newspapers advertising matter with the view to deceiving the public.

"2. A person who published and circulated, by means of newspapers, advertising matter with the view of defrauding the public.

"3. A person who advertised as using an anæsthetic which you falsely advertised.

"4. A person who advertised as using an anæsthetic which you falsely misnamed.

"5. A person who advertised as using an anæsthetic which you did not in reality use.

"You are further notified that the hearing hereof will be held in the office of the department of law enforcement, capitol building, Boise, Idaho, on January 17, 1920, at 11 a. m., when and where you may appear, either in person or by counsel, or both, and introduce any relevant statements, testimony, or other matters, and be fully heard on the subject matter thereof.

"By order of the department of law enforcement of the state of Idaho, this 3d day of January, 1920.

"Respectfully yours,

"[Signed] Robert O. Jones,

"Commissioner of Law Enforcement."

Both prior to and at the hearing respondent, through his counsel, made demand upon the commissioner that he be furnished more specific charges and a bill of particulars showing the written report of the dental examining committee, the names of the newspapers in which the advertisements were claimed to have been published, the dates and subject-matter of such advertisements, and the name of the anæsthetic referred to, which demands the commissioner refused and neglected to comply with, until during the course of the hearing a bill of particulars was furnished and a continuance denied to respondent, who was required to submit himself to the hearing upon the general charges quoted above.

The hearing was held before the dental examining committee on January 20, 1920, after which the committee addressed the following communication to the commissioner:

"January 21, 1920.

"Honorable Robt. O. Jones, Commissioner Law Enforcement, Boise, Idaho—Dear sir: We, the undersigned, members of the Idaho state dental committee, appointed pursuant to the provisions of section 17, chapter 60, 1919 Session Laws of Idaho, being all the members of said committee, do hereby certify that the committee met in regular session on the 17th, 19th, 20th and 21st days of January, 1920, at the office of the department of law enforcement in the state capitol at Boise, Idaho, and that during said session, to wit, on the 20th day of January, 1920, a hearing, at which all the members were present, was accorded to Dr. A.

M. Abrams on the question of whether or not his license to practice dentistry and dental surgery in the state of Idaho should be revoked, for the following specific grounds: [Reciting the charges contained in the commissioner's letter of January 3d]—and, having heard the evidence in the said matter, the committee finds that a complaint in writing, under date of December 27, 1919, filed by duly licensed dentists practicing in the state of Idaho, was heretofore filed with the commissioner of law enforcement of said state, asking that the said Dr. Abrams should appear and show cause why his license to practice dentistry and dental surgery in the state of Idaho should not be revoked on the grounds hereinbefore set forth; that he had reasonable notice of said hearing and opportunity to appear and be heard, and did appear, in person and by counsel, but declined to be heard except by his counsel in argument; that he is the holder of a license to practice dentistry in the state of Idaho; that it appears by the evidence that the grounds of revocation are true; that the said license should be revoked on the grounds and for the reasons hereinbefore set forth, and your committee so recommends.

"[Signed] H. B. Colver.

"R. J. Cruse.

"Ira D. Boyd.

"R. C. D. Higgins.

"E. V. Jefferson."

On February 12, 1920, and before any further action had been taken looking to the revocation of respondent's license, he filed his complaint praying that the commissioner be enjoined from revoking or attempting to revoke said license, which, it appears, was issued on June 16, 1904. A demurrer to the complaint was filed and overruled, whereupon the commissioner filed his answer, to which a general demurrer was filed and sustained. Appellant refused to plead further, and judgment was thereafter entered in favor of respondent granting the injunction prayed for. This appeal is from the judgment.

Appellant makes two assignments of error: First, that the court erred in overruling appellant's demurrer to the complaint; and, second, that the court erred in sustaining respondent's demurrer to the answer.

Respondent attacks the constitutionality of chapter 8, Idaho Sess. Laws 1919, pp. 43-69, commonly known as Senate Bill No. 19, providing for a commission form of government in Idaho (C. S., c. 17, §§ 250 to 353), creating the department of law enforcement with a commissioner of law enforcement at the head thereof, and defining its powers and duties. A determination of this question, however, is not necessary to a proper disposition of this case, and the rule is well settled that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the case in which the constitutionality of

such statute has been drawn in question. *Kimbley v. Adair*, 32 Idaho, 790, 189 Pac. 53.

Nor will we consider respondent's contention that the act regulating the practice of dentistry (chapter 60, Idaho Sess. Laws 1919, pp. 182-191; C. S. c. 91, §§ 2116 to 2136) is so vague, indefinite, and uncertain in numerous respects as to be wholly void. There are but three questions necessarily presented in this case, viz, whether the present Dental Law is applicable to persons licensed prior to its enactment, whether the charges brought against respondent were sufficiently definite and certain, and whether he was accorded a hearing before an impartial tribunal.

C. S. § 2118 provides that:

"The department of law enforcement * * * shall have the following powers: * * * 5. To conduct hearings on proceedings to revoke licenses of persons practicing dentistry and to revoke such licenses. * * *"

And C. S. § 2130 provides:

"Every license or certificate of registration issued under the provisions of this chapter shall be subject to revocation of the department upon any of the following grounds. * * *"

[1] The Dental Law provides for the examination, registration, and licensing of persons who desire "to begin the practice of dentistry in the state of Idaho" (C. S. § 2120), and for the revocation of licenses or certificates of registration issued under its provisions. It contains no provision which, either expressly or by necessary implication, authorizes the department of law enforcement to revoke licenses issued prior to the passage and approval of the act. If it was the intention of the Legislature to give the department the power to discipline the holders of licenses issued prior to March 14, 1919, and to revoke such certificates, it has certainly failed to express such intention by this act.

[2] The right to practice dentistry, like the right to practice any other profession, is a valuable personal right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured. *State v. Cooper*, 11 Idaho, 219, at page 227, 81 Pac. 374; *People v. Love*, 298 Ill. 304, 131 N. E. 309, 16 A. L. R. 703. While legislation of the character embraced within the general scope of the act in question is sustained upon the ground that the Legislature has authority under the police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals (*Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. [N. S.] 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750), such an act in its nature highly penal, should be strictly construed, and should not be held to include persons

not clearly and plainly within the scope of its provisions.

[3] It is evident, therefore, that respondent's license is not subject to revocation by the department of law enforcement, upon the grounds and in the manner provided in the present Dental Law, the license having been issued prior to the passage and approval of said law.

[4, 5] We will, nevertheless, proceed to discuss the second question presented. It will be observed that the charges purporting to which the hearing was had were couched in the most general terms, and are in fact but conclusions of law. There are no averments of facts from which the conclusions of law are drawn. It is elementary that in any judicial or quasi judicial proceeding a pleading in the nature of an accusation or complaint must contain positive statements of the essential facts, and that it is insufficient where it merely states conclusions. The charges brought against respondent were altogether indefinite and uncertain, and he was entitled to a bill of particulars or to have the charges set out specifically, in order that he might have time and opportunity to prepare his defense.

As was said in *Board of Medical Examiners v. Eisen*, 61 Or. 492, 123 Pac. 52:

"* * * It is necessary in a complaint to charge the acts of unprofessional or dishonorable conduct and facts complained of against the accused licensee. It is not sufficient to state merely legal conclusions."

In *Klafter v. Board of Examiners of Architects*, 259 Ill. 15, 102 N. E. 193, 46 L. R. A. (N. S.) 532, Ann. Cas. 1914B, 1221, the court said:

"If the charge against the holder of a license, on a hearing such as this [to revoke a license], is not sufficiently specific to permit him to prepare properly his defense, it is the duty of the board of examiners, on request of the holder of the license or his counsel, to require the charge to be made more specific. If the discretionary power of the board is exercised with manifest injustice, the courts will interfere when it is clearly shown that the discretion has been abused."

And in *Re Baum*, 32 Idaho, 676, 186 Pac. 927, this court held:

"An attorney against whom disbarment proceedings are instituted is entitled to have the charges fully stated, and is not required to defend against or explain any matter not specified in the charges."

See, also, *Green v. Blanchard*, 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84.

Finally, it appears that the hearing involved in this case was ordered upon the written report and recommendation of the dental examining committee, that it was held before the committee, and that they recommended to the commissioner the rev-

ocation of respondent's license. It would also seem from the communication addressed to respondent that the charges contained in the commissioner's letter were formulated by the dental examining committee, while C. S. § 2130, provides, *inter alia*, that:

"In prescribing procedure for the determination of the truth or falsity of any charge against a licensee, having for its purpose the revocation of his license or certificate of registration, * * * the department, upon written complaint by any licensed dentist, shall use reasonable means to establish the truth or falsity of such charge and for that purpose may make such expenditures as are necessary."

C. S. § 2118, clothes the department of law enforcement with power to conduct hearings on proceedings to revoke licenses of persons practicing dentistry, but due process of law and every consideration of justice demand that such hearing should be a fair and impartial hearing before a body which has not already decided the controversy. Here we have the anomalous situation of a committee of ethical dentists, who are empowered to investigate the affairs of other members of their profession, upon written complaint of any licensed dentist, to make such expenditures of public moneys as may be necessary to that end, to prefer charges against dentists whom they regard as guilty of violations of the dental law, and then under the semblance of a hearing to sit in judgment upon and to condemn the accused. This dual role of the dental examining committee as both prosecutor and judge is repugnant to the spirit of American law, a fundamental principle of which is that no man shall be deprived of life, liberty, or property without due process of law, and as was said in *Re Cameron*, 126 Tenn. 614, at page 659, 151 S. W. 64, at page 76:

"Beyond question it is not according to due course of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice."

[6] Due process of law is not necessarily satisfied by any process which the Legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade, or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

[7] We are bound to assume that in preferring the charges against respondent the dental examining committee had reasonable ground to believe that the charges were true, or, in other words, that they had received

evidence which appeared to justify the revocation of respondent's license under the dental law. It would then be manifestly unfair to require respondent to submit himself to a hearing before the committee, which had at least tentatively prejudged the matter as evidenced by the charges which it had brought against respondent. The committee was clearly disqualified, both in law and in fact, to give respondent a fair and impartial hearing, and this is the only hearing known to the law. It is of the highest importance that the actions, not only of the courts, but also of all other governmental agencies, should be free from reproach or the suspicion of unfairness. We attribute only the highest motives to the commissioner and the members of the committee. Nevertheless the fact remains that respondent was entitled to a hearing before an impartial body, and this right was denied when he was required to submit himself before a body which was at once his accuser, prosecutor, and judge.

In *Broom's Legal Maxims* (8th Ed.) pp. 94-99, it is said:

"It is a fundamental rule in the administration of justice that a person cannot be judge in a case where he is interested. * * * And therefore in the reign of James I it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts and give judgment on it himself. * * * And it is a maxim of law that no man can be at once judge and suitor."

See, also, *State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802; *State v. Clancy*, 30 Mont. 529, 77 Pac. 312; *Lindsay-Strathmore Irrigation District v. Superior Court*, 182 Cal. 315, 187 Pac. 1056; *Coke on Littleton*, § 212.

In the case of *Meyer v. City of San Diego*, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22, the following language was used by the court:

"It is a principle which finds expression in the Constitutions of many of our states, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy, for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired."

While in *Stahl v. Board of Supervisors*, 187 Iowa, 1342, 175 N. W. 773, 11 A. L. R. 185, it is held that, with possibly few exceptions, the same disqualifications that apply to judges should apply to administrative boards in the absence of express statutory provisions.

Respondent contends that the procedure

outlined in the Dental Law does not satisfy the requirements of due process of law, but we do not think it necessary to pass upon this contention. That he was not accorded due process of law in this case is evident, and we do not decide whether a procedure might be had under the law which would safeguard and protect the rights of the accused.

From what has been said it follows that the judgment should be affirmed; and it is so ordered.

RICE, C. J., and DUNN, J., concur.

LEE, J., concurs in the conclusion reached.

McCARTHY, J., deeming himself disqualified, did not sit at the hearing nor take part in the opinion.

(35 Idaho, 548)

BEALE v. JONES, Commissioner of Department of Law Enforcement, et al.
(No. 3668.)

(Supreme Court of Idaho. June 1, 1922.)

Appeal from District Court, Ada County; Chas. F. Reddoch, Judge.

Separate suits by R. L. Beale, by G. Cleveland Martin, by H. J. De Groot, by Thomas J. Forde, by Claude E. Gadsby, by R. Jay Greer, by Le Roy McRae, by B. T. Mohny, by Painless Parker, by J. R. Van Auken, by G. F. Wolfe, and by M. E. Roby against Robert O. Jones, as Commissioner of the Department of Law Enforcement, and others. Judgments for plaintiffs, and the defendants appeal in each case. Affirmed.

Roy L. Black, Atty. Gen., and Dean Driscoll, First Asst. Atty. Gen., for appellant.

J. A. Prentice, and C. C. Cavanah, of Boise, for respondents Greer and Parker.

James R. Bothwell and W. Orr Chapman, both of Twin Falls, and J. A. Prentice, for respondent Roby.

J. T. Pence, of Boise, and J. A. Prentice, for other respondents.

BUDGE, J. The questions involved in this case are substantially the same as those determined in the case of *Abrams v. Jones*, 34 Idaho, —, 207 Pac. 724, and upon the authority of that case the judgment in this case is affirmed.

RICE, C. J., and DUNN, J., concur.

LEE, J., concurs in the conclusion reached.

McCARTHY, J., deeming himself disqualified, did not sit at the hearing nor take part in the opinion.

BRONAUGH et al. v. EXCHANGE NAT. BANK OF ARDMORE. (No. 13293.)

(Supreme Court of Oklahoma. June 13, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 786—Appeal which appears to have been taken for delay merely, dismissed as frivolous.

Where it clearly appears from the record that the appeal is frivolous, and for delay merely, the appeal will be dismissed.

(Additional Syllabus by Editorial Staff.)

2. Appeal and error \S 786 — Appeal from judgment for plaintiff by defendants, who had offered no evidence in their behalf, dismissed as frivolous.

In an action on a note against the maker and indorser, in which the indorser entered his appearance, but did not answer or otherwise plead, and maker filed an unverified general denial, and in which there was no evidence offered on behalf of such defendants, their appeal from judgment for plaintiff will be dismissed as frivolous; it being apparent that the appeal was taken merely for the purpose of delay.

Appeal from District Court, Choctaw County; G. M. Barrett, Judge.

Action by the Exchange National Bank of Ardmore, Okl., against V. Bronaugh and another. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

Evans & Sherman, of Hugo, for plaintiffs in error.

R. H. Stanley, of Hugo, for defendant in error.

NICHOLSON, J. This case is before us on motion to dismiss the appeal; one ground of such motion being that the appeal is frivolous and for delay merely.

It appears that the action was upon a promissory note executed by the defendant V. Bronaugh, indorsed by W. W. Jeter, and payable to the order of the defendant in error. Jeter entered his appearance in the trial court, and waived the issuance and service of summons, but did not answer or otherwise plead. Bronaugh filed an unverified general denial. No evidence was offered on behalf of the defendants below. It is apparent from the record that the appeal is frivolous, and is for delay merely.

Therefore the appeal is dismissed.

JOHNSON, McNEILL, ELTING, KENNAMER, and MILLER, JJ., concur.

(85 Okl. 163)

SMITH v. KENNEDY. (No. 9603.)

(Supreme Court of Oklahoma. Nov. 22, 1921.
Rehearing Denied Jan. 10, 1922. Second Petition for Rehearing Denied March 7, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 1099(3) — Rule that former opinion is law of the case held inapplicable, where ruling was on demurrer to petition as not stating a cause of action.

The general rule is that all questions open to dispute, either expressly or by necessary implication, decided on appeal in this court, will not be open for review on second appeal, but such decision becomes the settled law of the case as to all of such questions and are not subject to re-examination; *held*, said rule is not applicable to the facts and pleadings in the case at bar.

2. Public lands \S 106(1) — Decisions of officers of land office on controverted fact questions are final, except for fraud or mistake, or as reversed by the department.

The general rule is where officers of the land office decide controverted questions of fact, in the absence of fraud or mistake, their decision on these questions are final, except as they may be reversed on appeal in that department.

3. Partnership \S 246 — Partnership land may be sold by surviving partner to pay debts, and decedent's heirs be forced to convey.

The general rule is that real estate of a partnership is considered as personality for the purpose of paying the debts of the firm and the settlement of its affairs, and the surviving partner, as between himself and the heirs of the deceased partner, has a right to sell the real estate belonging to the firm in the same manner as if it was personal estate, although the surviving partner alone cannot transfer the legal title to the real estate, but a deed by him will operate to transfer the equitable interest from him to the purchaser, who may then compel a conveyance from the heirs of the deceased partner.

4. Appeal and error \S 1012(1) — Findings and judgment not against weight of evidence not disturbed.

From an examination of the record, *held*, that the finding and judgment of the trial court was not clearly against the weight of the evidence, and therefore will not be disturbed on appeal.

Appeal from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by James A. Smith against A. J. Kennedy. Judgment for the defendant, and the plaintiff appeals. Judgment, in so far as in conformity with opinion, affirmed.

Geo. S. Ramsey, of Muskogee, Edgar A. De Meules, of Tulsa, and Malcolm E. Rosser and Villard Martin, both of Muskogee, for plaintiff in error.

T. P. Winchester, of Muskogee, for defendant in error.

McNEILL, J. This is the second appeal in this case; the case on former appeal being *Smith v. Kennedy*, 46 Okl. 493, 149 Pac. 197. The question involved on the former appeal was whether the petition stated a cause of action; a demurrer having been sustained to the petition by the trial court. This court reversed the trial court and held the petition stated a cause of action. The material parts of the petition are set out in the statement of facts in the former opinion, and it will serve no useful purpose to again copy the petition in this case, but reference may be had to the same for the allegations of the petitions in this case.

After the reversal of the case the defendant filed his answer, which consisted of a general denial, and alleged the improvements placed upon the lots prior to the time said lots were scheduled were property of the partnership of Blackstone & Co., and pleaded the proceedings had before the different departments in relation to obtaining the deed since September 15, 1908. The proceedings disclosed upon what theory the department issued the deed, and why the deed was made to the surviving partner, as partnership property. It was also pleaded those proceedings were never appealed from and were *res adjudicata*.

On the trial of the case the records of the Commissioner of the Five Civilized Tribes were introduced, together with the proceedings before the Secretary of the Interior and the decisions of those officers relating to the land in controversy, together with oral testimony. Upon trial of the case the court found the issues in favor of the defendant and against the plaintiff. The court found, in substance, first, that C. W. Turner and Pleasant N. Blackstone entered into a partnership in the year 1888 or 1889, under the style of Blackstone & Co. In the year 1898 they disposed of the mercantile business in Vian to the Vian Trading Company, retaining their interest in the real estate with the exception of the building used as a store building.

The court further found that, in relation to the real estate in question, they improved the lots in controversy out of partnership funds, and when the time came to schedule the lots preparatory to their sale A. J. Kennedy appeared for the town-site commission, acting for Blackstone and Turner, and sought to have the lots in question scheduled to Blackstone and Turner as partners, but was informed by the town-site commissioners that the lots could not be scheduled in the name of the firm and the lots were scheduled to C. W. Turner and P. N. Blackstone. After the schedule was attempted to be changed Blackstone died, and the lots were scheduled to Turner and the heirs of Blackstone. The court further found that the only right that either party had to any of

the lots was by reason of the improvements placed upon the lots by Blackstone & Co., and no improvements were placed upon the same either individually by Blackstone or Turner. The court further found that the firm of Blackstone & Co. was indebted and was insolvent. The court further found that the deed to the lots was issued to Turner as surviving partner of Blackstone & Co., and Turner afterwards sold the lots to Kennedy for the purpose of applying the same upon the indebtedness of Blackstone & Co. The court found that the plaintiffs, or the Blackstone heirs, had made certain payments to the government upon the lots in the total sum of \$630.18. The court in rendering judgment denied the plaintiffs any relief in so far as the title to the property was concerned, but held they had a first lien upon the property for the payments made, to wit, the sum of \$630.18.

[1] For reversal it is first contended the court should have sustained the demurrer to the answer of the defendant, basing its conclusion upon the fact that the opinion in the former appeal is the law of the case, and following the decisions of this court which announced the rule:

"Generally, all questions open to dispute, and either expressly or by necessary implication decided on appeal to this court, will not be open for review on a second appeal, but such decision becomes the settled law of the case as to all such questions, and not subject to re-examination." *Childs v. Cook*, 174 Pac. 274; *Ezell v. Midland Valley R. Co.*, 174 Pac. 781; *Nance v. Fouts*, 173 Pac. 1038.

We do not think this position is well taken, for the reason in the first appeal this court was passing upon whether the petition stated a cause of action. If the answer had admitted the allegations in the petition to be true, then the law would be applicable; but the answer denied the allegations of the petition and alleged a different state of facts, alleging the improvements that were placed upon the lots prior to the time of scheduling the same were partnership property and the Secretary of Interior had so found. The answer referred to additional proceedings before the department, not referred to in the petition.

In the former opinion this language will be found:

"Does the petition state facts sufficient to constitute a cause of action? We think it does. From the foregoing statement of facts it appears that the contest of Turner to have this land declared partnership assets was, in fact, rejected by the Commissioner of Indian Affairs on the very apparent ground that the department could not administer the equities in this case between the heirs of Blackstone and the creditors of Blackstone & Co. The Secretary also directed the deed to issue to Clarence W. Turner and the heirs of Pleasant N. Blackstone, by his letter of September 15,

1908. Without further hearing, as far as this record discloses, or without any additional notice to the Blackstone heirs, the deed was issued to Clarence W. Turner as surviving partner of Blackstone & Co. This deed, it is true, was approved by the Secretary of the Interior, but the record is silent as to why this change was made."

In addition to the facts alleged in the petition, the additional records and proceedings were introduced in evidence in the trial of the case. In addition to what was alleged, we have the additional facts.

[2] On February 6, 1908, John G. Wright, Secretary of the Five Civilized Tribes, in passing upon the contest of Clarence W. Turner, wherein he was contesting the scheduling of said lots, one-half to himself and one-half to the heirs of Blackstone, after considering each step taken relating to the land, used the following language:

"It would therefore appear that the possessory right to the lots and the improvements were owned by the copartnership as such, and not by the members of the firm individually, when the original schedule of Vian was being made. This conclusion is supported by the fact that the lots were originally scheduled, as above stated, to 'Clarence W. Turner and Nip Blackstone'; this being the usual manner of scheduling lots to a copartnership."

The Commissioner, however, ordered that the lots be scheduled to Clarence W. Turner and the heirs of Pleasant N. Blackstone. On February 10, 1908, Turner appealed from this order. On July 18, 1908, the Acting Commissioner of the Department of Indian Affairs decided the contest in favor of Turner, and used the following language:

"The office does not concur in your recommendation that the above lots should be scheduled to 'Clarence W. Turner and the heirs of Pleasant N. Blackstone,' but direct that above lots be scheduled 'Clarence W. Turner and Pleasant N. Blackstone,' an undivided one-half interest in each as members of the firm of Blackstone & Co.; and it is so ordered."

No appeal was taken from this order. On August 27th the Commissioner of the Five Civilized Tribes asked the Secretary of Indian Affairs for instructions regarding the wording of the granting clause in the patent conveying the lots in controversy as directed in above order. On September 6, 1908, the Secretary of Indian Affairs suggested that the patent read, "To Clarence W. Turner and the heirs of Pleasant N. Blackstone." On September 24, 1908, the attorney for Turner protested against the suggestion, and on January 5, 1910, the heirs of Blackstone protested against the request of Turner as to the wording of the deed. On January 25, 1910, Baggs' (who represented Turner) letter, was transmitted to the Secretary of the Interior, with certain explanations and recommendations. On February 19, 1910,

Frank Pierce, Assistant Commissioner, advised the Commissioner of Indian Affairs and directed the form to be used in preparing the patent, and used the following language:

"In the matter of the issuance of deeds of certain lots in the town of Vian, Cherokee Nation, Okl., originally scheduled to Clarence W. Turner and Pleasant N. Blackstone, known as Blackstone & Co., concerning which you wrote the department, under date of January 25, 1910, you are authorized to direct the Commissioner to the Five Civilized Tribes to make the deeds to Clarence W. Turner, as, and in the capacity of, surviving partner of the firm composed of said Clarence W. Turner and Pleasant N. Blackstone (now deceased), doing business under the firm name and style of Blackstone & Co.

"This is believed to be preferable to the plan suggested in your letter. It conveys the land to the surviving partner as such, charged with the usual trust imposed on one in that capacity. It avoids the anomaly of conveying an undivided interest to a person not living at the time of conveyance."

[3] On April 15, 1910, the heirs of Blackstone filed a motion for a reconsideration of order dated February 19, 1910. Very extensive briefs were filed on both sides, and the cause was assigned for oral argument before Frank Pierce, First Assistant Secretary, and he rendered his decision herein on July 29, 1910. The decision was quite lengthy, and recited the contention of the heirs of Blackstone, to wit: That Turner and Blackstone were tenants in common and did not own the improvements on the town lots, out of which the preference right to purchase accrued, as a partnership; therefore the deed should be executed to Turner and to the heirs of Blackstone, an undivided one-half interest in each. The Assistant Secretary, after reviewing the case, stated as follows:

"The record presented admits but one conclusion, and that is that the improvements were the property of Blackstone & Co. The preference right to purchase the lots therefore resided, not in Turner and Blackstone as individual persons, but in the partnership as an entity—a person."

And again the Commissioner stated:

"And as such 'person' the property stands scheduled to the firm at the full appraised value; thus clearly evincing the fact that Blackstone, an Indian who would have been entitled to take his share of the property at one-half the appraised value, was not merely a tenant in common."

The Commissioner then wrote:

"I see no reason to modify the order of February 19, 1910."

The answer and the evidence supplied the reason for scheduling the lots to the surviving partner, which this court said in the

former opinion stated the record was silent upon that question.

The law of the case, announced upon a demurrer to a petition, cannot prevent the pleading of a different state of facts in the answer that would make the law as announced upon the demurrer inapplicable.

The next question presented is that the court erred in holding that the property in controversy was the property of Blackstone & Co. This raises a question of fact, and the exact question decided by the department that issued the deed. John G. Wright, the Commissioner of Indian Affairs, first had under consideration this fact, and decided that the improvements placed upon the lots were partnership property of Blackstone & Co., but decided the lots should be scheduled to the parties as individuals. The Secretary of Indian Affairs likewise held the improvements were partnership property, but reversed the holding that the lots should be scheduled to the individuals, but held they should be scheduled to the partnership. The matter was then considered by Frank Pierce, First Assistant Secretary, and he likewise held that the property was partnership property and the lots should be so scheduled. The rule announced in *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800, stated:

"The decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question."

Supporting this decision is the case of *Heath v. Wallace*, 138 U. S. 572, 11 Sup. Ct. 380, 34 L. Ed. 1063; *Colbert v. Patterson*, 201 Pac. 256 (not officially reported, decided September 13, 1921); *Ross v. Stewart*, 25 Okl. 611, 106 Pac. 870; *Id.*, 227 U. S. 530, 33 Sup. Ct. 345, 57 L. Ed. 626. This question of fact was likewise decided in the same way by the trial court in this case. An examination of the evidence falls to disclose that this finding is clearly against the weight of the evidence, if we should consider the findings of the department not binding.

It is next contended that Turner had no right, as surviving partner, to convey the land, and there was no competent evidence that it was sold for the purpose of applying the proceeds on the debts of the partnership.

The rule in 20 R. C. L. 994, is as follows:

"Since real estate belonging to a partnership is considered as personality for the purpose of paying the debts of a firm and the settlement of its affairs, a surviving partner, as between himself and the heirs of the deceased partner, has a right to sell the real estate belonging to the firm in the same manner as if it were personal estate. This right extends to all real estate of

the partnership in whosoever name the legal title may have been, when such sale is necessary for the purposes of paying and discharging the liabilities of the firm and settling the partnership accounts, including any balance due him. Although the surviving partner alone cannot transfer a legal title to partnership realty, a deed by him nevertheless will operate to transfer the equitable interest of the firm to the purchaser, who may then compel a conveyance from the heirs of the deceased partner."

[4] The court in the instant case found this to be partnership property; second, that the partnership was indebted; third, that the same was sold to pay the debts of the partnership, although the full purchase price was not paid. It was testified that what was paid was paid upon the account by the partnership firm. While the evidence is not very satisfactory, there is no evidence to the contrary, and we are unable to say that the findings of the court upon these questions are clearly against the weight of the evidence.

The heirs, or a portion of them, have disposed of their interest to James A. Smith and Milton Thompson, and are asking that the title of Kennedy to an undivided one-half interest in the land be held in trust for them. Whether the title conveyed by Turner is sufficient to convey a legal title is unnecessary for us to determine, nor can the accounting between Turner and the administrator be determined, for the reason Turner is not a party to this action; but the plaintiff, Smith, and Thompson and the heirs are not entitled, under the facts, to have whatever title is in Kennedy to be held in trust for them.

The judgment, in so far as it is in conformity with this opinion, is affirmed.

HARRISON, C. J., and JOHNSON, ELTING, and KENNAMER, JJ., concur.

(86 Okl. 198)

SOSBEE v. CLARK. (No. 10664.)

(Supreme Court of Oklahoma. June 6, 1922.)

(Syllabus by the Court.)

1. Contracts §22(1)—Offer does not become binding promise until accepted.

Before an offer can become a binding promise and result in a contract, it must be accepted, either by word or act, for without this there cannot be an agreement.

2. Frauds, statute of §53—Year within which oral contract is to be performed within statute did not begin to run until contract actually agreed to.

In determining whether or not a contract is to be performed within a year from the time of making it, the year does not begin to run until the contract is actually agreed to by both of the parties.

3. Frauds, statute of §51—Continuing contract which may be terminated at any time by either party not within statute.

An oral agreement may be a continuing contract and extend for more than one year and not be within the statute of frauds, if the contract may be terminated at any time by either party.

4. Trial §139(1)—Sustaining demurrer to evidence reversible error where plaintiff proves facts sufficient to entitle him to recover.

Where, on the trial of a case, the plaintiff proves facts sufficient to entitle him to recover as against the defendant, it is reversible error for the trial court to sustain a demurrer to the evidence.

Appeal from Superior Court, Muskogee County; Guy F. Nelson, Judge.

Action by J. W. Sosbee against J. L. Clark. From an adverse judgment, plaintiff appeals. Reversed and remanded, with instructions.

William Neff and L. E. Neff, both of Muskogee, for plaintiff in error.

Glenn Alcorn and R. M. DeWitt, both of Muskogee, for defendant in error.

MILLER, J. This action was instituted in the city court of Muskogee by plaintiff in error, as plaintiff, against the defendant in error, as defendant, to recover \$225 on a contract. Judgment was rendered in the city court in favor of the plaintiff, and the defendant appealed to the superior court of Muskogee county, Okl. When the case was called for trial in the superior court, a jury was duly impaneled and sworn to try the cause. At the conclusion of the introduction of plaintiff's evidence, the defendant demurred to the evidence, which demurrer was by the court sustained and judgment rendered against the plaintiff. He perfected this appeal to reverse the judgment of the trial court and appears here as plaintiff in error. For convenience the parties will be referred to as they appeared in the trial court.

Plaintiff sets out four assignments of error, and then says:

"These assignments of error present but a single question, and that is whether the contract sued upon was void under the statute of frauds."

The bill of particulars, omitting the prayer, reads as follows:

"The plaintiff for his bill of particulars states that he is a practicing physician and that he moved to Webbers Falls, Okl., by reason of an agreement made by the defendant that he would pay him \$100 per year as long as he remained at Webbers Falls, that defendant has paid plaintiff \$75 pursuant to said agreement, and owes plaintiff a balance of \$225 for the years 1915, 1916, and 1917."

To this bill of particulars, the defendant filed the following answer:

"Comes the defendant, J. L. Clark, and for answer to the bill of particulars denies each and every allegation thereof as therein pleaded. Defendant says he has already paid all he agreed to pay, and that the defendant is not due the plaintiff any sum whatever.

"Further answering, the defendant states that such an alleged contract as pleaded in plaintiff's petition is a violation of subdivision 1, § 941, Revised Statutes of 1910, the same being the statute of frauds."

The plaintiff testified that the proposition made by defendant which plaintiff subsequently accepted and relies upon was as follows:

"A. Mr. Clark says: 'If you will move to Webbers Falls, I will give you one hundred dollars a year to do my practice, if I never take a dose of your medicine; besides, I will move you free of charge.'"

The defendant contends that under this statement the agreement was not to be performed within a year; that the plaintiff under this promise was required not only to move to Webbers Falls, but, after so doing, to do a full year's practice, or be ready to do the same, before he could lay claim to the \$100; that therefore this contract falls squarely within the first subdivision of section 941, Revised Laws of Oklahoma 1910, which reads as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: First. An agreement that, by its terms, is not to be performed within a year from the making thereof."

Defendant insists the contract was made when the proposition was made by defendant to plaintiff, and that some time elapsed after the making of the contract before the plaintiff moved to Webbers Falls, and the year did not begin to run until the plaintiff moved to Webbers Falls, and defendant cites a number of authorities which he claims support his theory that the contract is void under the statute of frauds. It will be sufficient to refer to two of them.

In *Chase v. Hinkley*, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328, the court said:

"Respondent testified quite positively that the agreement was made October 29, 1908, for services to be rendered for the period of one year, commencing on the first day of November following. The testimony of appellant in respect to the matter, by itself, left the date of the agreement in considerable doubt. In that situation the trial court concluded as well it might have that the contract was by its terms not to be performed till the expiration of one year and two days from its date."

In *Snelling v. Lord Huntingfield*, 1 Crompton, M. & R. (English Courts of Exchequer) p. 20, the court said:

"The plaintiff apparently assents to the proposals made on the 20th, takes the writing with him, and enters into the service of the defendant on the 24th. Then, if there was a contract in fact upon the 20th, although by the statute of frauds, no action can be brought upon it, how can another contract be implied?"

In the case of *Chase v. Hinkley*, supra, the contract was actually made two days before it was to commence and was to run for a year. In the case of *Snelling v. Huntingfield*, supra, the court assumed the contract was made four days before it was to begin. In the case at bar the defendant assumes the contract was made when Clark first made the proposal, but the evidence clearly shows that it was not made at that time. The demurrer admits the evidence to be true. Dr. Sosbee testified that Clark made the first proposition to him at Webbers Falls. A few days later he renewed the proposition at the depot of the Iron Mountain Railroad at Gore. It is clear that he did not accept the proposition when first made or defendant Clark would not have renewed it at Gore. In referring to this conversation, Dr. Sosbee stated: "A. I told him I expected I would take him up." This does not constitute an acceptance of a contract. It clearly denotes that the mind has not fully reached a decision.

[1.2] A few days after the conversation at Gore, Dr. Sosbee called Clark over the telephone and asked him about getting a house at Webbers Falls. Clark told him there was a house available and for him to come over and look at it. The exact date Dr. Sosbee accepted Clark's proposition is not shown. Clark's proposition did not constitute a contract until accepted.

In 13 Corpus Juris, p. 272, the text reads:

"Before an offer can become a binding promise and result in a contract, it must be accepted, either by word or act, for without this there cannot be agreement. Nor is a promise binding on its maker unless the promisee has assented to it."

In *Lemp Brewing Co. v. Secor*, 21 Okl. 537, 96 Pac. 636, the third paragraph of the syllabus reads:

"An 'assent' is evidenced by a proposition emanating from one side, and an acceptance of it on the other, such proposition and acceptance together constituting what is called a 'meeting of the minds'; and, where the proof fails to show that there was a 'meeting of the minds' in the making of a contract, such contract does not become effective."

In *Atwood v. Rose et al.*, 32 Okl. 355, 122 Pac. 929, paragraph 6 of the syllabus reads:

"No contract is complete without the mutual assent of all the necessary parties to all its terms."

[3] Under the facts disclosed by the evidence in this case, the contract was not void because within the statute of frauds. Under the terms of the contract, as testified to by Dr. Sosbee, it was a continuing contract, and the fact that it continued for more than a year did not bring it within the statute of frauds because it could have been terminated by either party at any time.

In *Mellon v. Fulton*, 22 Okl. 636, 98 Pac. 911, 19 L. R. A. (N. S.) 960, this court said:

"Hence we say that under the testimony the item was a proper charge in estimating the worth of plaintiff's services under the general employment found by the referee to exist, and to have failed to regard it would have been wrong. It was not disputed that such service was reasonably worth \$60 per year, or \$300 for five years, charged in plaintiff's account, and, as we are of the opinion that the finding is reasonably supported by the evidence, we do not think the court erred in overruling defendant's exception to it.

"As there was nothing in this arrangement to prevent either party from terminating the retainer at any time, we do not think the contract was within the statute of frauds as one not to be performed in one year, as urged by plaintiff in error. 29 Am. & Eng. Enc. of Law (2d Ed.) 952."

[4] The trial court committed reversible error in sustaining the demurrer to the evidence. The judgment of the trial court is reversed, and this action is remanded to the superior court of Muskogee county, with instructions to grant a new trial.

JOHNSON, McNEILL, ELTING, KENNA-MER, and NICHOLSON, JJ., concur.

(86 Okl. 216)

ST. LOUIS SMELTING & REFINING CO.
et al. v. **STATE INDUSTRIAL COMMISSION** et al. (No. 12957.)

(Supreme Court of Oklahoma. June 13, 1922.)

(Syllabus by the Court.)

1. Master and servant §417(7)—Industrial Commission's finding of fact conclusive under Compensation Act.

In a suit instituted in this court to review an award of the State Industrial Commission, the suit must be to review an error of law, and not an error of fact. The decision as to all matters of fact is final. *Held*, that the appeal herein involves a question of fact, and not an error of law.

2. Master and servant §416—Finding as to notice of compensable injury held unnecessary.

When, on the hearing of a complaint filed by an employee under the Workmen's Compensa-

tion Act, no objection is made that such employee failed to give notice of his injury to the employer, it is unnecessary for the State Industrial Commission to make any finding upon that question or in any way excuse the failure to give such notice.

3. Master and servant §385(16)—Medical treatment not allowable as compensation without request.

Where the complainant fails to comply with the provisions of section 4, art. 2, c. 246, Session Laws 1915, the Workmen's Compensation Law, claimant is not entitled to recover for expenses for medical treatment.

Appeal from the Order of the Industrial Commission.

Proceeding by William A. Simpson under the Workmen's Compensation Act, for compensation for injuries, opposed by the St. Louis Smelting & Refining Company, employer, and the Ocean Accident & Guarantee Corporation, insurance carrier. Award for complainant by the State Industrial Commission, and the employer and the insurance carrier brought an action to reverse the commission's order. Affirmed in part and reversed in part.

Harris, Spielman & Harris and Paul G. Darrough, all of Oklahoma City, for petitioners.

Rainey & Flynn, of Oklahoma City, for claimant.

McNEILL, J. This action was commenced on behalf of the St. Louis Smelting & Refining Company, employer, and Ocean Accident & Guarantee Corporation, insurance carrier, against the State Industrial Commission and William A. Simpson, to reverse an order of the Commission wherein the Commission awarded Simpson \$12.98 per week beginning December 21, 1920, and continuing weekly until the termination of disability, or until otherwise ordered by the Commission, and to pay all medical expenses incurred by claimant as the result of the accident.

[1] For reversal it is first contended the Commission committed error in finding there was a temporary total disability. The claimant testified he was unable to work. He testified after the injury he worked until December, and the foreman favored him in his work until he got so bad he could not work any longer. The foreman testified during the time claimant worked after the accident he appeared to work under difficulty. There being evidence in the record to support this finding, the appeal involves a question of fact, and not a question of law. Under and by virtue of section 10, c. 14, Sess. Laws 1919, as construed by this court in the case of *Wilson Lumber Co. v. Wilson*, 77 Okl. 312, 188 Pac. 666, the finding of the Commission on questions of fact is conclusive.

[2] It is next contended that the award of the Commission is improper because written notice of the injury was not filed nor given to the employer until 12 months after the alleged accident, and no excuse was found by the Commission for failure to give said notice. This question was not presented to the Commission, and no objection made at the hearing before the Commission that the employer did not have written notice of the accident. Having failed to make any objection before the Industrial Commission to said award on the ground of not receiving written notice, the employer will be deemed to have waived said notice. See Consolidated Fuel Co. v. State Industrial Commission (Okl. Sup.) 205 Pac. 170; Okmulgee Democrat Pub. Co. v. State Industrial Commission (Okl. Sup.) 208 Pac. 249. The evidence disclosed the foreman had notice and knew of the injury, and knew the condition the claimant was working under after the accident. Commission made a finding that the employer had proper notice. This was unnecessary, but is sufficient when no objection was made to the Commission regarding the failure to give the notice.

[3] The third contention is that the award by the Industrial Commission requiring the employer to pay all medical expense as the result of said accident is erroneous, under the facts in this case. This was error, in view of the holding of this court in the case of Okmulgee Democrat Publishing Co. v. State Industrial Commission, supra, and it is conceded by the claimant.

The order of the Commission and the award is therefore modified to exclude the payment of medical expenses; otherwise the same is affirmed.

JOHNSON, MILLER, ELTING, KENNAMER, and NICHOLSON, JJ., concur.

(85 Okl. 230)

JACKSON v. CARROLL et al. (No. 10360.)

(Supreme Court of Oklahoma. Feb. 21, 1922.
Rehearing Denied June 13, 1922.)

(Syllabus by the Court.)

1. Guardian and ward \S 108—Where joint guardian's petition, order to sell, notice of sale return, and confirmation do not specify the separate tracts of the three minors, the sale is a nullity.

A joint guardian over three minors, each minor being a Chickasaw freedman and each owning an allotment, makes application to a county court for an order to sell the three allotments, and in said petition does not set out the tract of each particular ward, nor the lands of each, which it is asked for an order to sell, but lumps the three allotments to-

gether, and asks for an order to sell them as the lands of the three minors. The court makes an order directing the sale in the same manner, not designating the separate tract of the minors, and the notice of sale does not advertise the lands separately as the lands of each ward; the return of sale shows that the lands were sold for a lump sum without designating the separate tracts of each minor and the amount each brought. In fact, they were not sold separately. The order confirming said sale upon said return confirmed said sale as one tract for a lump sum, and the deed by the guardian to the purchaser was made in the same manner. *Held*, that such proceeding is an absolute nullity, and conveys no title of the wards in and to said lands.

2. Guardian and ward \S 108—A record of sale of minors' land, void upon its face, binds no one.

A record, showing the manner of conducting said sale, as set forth in the first paragraph of the syllabus herein, is what is called "void upon its face," and binds no one, and all who deal in said lands under said purported sale take with notice of all that said record shows.

3. Appeal and error \S 1176(1)—Where judgment was erroneously rendered and only questions of unmixed law are involved, the Supreme Court may direct a judgment rather than a new trial.

Where it appears that the court committed prejudicial error in directing and rendering the judgment rendered, and only questions of unmixed law are involved, and the record of the court discloses what judgment should have been rendered, this court will not reverse and remand said cause for another trial, but will reverse and remand said cause, with instructions to the trial court to render the judgment which it properly should have rendered. *First Nat. Bank of Soper v. Beecher*, 62 Okl. 36, 161 Pac. 327.

On Petition for Rehearing.

4. Judgment \S 489—A judgment is void and subject to collateral attack to the extent that the court was without jurisdiction.

Where the record in a case affirmatively discloses the facts to be such that the court rendering judgment is without power in such case to make the order or decree it assumes to make, the same is void, and therefore subject to collateral attack for want of jurisdiction to the extent at least that such court is without power to make the same.

5. Judicial sales \S 50(1)—Purchaser is chargeable with notice of facts appearing in title papers and with knowledge of all facts suggested therein of which he might have acquired knowledge.

A purchaser of land must look to the title papers under which he purchases, and is chargeable with notice of the facts appearing upon their face; also a knowledge of all the facts suggested therein, and which he might, with the exercise of reasonable prudence and diligence, have ascertained; and hence a purchaser at a judicial sale not only takes with

notice of what is shown upon the face of the proceeding and in the manner and scope as defined herein, but in addition thereto of all facts shown by any record which in law the purchaser is required to take notice.

6. Judicial sales \S 50(1)—Purchaser obtaining clear legal paper title also obtains an equity superior to any equity in favor of the seller.

If the record of a judicial sale shows a legal title upon its face, together with all other records which the law requires a purchaser to take notice, and the purchaser has no actual notice of any fact that impeaches and destroys the validity of the record title (we mean by "actual notice" such actual notice as defined in the quotation in this opinion from the case of *Creek Land & Improvement Co. v. Davis*, 28 Okl. 579, 115 Pac. 468, herein cited and quoted), and in addition thereto the purchaser has paid a consideration for his title, then the purchaser has a right to stand upon his title, notwithstanding the title may in fact and in truth be fraudulent, void, or a nullity as between the parties and all persons with notice, actual or constructive. The law does not give this to the purchaser because he holds a legal title, but because he had a right to rely upon a record showing a legal title, and upon the strength of that record he parted with a consideration, and this gives him, in addition to a clear legal paper title, an equity, which public policy holds to be superior to any equity which may exist in favor of the seller. *German Savings, etc., Society v. De Lashmutter* (C. C.) 67 Fed. 399.

7. Judicial sales \S 50(1)—Sale involving breach of owners' substantial right is void against all who take with actual or constructive notice.

A sale proceeding, which involves a breach of a substantial right of the owner as distinguished from a breach of a pure remedy or a right of procedure, is void as against all who take with notice either actual or constructive.

8. Courts \S 93(1)—Repeated decisions of inferior courts do not settle the law, and that the parties may have accepted them in good faith does not preclude the highest court from announcing a contrary rule.

No such finality attaches to the decisions of the inferior or intermediate courts that they can be considered as establishing a rule of property, however uniform their course of decisions or however long continued. No question of law is finally settled until it has been determined by the court of last resort. It is of the essence of the theory of rules of property that the members of the community have (or may be supposed to have) taken titles, invested money, and regulated their business dealings in reliance on a judicial decision or decisions which they had a right to regard as a final and authoritative statement of the law which should govern them. If such action has been taken by interested parties on the faith of a decision of a lower court merely, this should not in any way bind or preclude the highest court, when the question is presented

to it, from announcing a contrary rule, if that is deemed more correct.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Suit by Riley Jackson against J. S. Carroll and others. Judgment for the defendants quieting title and removing cloud from land. Plaintiff's motion for a new trial was overruled, and plaintiff appeals. Reversed and remanded, with directions.

Sigler & Jackson, of Ardmore, for plaintiff in error.

Charles A. Coakley and Thomas Norman, both of Ardmore, for defendants in error.

ELTING, J. This suit was commenced in the district court of Carter county, Okla., by Riley Jackson against J. S. Carroll and others, setting up that he was the owner and entitled to immediate possession of the southwest quarter of the northwest quarter of section 29, township 3 south, range 1 west.

There are three counts in his petition: First, an action for ejectment; second, in the nature of an action to quiet title; third, for recovery of rents for the wrongful dispossession of said lands for a period of six years at \$100 per year.

In his petition, Riley Jackson alleges in substance that he is a Chickasaw freedman, and that said lands were his distributive share as an allottee of the Chickasaw Nation, and sets forth a copy of his patent to said lands.

J. S. Carroll, defendant, filed answer denying the allegations of the plaintiff's petition, and sets up by way of affirmative defense that he (J. S. Carroll) is the owner in fee-simple title of the lands sued for by plaintiff, and claims said title by reason of a guardian's deed dated July 8, 1912, from Ben Wright, the duly appointed, qualified, and acting guardian of Riley Jackson, Lidia O. Jackson, and Andrew Butler, then alleges the due recordation of the said deed, and that he had collected the rents and profits, paid the taxes, and made valuable improvements thereon by greater buildings, cultivation, and otherwise reclaiming said land to the amount of \$2,000, asking that title be quieted in him and for all necessary relief, and attached as an exhibit to his answer a copy of the guardian's deed.

To this answer Riley Jackson filed a reply, denying each and every allegation of defendant's answer so far as the same does not admit the allegations of his petition, denying that Ben Wright was ever the guardian of the plaintiff, denying that the court had authorized Ben Wright to sell the land mentioned in plaintiff's petition, and denying that any of the matters were ever

authorized by a court having jurisdiction of said matter.

Plaintiff alleged further that he is informed and believes that a purported order appointing Ben Wright as a guardian was made in the county court of Carter county, and that said order was void and of no effect; that at the time of said purported appointment the plaintiff was in the penitentiary at McAlester, Okl.; that he never signed a waiver, and never nominated Ben Wright as a guardian, and no notice was ever served upon him of said proceeding, and that the same was without his knowledge or consent, and that Carroll had entered into a conspiracy with Ben Wright, the purported guardian, to cheat and defraud this plaintiff out of his property, and that Carroll had Wright appointed with a view of purchasing said lands at fraudulent sale; that he never paid the guardian the consideration for said lands only through a fraudulent devise and a purchase by the guardian of worthless property from the defendant Carroll; that Carroll had signed the bonds necessary for Wright to make, and Carroll had Wright immediately upon his appointment institute proceedings with a view to carry out said fraudulent sale. Alleging, furthermore, that the plaintiff, at the time of the purported appointment of Ben Wright as his guardian, was more than 15 years of age, and that he was entitled to notice of said proceeding and entitled to nominate his own guardian. In substance, alleging that said sale was void: First, for fraud perpetrated by the purchaser in securing the appointment and the sale; and, second, because the appointment of the guardian was void by reason of failure to give the notice as required by law to the plaintiff.

A jury was waived, and the cause proceeded to trial before the court. The court, after hearing the evidence, rendered a judgment in favor of the defendant J. S. Carroll, quieting title in him and removing cloud from title, and enjoining Riley Jackson from claiming or asserting any right, title, or interest in said estate.

Motion for a new trial was filed and the same overruled by the court, and appeal lodged in this court by Riley Jackson, plaintiff below, plaintiff in error herein.

There is attached to the evidence in the case made a copy of the petition of the appointment of the guardian, the waiver of the mother of the plaintiff; a written nomination by Andrew Butler of Ben Wright to be his guardian; order appointing Ben Wright as the joint guardian of Riley Jackson, Lidia O. Jackson, and Andrew Butler; oath of guardian; guardian's bond; signed by Ben Wright, Clyde Johnson, and J. S. Carroll; letters of guardianship; petition to sell real estate; order for hearing petition to sell real estate; an appraisal of the lands

of the three minors; the bid of J. S. Carroll in writing; return of sale; order confirming sale; guardian's deed by Ben Wright to J. S. Carroll; an order of the county judge, directing guardian to buy a team for \$225 and credit the same on the purchase of the land, and an order directing Ben Wright to loan J. S. Carroll \$200 on a first real estate mortgage.

An examination of the record in this case leads this court to conclude that this sale is void absolutely upon the face of the proceeding and for reasons other than the fraud alleged and contended for by plaintiff in error and other than upon the grounds of the voidness of the proceedings by reason of failure to give the plaintiff in error notice of the proceeding for the appointment of a guardian. These last two being the questions specifically raised by the plaintiff in error in his motion for a new trial, and the overruling of which contentions by the trial court is assigned as error in this court.

It is true that the grounds upon which we reverse this case and direct judgment for the plaintiff in error were not raised by the plaintiff in error in this court, but we hold that this court has authority to review this record, and either direct or render judgment such as the record discloses that the trial court should have rendered in the first instance.

In the case of First Nat. Bank of Soper v. Beecher, 62 Okl. 36, 161 Pac. 327, the third syllabus reads as follows:

"Where it appears that the court committed prejudicial error in directing and rendering the judgment rendered, and only questions of unmixed law are involved, and the record of the court discloses what judgment should have been rendered, this court will not reverse and remand the cause, for another trial, but will reverse and remand said cause, with instructions to the trial court to render the judgment which it properly should have rendered."

To the same effect is *Andrews v. Thayer*, 171 Pac. 1117, and numerous other decisions by this court.

[1] We will now proceed to set forth our reasons why this record discloses that the sale is void upon its face, and that the guardian's deed is an absolute nullity.

The petition for the appointment of a guardian, signed by Ben Wright, asks that he be appointed the guardian of Riley Jackson, Lidia O. Jackson, and Andrew Butler, minors, in Carter county, Okl., and that they are of the ages of 17, 12, and 15 years, respectively. The petition for appointment further alleges: That as Chickasaw freedmen the said minors had lands allotted to them as follows: To Riley Jackson the lands heretofore described in the statement of the case and being the lands in controversy in this case; and to Andrew Butler, the southwest quarter of the southwest quarter of section 20; and to Lidia O. Jackson, the

northwest quarter of the northwest quarter of section 29, township 8 south, range 1 west. That after Ben Wright was appointed guardian of these three minors and on, to wit, March 25, 1912, he filed a petition to sell the real estate of the three minors. In said petition, after alleging that the personal property of said wards consisted of nothing, alleged the following:

"That the said wards owned the following real estate of the approximate value of \$1,200, to wit."

Then describes the three allotments heretofore designated. The order of sale does not appear to be in the record. The return of sale shows, however, the following recital:

"Comes now Ben Wright, guardian of the estate of said above-named minors, and shows to the court that pursuant to the decree of the court entered herein on the 24th day of April, 1912, authorizing him as such guardian to sell all of the real estate belonging to said above-named minors hereinafter described, he caused public notice to be given as provided by law and said order by publication in the Ardmore Statesman for four consecutive weeks and by posting three notices thereof that he would, on the 25th day of June, 1912, at the hour of 2 p. m., sell to the highest bidder, subject to confirmation by said court, said described lands; that on the 25th day of June, 1912, he sold said real estate, to wit, 'S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 20, and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 29, and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 29, all in township 3 south' and range 1 west, to J. S. Carroll for the sum of \$1,200 on the following terms, to wit, cash on delivery of deed; that said J. S. Carroll was the highest bidder therefor, and said sum of \$1,200 the highest and best sum bid, and that said sum of \$1,200 is not disproportionate to the value of said property. Wherefore said Ben Wright prays the court to enter its order setting said return for hearing, and that upon said hearing being had he be directed to execute a proper conveyance thereof to said purchaser.

"Dated this 25th day of June, 1912.

"Ben Wright."

It appearing from this return of sale that the three allotments as directed by the order of the court were sold to J. S. Carroll in one tract for the lump sum of \$1,200, on the 8th day of June, 1912, the county judge confirmed said sale of said three allotments for the sum of \$1,200 to J. S. Carroll, and directed deed by guardian to J. S. Carroll to said lands, and on the 8th day of July, 1912, the guardian made a deed of said allotments in one tract for a lump sum of \$1,200 to J. S. Carroll.

The notice of sale in this sale proceeding is not in the record, but we have a right to conclude from the recitals in the return of sale that the advertisements and notice of sale was of the sale of the land in one tract, and not as separate tracts. We hold that each tract should have been sold separately,

and, if not advertised in separate advertisements, they should have been separated in the same advertisement or notice of sale.

The provisions of the statute as to the kinds of notice of sale that is required, whether at public or private sale, requires that the lands and tenements to be sold must be described with common certainty in the notice. This, of course, has reference to the lands belonging to each particular ward. A portion of the first syllabus of the case of Perkins et al. v. Middleton et al. (Okla. Sup.) 166 Pac. 1104, reads as follows:

"The authority of a guardian to sell and convey the real estate of his ward rests entirely upon the statutes. Such real estate cannot be sold or conveyed by the guardian except for the purposes and upon the terms and conditions prescribed by the statute."

This is, to say the least of it, a very unusual proceeding, and one that has been probably but rarely resorted to, and hence the occasions for courts to pass upon the legality of the same have been very rare. After considerable search we have been unable to find any case where any court has directly passed upon this question, but as a proceeding it is so out of consonance with any elementary sense of right and proper legal principles and procedure that we think citation of authority is unnecessary.

These tracts of land were the individual property of each of these minors. Neither minor had any interest in the tract that belonged to the other minor. Their interest not being joint or common, it is absurd to contend that a court or its agent had authority to hotchpotch these three allotments in one sale and sell them as one tract and for a lump sum without separating and designating the interests of each ward and the particular tract that was its individual property and advertising each particular tract upon its particular merits and disposing of each upon its special intrinsic value. They were sold as a joint interest when in fact and in truth their interests were several, and a guardianship court or its agent, the guardian, has no authority under our statutes for such procedure, and such a sale is in absolute disregard of the fundamental rights of the respective wards and their several special interests, that this sale must be held void.

It is true that the appraisal filed in this record shows that each separate tract was appraised at \$350, and that the lump sum received for the three combined tracts sold for \$150 in excess of their combined appraisal. We conclude from this record that this was a sale at private sale, under the order of the court, and which requires an appraisal. But the object of the appraisal is to fix a standard below which the lands cannot be legally sold; the statute fixing the per cent. of the appraisal,

which the land must bring before it can be a legal sale.

There is no way to tell what any particular tract brought nor what value the purchaser placed upon each particular tract. What each particular tract possessed of intrinsic merit and which would appeal to a purchaser each ward was entitled to and each ward was entitled to have its property sold separate and upon the particular merits of his tract of land and to no more and no less.

To divide the proceeds of this sale equally between the three minors is not to say that he has a just distribution of what his property would bring under a free, fair, and independent sale of its particular interests.

To repeat, this is such an anomalous and unusual procedure that decisions upon the proposition seem to be very rare.

The eighth paragraph of 21 Cyc. 37, reads as follows:

"Subject to the qualifications just noticed that no conflict of property interest shall exist between the guardian and his ward. A guardian may be appointed for more than one ward. Thus where several wards hold by a common title, one guardian may be appointed to act for all"

—and under said paragraph the case of *Pursley v. Hayes*, 22 Iowa, 11, 92 Am. Dec. 350, is cited. We take the following from the body of the last-cited case from pages 30 and 31 of 22 Iowa, from pages 365 and 366 of 92 Am. Dec.:

"Next is the objection that the guardian was appointed for the wards jointly, and the bonds are for their security in the same manner. The record discloses that these lands constituted the entire property of these minors. Each ward did not have property in his own right distinct from the others. They all held by a common title as tenants in common. And certainly nothing has been more common in our practice than to appoint one guardian for all minors thus interested, and no rule of the statute can be found forbidding it. True, the guardian ought to keep his account with each ward separate and distinct. And this is all that is held in this respect in the case of *Foteaux v. Lepage*, 6 Iowa, 123, to which counsel so frequently refer. But a failure on the part of the guardian to comply with his duty in this respect would not invalidate a title held under a sale made by him. And we may be allowed to add that, where property is held as in this instance, economy and a sound discretion would dictate that the trust should be imposed upon one instead of upon several persons. We fail to see any legal or reasonable objection to such a practice."

In the cited and quoted case they sustain the joint appointment and the sale on the grounds that the wards had a joint interest in the property. But by strong inference this case holds that if the wards had been held by a several ownership they would not have so held.

We have examined also the case of *Fote-*

aux v. Lepage, 6 Iowa, 123, and cited in the quotation given. This last-cited case seems to have involved a question where the guardian had merged the accounts of his wards for whom he was joint guardian, holding that the accounts should have been separated and holding a joint judgment valid.

It is possible that the interests in lands of two or more minors might be properly and legally sold and carried through in one proceeding, but that would, in effect, if properly conducted, be three separate and distinct proceedings carried on at one and the same time and might be quite difficult and hazardous to undertake. But such a proceeding as is disclosed by the record in the instant case we are compelled to hold to be a nullity, and the same is shown upon the face of the proceeding.

The following is taken from *Pettis v. Johnston*, 78 Okl. 285, 190 Pac. 689:

"A judgment void on its face may be vacated upon motion, no matter what length of time has interposed since its rendition; neither is it necessary for the movant to show any meritorious defense, nor can the court impose any conditions for vacating it. See long list of cases in annotation to *Furman v. Furman*, 60 Am. St. Rep. 642, 643; *Blyth & Fargo Co. v. Swenson*, 15 Utah, 345, 49 Pac. 1027; *Harris v. Hardeman*, 14 How. 337, 14 L. Ed. 444; *Condit v. Condit*, 168 Pac. 456."

The tenth syllabus of *Pettis v. Johnston*, supra, reads as follows:

"A judgment which is void upon its face, and requires only an inspection of the judgment roll to demonstrate its want of validity, is a 'dead limb upon the judicial tree, which may be lopped off at any time;' it can bear no fruit to the plaintiff, but is a constant menace to the defendant, and may be vacated by the court rendering it 'at any time on motion of a party or any person affected thereby,' either before or after the expiration of three years from the rendition of such void judgment. Such motion is unhampered by a limitation of time."

[2] A guardianship proceeding for the sale of a ward's real estate, void upon its face, or, in other words, the record of the proceeding, shows that it was in contravention of the essential terms, conditions, and purposes of the statutes, and is so out of consonance with the policy and safeguards of the general law intended for the protection of the fundamental rights of the wards of probate courts that it binds no one and all who deal in such lands purported to be sold under such proceeding, does so at his peril, and at the risk of having the title declared void upon its face.

[3] This cause is therefore reversed and remanded, with directions to enter judgment for the lands sued for in favor of the plaintiff in error, *Riley Jackson*, and decree declaring the guardian's deed void and of no force and effect and canceling the same and

declaring the title to be in the plaintiff in error, Riley Jackson, and enjoining the defendant in error, and any one claiming by or through him, from claiming any right, title, or interest in and to said lands, and that the court proceed to determine the amount of rents and profits due the plaintiff in error, Riley Jackson, as against the defendant J. S. Carroll for the wrongful dispossession of said lands.

HARRISON, C. J., and JOHNSON, McNEILL, NICHOLSON, and KENNAMER, JJ., concur.

On Petition for Rehearing.

Sigler & Jackson, of Ardmore, for plaintiff in error.

Charles A. Coakley and Thomas Norman, both of Ardmore, for defendants in error.

Joseph C. Stone, Charles A. Moon, and Francis Stewart, all of Muskogee, Kenneth H. Lott, of Okemah, J. R. Cottingham, S. W. Hayes, George M. Green, B. E. McInnis, J. H. Everest, Ed. S. Vaught, and Phil D. Brewer, all of Oklahoma City, Thos. H. Wren, of Okemah, and A. G. Cochran, of Tulsa, amici curiæ.

ELTING, J. It is the contention of those favoring the petition for rehearing in this cause that, since the court had jurisdiction of the minor and of the subject-matter, any defects that afterwards arose in the proceeding were mere irregularities and were cured by an order of confirmation. They offer but one authority in support of the contention that this defect is a mere irregularity, and that is at the close of their brief, and this authority we hereinafter discuss.

The whole burden of the argument in the brief of the supporters of the petition for rehearing is devoted to an effort to show that the purchaser could not have had notice of these defects under the state of the record, and certainly if the defects complained of were mere irregularities (and we suppose they mean by irregularities, such as are defined in *Eaves v. Mullens*, 25 Okl. 679, 107 Pac. 433, hereinafter cited), then the fact that the purchaser had notice of these defects could not in any way affect his title, for the rule is that the owner cannot take advantage of irregularities as against a purchaser only by appeal of the proceeding, and in a proceeding such as is the one in the instant case as against irregularities it would make no difference whether the purchaser had notice or not, and we come to the conclusion that the supporters of the petition for rehearing in this case regard the defect in this proceeding something more than a mere irregularity; otherwise they would not be putting up such a strenuous contention on the question of notice as they are doing in this case.

[4] There are two propositions that the amici curiæ repeat in tiresome regularity, and that is that, the county court of Carter

county having jurisdiction of the guardian and of the subject-matter, any proceeding by the court thereafter could not be void and the other is that the defect, if any, was a mere irregularity.

We would infer that the proposition for which the supporters of the petition for rehearing contend is that, if the county court had jurisdiction of the ward and the subject-matter, then any act performed by the court thereafter would be a mere irregularity and not subject to a collateral attack. The following, however, is the true rule as found in 7 Ency. U. S. Sup. Court Reports, 626:

"Qualification of Rule.—It has been expressly held in several well-considered cases that the doctrine just set forth that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it. Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a judgment or decree which is not within the powers granted to it by law of its organization, its judgment or decree is void."

And following this is found this note:

"Qualification of Rule.—*Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914."

See *Windsor v. McVeigh*, 93 U. S. 274, 282 (23 L. Ed. 914) for the following:

"Though the court may possess jurisdiction of a cause, and of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law."

In the case of *Roth v. Union National Bank*, 58 Okl. 604, 160 Pac. 505, the court said:

"Where the record in a case affirmatively discloses the facts to be such that such court is without power in such case to make the order or decree it assumes to make, the same is void, and therefore subject to collateral attack for want of jurisdiction to the extent, at least, that such court is without power to make the same."

The same proposition is laid down in 5 R. C. L. 853.

Our conclusion is that the act of the county court and the guardian in selling these three separate individual allotments in the manner in which they were sold was such a proceeding as could only be had in a sale of a joint interest, and where the interest of the three minors attached to every part and parcel of the tract, we hold the sale to be void for the reason that it was against public policy

and the statute, and we do not care whether you designate the act void because in excess of statutory or constitutional jurisdiction of the county court or in excess of the inherent power of the county court. In either event, it is beyond the power of the court to direct or the guardian to perform without direction and the court to confirm such an act.

This holding was stated in substance in the original opinion, and there is nothing in the petition for rehearing or the brief in support thereof that has caused this court to change its attitude taken in the original opinion, and, to repeat, will state that the main argument and citation of authority in the brief and petition for rehearing is directed to show that the state of the record was not sufficient to bring notice home to the purchaser, the defendant in error J. S. Carroll.

[5] This court has passed upon various phases of fraud in the procurement of orders of confirmation and guardianship proceedings, stating when open to attack and when not; when void and when voidable; when irregularities and when nullities; when the purchaser takes with and when without notice, and when the purchaser becomes an innocent purchaser for value without notice and under what circumstances of the record a purchaser is an innocent purchaser without notice and for value; and some of said opinions being as follows: *Roth v. Union National Bank*, 58 Okl. 604, 160 Pac. 505; *Burton v. Compton*, 50 Okl. 365, 150 Pac. 1080; *Langley v. Ford*, 171 Pac. 471; *Adams Oil & Gas Co. v. Hudson*, 155 Pac. 220; *Winters v. Okla. Portland Cement Co.*, 164 Pac. 965; *Thomas v. Huddleston et al.*, 164 Pac. 106; *Perkins v. Middleton*, 166 Pac. 1105; *Griffin v. Culp*, 174 Pac. 495; *Allison v. Crummey*, 64 Okl. 20, 166 Pac. 691; *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *McCoy et al. v. Mayo*, 174 Pac. 491; *Gaines v. Montgomery*, 82 Okl. 275, 200 Pac. 219; *Levi Carlile v. Nat. O. & Dev. Co.*, 201 Pac. 377; *Tootle v. Payne*, 82 Okl. 178, 199 Pac. 201.

We think that a study of the legal propositions and the facts involved in the above-listed cases will make it reasonably clear as to when and when not and in what manner orders, judgments, and proceedings can be collaterally attacked and when they can and when they cannot be set aside. We are not going to take the time and space to analyze the various phases and legal propositions in the above list of cases. We may, however, analyze one or two of the propositions involved which are particularly applicable to the instant case before we are through.

From the reading of these cases we find it would be difficult to deduce a general principle that would be a test of when a proceeding is void and when only voidable, since such a variety of facts and circumstances arise in these proceedings. It is

almost impossible to find a general principle applying to all of them, and hence each case, like the tub, must stand upon its own bottom.

Attorneys, and even the courts, are in many instances inaccurate in the use of language; or probably the best way to state it is to say that in their use of language they are often misleading, and this arises from the fact that they often fail to state the scope that is intended to be given the language used. To illustrate, we say that a certain proceeding is void and a nullity and beyond the power or jurisdiction of the forum in which it was made, and, if such voidness appears upon the face of the proceeding, that the purchaser and his assigns and successors take no title. This is a true statement as far as it goes, but is misleading for the reason that it does not go far enough. A purchaser is not only bound by what is shown upon the face of the court proceeding, or judgment roll, but the purchaser and even the court is also bound to take notice of, not only the court record, but all other records that affect the title and rights of the parties involved in the proceedings, and which in law are held to be notice.

The following is the first and third syllabus of the case of *Creek Land & Improvement Co. v. Davis*, 28 Okl. 579, 115 Pac. 468:

"1. A purchaser of lands takes them with constructive notice of whatever appears in the conveyances which constitute his chain of title; and, if sufficient appears therein to put a prudent man on inquiry, which would, if prosecuted with ordinary diligence, lead to actual notice of a right or title in conflict with that he is about to purchase, and he fails to make such inquiry, the law will charge him with the actual notice he would have received if he had made it."

"3. 'Actual notice' does not always mean what in metaphysical strictness it imports, but more often means knowledge of facts sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts."

The following is the second syllabus of the case of *Knowles v. Williams et al.*, 58 Kan. 221, 48 Pac. 856:

"A purchaser of land must look to the title papers under which he purchases, and he is chargeable with notice of the facts appearing upon their face; also with knowledge of all facts suggested therein, and which he might, with the exercise of reasonable prudence and diligence have ascertained."

For instance, in the case of *Thomas v. Huddleston*, heretofore cited, in which Blakemore, Commissioner, discusses what is embraced in the records that purchasers are presumed to take knowledge of, it was held that the purchaser would be held to take notice of the enrollment record of the Commissioner of the

Five Civilized Tribes, which showed conclusively that the ward was of age at the time the order to sell his lands was made, and that hence the probate court was without jurisdiction to make the order, since, not having jurisdiction of a ward shown by a conclusive record to be of age and hence, no longer laboring under the disability of minority.

Of course, if the question of age had been a matter resting entirely in the realm of proof and there was no record showing that he had arrived at age, then the presumption of nonage would have arisen to support the validity of the judgment. But this could not be true in the face of a conclusive record showing him to be of age at the time the order was made. Hence the statement "that what is shown upon the face of a record is all that binds the purchaser" is misleading. The true statement is that the purchaser is bound by any record which in law he is bound to take notice of, whether in the proceeding or not.

To bind this purchaser it must be a fact that the interest of these minors was in fact and in truth an individual and severable interest at the time of the sale, or that that of Riley Jackson was such an interest. It must further appear to be a fact that the court sold it as a joint interest or in such a manner as the joint interests of two or more wards would be sold. It must be shown furthermore that the record in this case is such that constructive notice of these facts is given the purchaser.

The record that we are dealing with in the instant case does show, and it is unrebutted by the answer, since not denied, but in fact is admitted, that Riley Jackson's interest in the land was a certain 40 acres, allotted to him as a Chickasaw freedman, and this interest is set out in his petition in this suit, and a copy of his patent is attached to the petition, and the defendant in the suit does not deny that it was Riley Jackson's individual allotment that constituted a portion of the lands bought in the proceeding, but sets up a claim to the same through the guardianship proceeding involved herein, and which proceeding is set out in the record in this case.

The lands so allotted to Riley Jackson as his individual land will continue to be his property until it is shown to have passed to some one else. The record shows that the only transfer of whatever interest Riley Jackson had was the transfer in the proceedings that we, in this case, have held void for the reason that it was sold in a joint conveyance with the lands of the other two minors. So it does not matter whether this record shows whether the other two minors held their interest jointly or severally, but it is sufficient if it is shown by this record that Riley Jackson's interest was an individual interest and is furthermore shown, as we hold, that this minor's individual allotment was hotchpotch-

ed and sold with the interests of the other two minors.

A copy of the patent appears in this record showing the lands in controversy, the 40-acre tract, to have been patented to Riley Jackson, a freedman, as his individual allotment. The date of the approval of said patent was 1906, while the petition for sale in the instant proceeding was filed March 25, 1912, so the patent and record thereof of which the purchaser, J. S. Carroll, was bound to take notice, was in existence a long time prior to the commencement of the proceedings under which he seeks to procure title, showing that the lands in controversy was the allotment of Riley Jackson. This brings notice home to J. S. Carroll, the purchaser, of the individual interest of Riley Jackson in this tract of land, at the time Carroll purchased the same.

The very documents, the patents, showing the allotment of this land in severality of these minors, would be among the first instruments appearing in an abstract of title, and are the sole basis of title, and it would be absurd to contend that the defendant in error J. S. Carroll was not required to take notice of what they show.

[8, 7] The only question left for consideration now is whether the record in this court shows a joint instead of a severable sale of this interest. Of this there can be no question, but since we have taken up an exposition of this matter we will analyze and show conclusively how this arises.

The supporters of the petition for rehearing in their brief state that this court has ignored the proper rule of presumptions in considering this case. The rule of presumption as they state it, and with which we agree, is that, in the absence of any showing in the record either one way or the other, a presumption arises in favor of the existence of all those matters necessary to give the county court jurisdiction and in favor of the validity of the sale.

The writer of said brief states that this court reversed this rule of presumption and presumed the existence of such facts as would make the record void, and the writer of said brief seems to base his conclusion upon the following situation, to wit: There is absent from the record a copy of the order of sale and of the notice of sale. This absence of these portions of the record was stated in the original opinion, and they, being absent, the writer of the brief states that this court presumed that the county court ordered a joint or hotchpotch sale, and that the notice of sale advertised a joint sale and not a sale of the several interests.

We differ with the writer of the brief, and state that the opinion does not presume any such facts, but the opinion gives the substance of the return of sale, which recites that the order directed them to sell it as one tract, and that they were advertised as one

tract, and that it was sold as one tract for the lump sum of \$1,200, and we desire to assert now, and with emphasis, that it does not make any difference whether the order of sale directed this land to be sold as the several interests of the minors or not, or whether it directed it to be sold as a joint interest and as one tract. Neither does it make any difference whether the guardian advertised it in the notice of sale to sell as the individual allotments of the minors, or whether he advertised it to sell in one tract, without designating the individual interests of each minor, since the return of sale shows that it was sold as a joint interest and as one tract and for a lump sum, that it was deeded in the same manner and confirmed in the same manner, and hence as a sale it is void as shown upon the face of the record. We care not whether the order was joint or not, or whether the notice was in accordance with the law, and advertised lands of each individual separately, the sale was not a legal sale, and was such a sale as a court could not legalize by an order of confirmation. All this appears upon the face of the return, upon the face of the deed and upon the face of the order of confirmation, and it shows that the interests of these minors were merged and hotchpotched, and no one could determine as to what the interests of each minor was.

The case of *McCoy v. Mayo*, heretofore cited, was a case in which a minor's lands were sold for part cash and part property, exchanged therefor, and, this appearing upon the face of the deed, the deed was held absolutely void, and the purchaser took no interest. We quote the following from page 494 of 174 Pac:

"It follows that, even if the procedure required by law had been followed for the sale of the minor's interest in the land in question, it appearing upon the face of the deeds, which are the basis of plaintiff's recovery, that the consideration of the sale was for part cash and part property, such deeds were absolutely void. The deeds set up by the plaintiff being absolutely void upon their face, the answer of James Daugherty stated a defense to the action, and the court committed reversible error in sustaining plaintiff's demurrer to the answer of James Daugherty."

We will state that the case of *Perkins v. Middleton*, heretofore cited, was the same kind of a case as the case of *McCoy v. Mayo*, and was a sale of a minor's interests without cash and for exchange of property, but in the last-cited case it did not appear anywhere upon the face of the record or upon the deed that it was for an exchange of property, but appeared regular and for cash, and it was held that a subsequent purchaser without notice and for value took good title, but that the minor had a cause of action against the purchaser to recover the difference between

the value of the lands sold and the property exchanged therefor.

We are inclined to avoid the giving of unnecessary definitions, but we are going to assume such a burden in this case and undertake to lay down a definition of the rights and powers of purchasers in guardianship and judicial sales as follows: If the record of a sale shows a legal title upon its face, together with all other records of which the law requires a purchaser to take notice, and the purchaser has no actual notice of any fact that impeaches and destroys the validity of the record title (we mean by actual notice such notice as is defined in the quotation in this opinion from the case of *Creek Land & Improvement Co. v. Davis*, heretofore cited and quoted), and has paid a consideration for his title, then the purchaser has a right to stand upon his title notwithstanding the title may be in fact and in truth fraudulent, void, and a nullity as between the parties. The law does not give this to the purchaser because he holds a legal title, but because he had a right to rely upon a record showing him a legal title, and upon the strength of that record he parted with a consideration. This gives him, in addition to a clear legal paper title, an equity which public policy holds to be superior to any equity which may exist in favor of the seller.

It is the policy of the law to recognize as superior the equity and rights of a purchaser in such a case as against a seller. This is discussed in the cases of *Tootle v. Payne* and *Allison v. Crumme*, heretofore cited. The case of *German Savings, etc., Society v. De Lashmutt* (C. C.) 67 Fed. 399, discusses the principle above stated. The following is quoted from the last-cited case:

"The doctrine of bona fide purchaser is not applied to protect an equity against a legal estate, but to protect the legal title against a prior equity, by uniting with such legal title an equity arising from the payment of money, and securing the conveyance without notice and a clear conscience."

See, also, in this connection, 8 C. J. 1147-1149, under the head of "Bona Fide Purchaser."

Even as defined above, there are exceptions but we are not going to undertake to point them out in this opinion, but suffice to say that this rule is applicable in the instant case, and states the rule that controls herein and when applied to the facts and the state of this record J. S. Carroll, the defendant in error, cannot be held to be an innocent purchaser without notice, but must be held as bound by the face of this record and by other records which the law requires him to have taken notice.

We have heretofore stated that the argument in support of the irregularity theory by those contending for the petition for rehearing in this case was a very short argument

at the close of their brief, and they cite and quote from the case of *Carolina v. Montgomery*, 177 Pac. 612. In this case this court refused to hold a guardianship proceeding open to collateral attack for the reason that the guardian had failed to execute a sales bond. This court held that the failure to make this bond was a mere irregularity, notwithstanding the fact that section 6564, R. L. 1910, directs the making of this bond before sale. But the court, in this case, interpreted this to be a directory statute and not mandatory. The brief then infers the existence of an analogy both in fact and principle to exist between the case at bar and the cited case, and hence concluded that this court should hold the defect in the instant case a mere irregularity, and not a substantial defect. Our answer to this argument is that the holding of the court in *Carolina v. Montgomery* does not help us in determining the rightness or wrongness of the opinion in the instant case and gets us nowhere. This court has in some instances, as in the case just cited, held certain statutes providing for procedure in guardianship matters to be merely directory, while it is held other statutes providing for procedure to be mandatory. For instance, in the case of *Winters v. Oklahoma Portland Cement Co.*, heretofore cited, wherein a private sale of the property of a ward failed to sell for the per cent. of the appraisement stated to be necessary, it was held that the statute was mandatory and the sale void.

In the case of *Roth v. Union National Bank*, heretofore cited, it was held that a mortgage given on the property of a minor's estate in excess of the debts for which the estate was legally liable was invalid to the amount of the excess, since in contravention of section 6364, R. L. 1910.

In the case of *McCoy v. Mayo* and that of *Perkins v. Middleton*, heretofore cited, it was held that the statute requiring the sale of a minor's land to be for cash or for part cash and balance by deferred payments was mandatory, and that a sale in exchange for other property was void. Hence, after a review of all these cases, we come to the same conclusion as is stated in 7 Words and Phrases, p. 6743: "The distinction between remedy and substantive right is incapable of exact definition," and just what controls a court in defining a certain statute pertaining to procedure to be directory and another statute to be mandatory is difficult to determine, and, no matter how much courts may undertake to limit and define, that when they undertake to apply such a principle to the particular facts of a particular case the difficulties still continue.

We take the following from page 14 of the brief in support of the petition to rehear:

"The question as to when a defect in a probate sale proceeding is jurisdictional, and when it is a mere irregularity was first passed upon

by the Supreme Court of Oklahoma in the case of *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433, which case has been many times cited, approved, and followed. We hope the court will carefully examine this entire case, but we shall quote therefrom only briefly as follows."

Eaves v. Mullen did not undertake to decide and define when a defect in a probate sale is jurisdictional and when it is a mere irregularity. It did, however, state that there were two lines of legal opinion. One line being for strict construction, and holding that all defects whether substantial or mere irregularities, to be sufficient to avoid sales, the other line being the liberal line, holding that only substantial defects would avoid sales, and then the opinion proceeded to hold that a notice of a hearing of a return of sale in a guardianship proceeding, published for only 9 days instead of 10 days as the statute required, was a mere irregularity and not a substantial defect, and did not avoid the sale, and also proceeded to commit this court to the liberal rule. So *Eaves v. Mullen* is not so much a legal straight edge by which to line up and demark the legal thought pertaining to guardianship sales as some would lead us to believe.

In the case of *Carolina v. Montgomery* this court based its ruling that the failure to make a sales bond was a mere irregularity and not a substantial defect upon the fact that the statute directing the making of such a bond does not state that if such bond is not given that the sale shall be void. In the case, however, in which certain statutes were declared mandatory, and that a failure to comply with their provisions in any sale proceeding had the effect of making such sales void, the bond did not contain such a provision. So the case of *Carolina v. Montgomery* affords no aid in distinguishing between irregularities and substantial defects, and only applies the irregularity theory to a particular statute involved in that particular case and to the particular facts.

In the case of *Frazier v. Jenkins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575, the following is stated:

"Whatever may be the law in other states, in this one it is settled that under the statute last quoted the order of the court confirming the sale becomes *res adjudicata* as to irregularities only, and cures nothing of substance."

The question involved in this last-cited case was the question of the right of the guardian to sell the property of his ward to his own wife. They refused to hold such a proceeding a mere irregularity, and held it to be a matter of substance and avoided the sale.

In the case of *Burton v. Compton*, heretofore cited, and involving the same question as the last-cited case, this court held that the sale by guardian to his wife of his ward's property was not an irregularity, but a mat-

ter of substance and avoided the sale, both for the reason that such a sale was contrary to the statutes and was condemned by public policy, and this it held without regard to whether such sale was in good faith and for fair consideration. In the instant case we hold that a sale conducted as was the sale herein was void for the reason that same is contrary to the statutes, and is condemned by public policy, and this is so held without regard to whether it was done in good faith and for a fair consideration.

From a study of the various cases, we conclude the test to be this: That where a proceeding is in contravention of those provisions of our probate statutes and of public policy that are intended to safeguard the substantial rights of the wards, such contravention avoids the sale; but, if the proceeding fails to comply with some mere remedial right of procedure that has no tangible, direct, or immediate connection with any substantive right, then such failure should be held to be a mere irregularity and not a fatal defect.

For instance, we can see a good reason why a court would hold a sale of a ward's property sold at a private sale and at a price less than the per cent. of appraisal as directed by statute to be a fatal defect. This could be based upon the fact that a private sale as defined under the statutes is a departure from the method of public sales as defined by the statutes, and the policy of the Legislature might well be that to protect a minor's interest it was necessary to appraise the property sold, and require that it bring a certain per cent. of the appraisal; otherwise, sale void; while a failure to execute a special sales bond as directed by statute would in reason be held to be a mere breach of a remedy or method of procedure, and would not be a violation of a substantial and inherent right, and the failure to comply could justly be held to be a mere irregularity, and not sufficient to vitiate a sale.

While it may be held more a difference in the degree than in the nature of the protection, since they are both intended as means of safeguarding the rights of the minor, but there is a fundamental difference, however, as we view it, since the appraisal requirement is a direct and an immediate means of protection; while the bond is a remote and indirect means of safeguarding the interests of the ward. This discussion of these distinctions may not be very profitable, and may assist us but little on the road to the solution of these difficult and intricate problems, but in closing we desire to state that the application of the principles that we have reviewed in this discussion to the proceeding in the instant case irresistibly press us to the conclusion that such proceeding is a nullity. The very nature of such a transaction and its possible consequences upon the interests of wards is such that both substan-

tive law and public policy condemn it, and this is so without regard as to whether or not a particular proceeding may work injury to the ward.

We will analyze briefly just what was done in this proceeding, and in just what manner the rights of the particular wards were involved in this proceeding. The property interests of each of these three minors was a several interest in absolute fee simple in a particular 40 acres embraced in the 120 acres sought to be sold. The petition for sale states that the wards "own the following described real estate of the approximate value of \$1,200, to wit," and then describes the 120 acres embracing the three allotments. The wards did not own the 120 acres, but each ward did own a particular 40 acres embraced in the description of the 120, but owned no interest in any acre that was embraced in the other 80 acres described.

Then the question can be asked, How can a court be held to have had jurisdiction of and the power to convey certain property in a sale proceeding, which subject-matter consisting of a certain property right, which is nowhere described and the actual property interests of each of the minors is nowhere properly defined nor limited? The sale, in effect, does not sell the entire interest of the minors in any acre of the land. It only purports to sell one-third of a minor's interest in any acre when in fact there are 2 acres in each 3 acres in which each minor did not own anything; and there is 1 acre out of each 3 acres in which some one of the minors owned the entire acre and the other two owned no part thereof.

We think that there is a strong analogy between the principle involved in the case of *Burton v. Compton*, heretofore cited, quoted, and discussed, and the instant case. We take the following brief quotations from said cases:

"And he says, in substance [referring to Lord Thurlow's discussion], that the rule rests upon public policy, and such a purchase will not be permitted in any case, however honest the circumstances; for the general interest of public justice requires it to be destroyed in every instance," and that "from general policy and not from any peculiar imputation of fraud, a trustee shall remain a trustee to all intents and purposes."

Again, quoting from *Frazier v. Jenkins*, heretofore cited, and which is based upon a sale by a guardian to his wife of his ward's property, states the following:

"The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter."

If guardians were permitted to hotchpotch the several interests of minors in the manner that was done in the sale in the instant case, it would give opportunity for fraud and inequitable handling of the estates of minors that is revolting to every reasonable estimate of what is just and proper law and the natural inclination of all just minds is to condemn such a proceeding.

We take the following from the petition for rehearing in the instant case:

"Said decision overlooked the further question that the manner of sale in question is not prohibited by statute, and has been uniformly approved by the title lawyers of the state since statehood, and has become the rule of property."

The first portion of the above proposition we have already answered in this opinion, and as to the last suggestion we will state that this is the first time it has ever been called to the attention of this court that title lawyers have the power to establish rules of property, or that a rule of property can be established by a holding of an inferior court, and which holding has not been approved by the highest appellate court of the state.

[8] We think the proper rule as to what constitutes a rule of property arising from judicial precedent is stated in Black's Law of Judicial Precedent on page 247 as follows:

"In order that a judicial precedent should be recognized as having settled an inviolable rule of property, it must have proceeded from the court of last resort."

The same authority on the same page, further says:

"No such finality attaches to the decisions of the inferior or intermediate courts that they can be considered as establishing a rule of property, however uniform their course of decisions or however long continued. No question of law is finally settled until it has been determined by the court of last resort. It is of the essence of the theory of 'rules of property' that the members of the community have (or may be supposed to have) taken titles, invested money, and regulated their business dealings in reliance on a judicial decision or decisions which they had a right to regard as a final and authoritative statement of the law which should govern them. If such action has been taken by interested parties on the faith of a decision of a lower court merely, this should not in any way bind or preclude the highest court, when the question is presented to it, from announcing a contrary rule, if that is deemed more correct."

The petition for rehearing in this case is therefore denied.

All the Justices concur, except HARRISON, C. J., PITCHFORD, V. C. J., and KANE, J., not participating.

TAYLOR v. STATE. (No. A-3782.)

(Criminal Court of Appeals of Oklahoma.
June 30, 1922.)

(Syllabus by the Court.)

1. Criminal law §605 — Requiring case to proceed on defendant's failure to prepare application for continuance within the required time held not reversible error.

Where the trial court granted defendant's counsel one hour's time in which to prepare an application for a continuance, and counsel failed or refused to prepare the same within the time allowed, and offered no sufficient excuse for not complying with the court's order, the action of the trial court in requiring the case to proceed to trial at the expiration of such time was not prejudicial to defendant's rights in the premises.

2. Criminal law §605—That defendant's counsel had matter pending in other court held not a sufficient excuse for failure to prepare application for continuance within the hour stipulated by court.

The courts of the state are conducted at great expense to the taxpayers, and it is incumbent upon counsel to assist the court in expediting the business before it; the mere fact that counsel had a matter pending in another court which he deemed more important to attend to was not alone a sufficient excuse for a failure to comply with the court's order granting time to prepare an application for continuance in this case, the time allowed being amply sufficient for that purpose.

3. Criminal law §1159(3)—Judgment on conflicting evidence not reversed if evidence is sufficient, if believed, to sustain conviction.

Where the state's evidence is sufficient, if believed, to sustain a conviction, the judgment will not be reversed although the evidence as a whole may be conflicting.

Appeal from District Court, Muskogee County; Benjamin B. Wheeler, Judge.

Ruby Taylor was convicted of grand larceny, and appeals. Affirmed.

Bruce & Brewer, of Muskogee, for plaintiff in error.

George F. Short, Atty. Gen., and N. W. Gore, Asst. Atty. Gen., for the state.

MATSON, J. On the 15th of October, 1919, the county attorney of Muskogee county filed in the district court of said county an information charging Ruby Taylor with the larceny of \$115 in money and one watch and one pair of cuff buttons of the value of \$10 from the person of W. E. Edwards. Said crime was alleged to have been committed on the 1st day of October, 1919. Thereafter, on the 3d day of November, 1919, defendant was arraigned in open court, and entered her plea of not guilty to the charge, and the

cause was set for trial for the 17th day of November, 1919.

[1] Thereafter, on the 17th day of November, 1919, said cause was called for trial, and the state announced ready for trial, and the defendant announced not ready because of the absence of certain witnesses. Thereupon the court allowed the defendant one hour's time in which to make a showing for a continuance on account of the absence of said witnesses, or else prepare for trial. At the conclusion of said recess the cause was again called for trial, and the state again announced ready and the defendant not ready, for the reason that defendant had not had sufficient time in which to prepare an application for continuance on account of the absence of certain witnesses. The court refused to grant the defendant further time in which to prepare an application for a continuance, impaneled a jury, and the cause proceeded to trial, resulting in a verdict of guilty and the assessment of one year's imprisonment in the state penitentiary against the defendant.

It is here urged that the action of the trial court in requiring the defendant to proceed to trial after the recess of one hour was prejudicially erroneous to the defendant, and should result in a reversal of this judgment.

[2] The only excuse given by counsel for defendant for not preparing an application for continuance was that counsel had a cause pending in the superior court of that county, in which counsel were required to get another defendant into that court by 11 o'clock of that morning in order to save a forfeiture on an appearance bond, and for that reason counsel was compelled to neglect the preparation of an application for a continuance in this case.

The granting of one hour's time in which to prepare the application for a continuance was sufficient. The blame, if any, rests upon counsel for defendant in not preparing the application within the reasonable time allowed by the court. The courts of this state are conducted at great expense to the tax payers, and it is incumbent upon counsel to assist the court in expediting the business before the court, and the mere fact that counsel had a matter pending in another court which he deemed more important to look after than the one in the instant case was not a sufficient excuse for further delaying the trial of this cause. It cannot, therefore, be said that there was any abuse of discretion on the part of the trial judge in refusing a further recess for the purpose of enabling counsel to prepare an application for a continuance.

[3] It is also contended that the evidence is insufficient to sustain a conviction. The evidence is conflicting, but the evidence on

the part of the prosecuting witness, if believed, is amply sufficient to sustain a conviction. The record in this case tends to show that the prosecuting witness, a farmer from a neighboring county, went to Muskogee to attend the state fair, taking quite a sum of money with him for the purpose of purchasing a new set of harness, in addition to sufficient funds to pay his expenses while attending the fair; that he fell into the company of the defendant and others with her, who knew he had this money upon his person, and proceeded to steal it, after taking numerous drinks of whisky with the prosecuting witness.

The defendant had a fair and impartial trial, and the verdict and judgment is warranted by the evidence. The alleged errors complained of are without merit.

The judgment is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

CRITTENDEN v. STATE. (No. A-3814.)

(Criminal Court of Appeals of Oklahoma.
June 24, 1922.)

(Syllabus by Editorial Staff.)

Embezzlement — In prosecution of tenant for removal of crop, the state must prove removal with intent to deprive landlord of rent due.

In prosecution of a tenant for embezzlement, under Laws 1915, c. 230, making it embezzlement to remove crops from leased or rented premises with the intent to deprive the owner or landlord of any of the rent due from such land, in which it was claimed that the tenant had given the landlord a note for the rent secured by a chattel mortgage on certain portions of the cotton crop, the state was required to prove that the tenant removed the seed cotton from the leased premises with the intent to deprive the landlord of the cotton or the proceeds of the sale thereof; such intent being a material ingredient of the crime.

Appeal from District Court, Lincoln County; Edward Dewes Oldfield, Special Judge.

John Crittenden was convicted of embezzlement, and he appeals. Reversed.

Jarrett & Speakman, of Chandler, for plaintiff in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the district court of Lincoln county wherein John Crittenden was convicted of the crime of embezzlement as defined by chapter 230, Session Laws 1915, and his punishment fixed at a fine of \$50 and costs of the action. From the judgment rendered against him he has appealed to this court.

In this case the Attorney General has filed the following confession of error:

"Plaintiff in error was charged by information and convicted of the violation of chapter 230, Session Laws of Oklahoma 1915, which makes it embezzlement for any person to remove crops from leased or rented premises with the intent to deprive the owner or landlord interested in said land of any of the rent due from said land, or who shall fraudulently appropriate the rent due the owner or landlord of said land, to himself or any person not entitled thereto.

"The undisputed evidence was that the premises in question were leased by written contract to plaintiff in error for cash rent, and that a note for the amount of cash rent, secured by chattel mortgage on certain portions of the crops, was given the landlord; that W. A. Heuston, cashier of the bank at Agra, had possession of the note and mortgage with the authority to collect the same.

"The information charges that plaintiff in error being the tenant on the estate of L. Harrison, deceased, received and took into his possession 1,680 pounds of seed cotton grown on the land covered by the lease in question, the same being of the value of \$184.80, which it is charged was the property of the estate of L. Harrison; that the plaintiff in error removed said seed cotton from the leased premises with the intent to embezzle the same and deprive the estate of L. Harrison of the rent due from said land, and that plaintiff in error appropriated the same to himself with the felonious intent to deprive the owner thereof.

"The undisputed evidence is that plaintiff in error picked 1,680 pounds of seed cotton off the leased premises, and from that portion of land covered by the chattel mortgage, and took the same to Agra and had it ginned and sold it, and on the same day, and immediately thereafter took the check which he received for said cotton, in the sum of \$184.80, to Mr. Heuston, who, as stated, was the agent of and represented the parties to whom the rent was due, and who also had possession of the note and chattel mortgage, and plaintiff in error handed this check over to Mr. Heuston, told him that he wanted to apply \$125 on the said note and mortgage, and would like to have the balance for the purpose of paying cotton pickers and to get something to eat for his family, who were in bed with the flu.

"As stated, this evidence is undisputed, and it seems to us that instead of showing that plaintiff in error took this cotton with the intent to deprive the owner, or the landlord, thereof, that the evidence conclusively shows the contrary.

"There was some evidence introduced to the effect that plaintiff in error had taken other loads of cotton at different times off the leased premises, and sold and disposed of the same, and that the proceeds were not turned over to be applied on the rent. This cotton, however, was not taken from that portion of the leased premises covered by the chattel mortgage. However, it seems to us that this evidence could only be competent for the purpose of showing the intent with which plaintiff in error may have taken the cotton mentioned in the information. That is, if there

had been any question as to the intent with which he took the same, then the fact that he may have appropriated other cotton would tend to show such intent, but where the testimony is undisputed that the cotton which he is charged with embezzling was sold and the proceeds applied to the payment of the note of the landlord, less such portion as the agent of the landlord permitted him to retain, then the evidence of the sales of other loads of cotton could not be material.

"We apprehend it is plain that plaintiff in error could only be convicted of the charge set forth in the information. In this connection we call the attention of the court to the undisputed testimony of plaintiff in error that the landlord was to look solely to the crops on that part of the leased premises covered by the chattel mortgage. That being true, it might be well said that the landlord waived any interest or any lien that he might have had to the balance of the crops.

"Counsel for plaintiff in error also call attention to the fact that the court was requested to give the instruction setting out the theory of plaintiff in error (Rec. 146), which the court refused, and also refused to give any instruction covering this theory.

"We feel that under the repeated rulings of this court, some of which are cited by counsel for plaintiff in error, that it is error for the trial court, when requested so to do, to refuse to instruct on the law applicable to the theory of the defense.

"Complaint is also made of the alleged misconduct on the part of the county attorney in his closing argument. We are of the opinion, however, that this assignment is entirely without merit, and that the county attorney did not overstep the reasonable bounds of argument.

"For the errors pointed out above, we are inclined to think that plaintiff in error did not have a fair and impartial trial guaranteed him by the Constitution.

"Respectfully submitted,

"For the Attorney General.

"E. L. Fulton, Asst. Atty. Gen."

Irrespective of whether the action of the landlord in taking a note secured by a chattel mortgage on part of the crop to be planted and raised by the tenant on the leased premises constituted a waiver of the landlord's lien on that part of the crop not covered by the mortgage (a question of law not necessary for decision in this case), we think the judgment should be reversed for the reason stated in the confession of error of the Attorney General, to wit, that as to the portion of the crop covered by the allegations of the information, the state failed to prove any intent on the part of the defendant to deprive the owner of the cotton or the proceeds of the sale thereof. Intent to deprive the owner or landlord of the rent due is a material ingredient of the offense and must be proved as alleged. The confession of error of the Attorney General in this respect is supported by the record.

For reasons stated, the judgment is reversed.

(111 Kan. 448)

ROTHENBERGER v. CURL et al.
(No. 23821.)(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)*(Syllabus by the Court.)*

Limitation of actions §148(6)—Cause of action between partners for contribution is barred in three years, though partner from whom it is claimed asked accounting after three years.

A cause of action between partners for contribution on account of money advanced to the partnership or of partnership debts paid by one of the partners is barred by the statute of limitations if the action is not commenced within three years after the cause of action accrues, notwithstanding the fact that the partner from whom contribution is claimed asked for an accounting after the three years had expired.

Appeal from District Court, Osborne County.

Action by F. A. Rothenberger against E. L. Curl and others, and from a judgment therein the defendants Hal W. Neiswanger and another appeal. Judgment reversed and judgment ordered below in favor of appellants on their motion for judgment on the pleadings.

E. C. Bennett, of Osborne, for appellants.
J. L. Travers, H. McCaslin, N. O. Elise, and J. F. Tillman, all of Osborne, and J. T. Reed and Relihan & Relihan, all of Smith Center, for appellee.

MARSHALL, J. Defendants Neiswanger appeal from a judgment rendered against them in favor of E. L. Curl on an accounting between them as partners. The only question argued by the Neiswangers is: Were the causes of action on which judgment was rendered in favor of E. L. Curl barred by the statute of limitations?

It is necessary to detail the circumstances that culminated in the judgment from which this appeal is taken. The defendants, E. L. Curl, Hal W. Neiswanger, and Jennie B. Neiswanger, entered into a partnership in 1913, but ceased to do business as partners in 1914. This action was commenced in 1914 by F. A. Rothenberger against the defendants as partners, to recover on an indebtedness incurred by the partnership. Judgment was rendered in favor of Rothenberger against the partnership on October 28, 1914, for \$1,001, with interest at 6 per cent. per annum. H. E. Mallery held a chattel mortgage on the stock of goods owned by the partnership, and was named as a defendant. At the time judgment was rendered in favor of Rothenberger, a stipulation was entered into between the parties, in part as follows:

"It is further agreed that the said H. E. Mallery have the first lien on said stock of goods to the amount as shall be found from the accounting to be due him in this case, and that the plaintiff F. A. Rothenberger have a second lien on said stock of goods for the amount of his judgment.

"It is further stipulated and agreed that Hon. J. W. Huff of Downs, Kan., be appointed as referee to take the testimony and the accounting between all the parties to this action, and make a full report of said accounting to the court, together with his findings of amount due that may be due any of the parties herein from said stock of goods or from any party in this action.

"That said referee make a report in writing to this court not later than the 8th day of November, 1914, showing what amount, if any, the individual partners have received from the partnership funds, and what amount, if any, the defendant Mallery has received from said copartnership which would be credited upon his claim against the partnership, and further showing what said copartnership has received from the individual partners, if any.

"That any funds remaining from the proceeds of any sale to be held hereunder after the lien of defendant Mallery, if any, be satisfied therefrom, together with the lien of the plaintiff, shall be left with the clerk of the court to await the order thereof distributing the same."

A referee was appointed under that stipulation, and he made findings, among which were the following:

"The defendant Curl has paid in cash to said partnership \$814.85, or \$414.85 more than Neiswangers have invested therein.

"In addition to the plaintiff's claim against said stock two notes are held by the First State Bank of Alton in the principal sum of \$1,218 and accumulated interest thereon signed by the defendants Neiswanger and Curl, that said notes were given for the benefit of said partnership, and that their proceeds were used by said partnership."

The referee made conclusions of law, among which were the following:

"The defendants Neiswanger should pay to said Curl one-half of the \$414.85 so advanced by him.

"The defendant Curl and the defendants Neiswanger should pay, half and half, the amounts due on said notes, and one should account for and pay to the other one-half of any sums paid thereon."

The referee found that the value of the stock of goods was less than the amount due Mallery under his mortgage. That report was filed on February 1, 1915, and was approved, in May, 1915. Final judgment was rendered on the report, but no judgment was rendered as between Curl and the Neiswangers. Rothenberger caused execution to be issued on the judgment rendered in his favor, and the execution was about to be levied on the property of Curl when, on

January 29, 1916, he paid the full amount thereof, \$1,260, and immediately filed notice of his payment of the judgment and his claim to contribution under section 474 of the Code of Civil Procedure. About January 25, 1917, Curl paid the notes held by the First State Bank of Alton. On September 8, 1920, he caused execution to be issued on the Rothenberger judgment, and to be levied on real property, the title to which was in the name of Jennie B. Neiswanger. On October 28, 1920, the Neiswangers filed an application, asking that the execution be stayed until an accounting be had between them and Curl. That application was granted, and the court directed that pleadings for an accounting be filed and that an accounting be made. On February 2, 1921, the Neiswangers filed their petition against Curl, in which they pleaded matters to excuse them from paying any part of the partnership debts, including the judgment that had been rendered in favor of Rothenberger. On April 16, 1921, Curl filed his answer and cross-petition, in which he pleaded the report of the referee, the payments that had been made by him, and asked for contribution on account of the \$414.85 that had been paid by him into the partnership and on account of the notes that had been held by the First State Bank of Alton. The Neiswangers on May 16, 1921, filed a reply to Curl's answer and cross-petition, in which they pleaded that the claims of Curl were barred by the statute of limitations. On May 19, 1921, the Neiswangers dismissed their petition against Curl, and moved for judgment on the pleadings, which then consisted of Curl's answer and cross-petition and the reply of the Neiswangers thereto. Their motion for judgment was denied. Curl moved for judgment on the pleadings, his motion was sustained, and judgment was rendered in his favor "in the sum of \$285.14, being one-half of the \$414 contributed by defendant Curl into the partnership, as found by the referee, with interest thereon at the rate of 6 per cent. per annum from this date; and for the further sum of \$978.14, being one-half of the amount paid by E. L. Curl, on the notes found by the referee to be due and owing to the First State Bank of Alton, with interest thereon at the rate of 6 per cent. per annum from this date."

Curl's cause of action for contribution on account of the money that had been advanced by him to the partnership accrued at the time the partnership was closed, if it had not accrued previous to that time; his cause of action for contribution on account of the notes paid by him accrued at the time he paid them. Both of these causes of action accrued more than three years before his answer and cross-petition was filed in the accounting proceeding.

Curl argues, "Will the statute of limitations

ever run in a pending action?" What action to which Curl and the Neiswangers were parties was pending after the judgment in favor of Rothenberger had been rendered and after the report of the referee had been filed and approved and final judgment had been rendered thereon? The answer is, None. That action was closed in every particular so far as matters then pending before the court were concerned. It is true that no judgment was rendered on the report of the referee so far as Curl and the Neiswangers were concerned, but there does not appear to have been any pleadings filed by either of them against the other, and it does not appear that any judgment was asked by either of them on the report of the referee so far as the other was concerned. The action was closed. The judgment in favor of Rothenberger was alive, execution was issued on it, and that gave rise to the subsequent proceedings in which the judgment appealed from was rendered, but that execution did not open any matter that had been closed by the judgment that had been rendered on the report of the referee.

Curl also argues, "Will equity permit a party to invoke the court's aid and accept its favor and later repudiate his own acts?" This argument must be based on the law of estoppel. What principle of the law of estoppel says that the Neiswangers cannot plead the statute of limitations against Curl's claim? The position of Curl was not altered nor changed by the request for an accounting. He was not misled by that request. He could have commenced his action for contribution at any time after the cause of action accrued. Nothing was done by the Neiswangers to prevent him from commencing such an action. Nothing was done to change the position or attitude of Curl toward the Neiswangers. They did nothing to estop them from pleading the statute. No reason has been shown why the statute of limitations should not run against Curl's causes of action.

In *Finley v. Gilmore*, 107 Kan. 349, 352, 191 Pac. 256, this language was used:

"The law is thoroughly established that when a business partnership is discontinued and its affairs are turned over to a liquidator for the purpose of being wound up, a final settlement between the partners cannot be made, whether for division of proceeds or for determination of their proportionate liabilities, until the partnership assets have been sold, the credits collected, and the debts paid."

In this instance, the partnership was closed when the referee's report was filed and final judgment was rendered thereon. In *Brooks v. Campbell*, 97 Kan. 208, 155 Pac. 41, Ann. Cas. 1918D, 1105, this court said:

"When a partnership business is closed out, a cause of action for an accounting and settlement arises between the partners, under an

implied contract mutually and equally to share the profits and bear the burdens of the partnership.

"A partnership business was closed out in April, 1908. An action for an accounting and settlement and for moneys due to one partnership from the other partners was not begun until September, 1913. Held, that such action was barred by the statute of limitations."

The court erred in rendering judgment in favor of Curl.

The judgment is reversed, and the trial court is directed to enter judgment in favor of the Neiswangers on their motion for judgment on the pleadings.

All the Justices concurring.

(111 Kan. 388)

DELPHOS MILLING CO. v. JACKSON.
(No. 23764.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Pleading ⚡176 — Reply held to traverse only plea of payment, and not the general denial.

Civil Code, § 104 (Gen. St. 1915, § 6996), authorizes the filing of a reply when the answer contains new matter. In an action on a verified account an answer was filed consisting of a general denial and a plea of payment to which plaintiff filed a reply consisting of a general denial. *Held*, that the reply traversed only the plea of payment.

2. Pleading ⚡422—Plaintiff held not to have waived verification of answer.

On the trial plaintiff insisted that the burden was upon the defendant. The court held that plaintiff must show that it was a corporation. Plaintiff offered evidence on that issue alone and rested. *Held*, that by filing a reply traversing only the plea of payment, and by offering evidence upon the one issue as required by the court, plaintiff did not waive verification of the answer.

3. Pleading ⚡34(1)—Under rule of liberal construction account held sufficiently verified.

The petition alleged that plaintiff purchased merchandise at certain times and at prices set forth and alleged in plaintiff's Exhibit A, which was part of the petition, and which consisted of a statement of the account verified by the president of the plaintiff company, stating that he had read the petition and the statement of the account, and that "all statements and items therein are just, true and correct." *Held* that, while the language of the petition was not aptly chosen, nevertheless in determining its effect the allegations must be liberally construed with a view to substantial justice between the parties (Civ. Code, § 117 [Gen. St. 1915, § 7009]), and that so construed the petition and the correctness of the account are sufficiently verified.

Appeal from District Court, Osborne County.

Action by the Delphos Milling Company against C. E. Jackson. Judgment for the plaintiff, and the defendant appeals. Affirmed.

J. L. Travers and Edgar C. Bennett, both of Osborne, for appellant.

David Ritchie, of Salina, and Else & Tillman, of Osborne, for appellee.

PORTER, J. The Delphos Milling Company sued the defendant upon an account. The petition alleged that the defendant purchased merchandise from the plaintiff at different times and in different amounts and at the prices set forth in Exhibit A, attached to the petition, which was a verified itemized statement of the account between plaintiff and defendant, and that after giving the defendant credit for all payments, set-offs, and counterclaims to which he was entitled, there was due and owing on the account a certain sum with interest at 6 per cent. as shown on Exhibit A. The exhibit consisted of an itemized statement of the account with numerous items, credits, and charges, and was verified by the president of the plaintiff company, who stated that he had read the above petition and examined the above statement of account, "and knows the petition and statement of account and all statements and items therein are just, true and correct, and there remains due plaintiffs from the defendants the sum of \$1,436.42."

The answer was a general denial with a plea of payment, to which the plaintiff filed a reply consisting of a general denial.

On the trial, after counsel for the parties had made their opening statements, counsel for the plaintiff suggested that the burden was on the defendant. The court, however, held that although the answer was not verified the burden was on the plaintiff for the reason that the petition failed to allege the corporate existence of plaintiff, and for that reason defendant could not admit it, and held that the burden of proof was on the plaintiff. Plaintiff then introduced evidence to show that it is a corporation and rested. The defendant demurred to the evidence on the ground that it failed to prove any cause of action. Plaintiff's counsel asked opposing counsel to point out under the pleadings wherein the evidence had failed, whereupon defendant's counsel said, "because there is no allegation contained in the petition as to the correctness of this account." The court overruled the demurrer and also a motion to direct a verdict for the defendant, and upon the defendant electing to stand upon the demurrer and motion, the court rendered judgment as prayed for in the petition. The de-

fendant appeals and insists that the court erred in these rulings and in overruling the motion for a new trial.

[1-3] In the briefs of the defendant it is said that two material questions are presented: First, did not plaintiff, by filing a reply and proceeding to trial without questioning the sufficiency of the answer, waive verification of the answer? Upon this proposition defendant cites *Emery v. Bennett*, 97 Kan. 490, 155 Pac. 1075, Ann. Cas. 1918D, 437, and *Livingston v. Lewis*, 109 Kan. 298, 198 Pac. 952. In the first case cited it was held that although section 110 of the Civil Code (Gen. St. 1915, § 7002) requires that the answer to a petition in an action founded upon a written instrument for the unconditional payment of money should be verified, the verification is waived when the plaintiff joins issue on the answer, introduces evidence contradicting such defense, and asks instructions covering his theory of the law pertaining thereto. In the case at bar plaintiff did not proceed to trial without questioning the sufficiency of the answer. It insisted that the burden was on the defendant because the answer was unverified. The court erroneously, we think, held that it was necessary for plaintiff to offer proof that it was a corporation. Plaintiff acquiesced in the ruling and offered evidence upon that issue alone. We think it was of no importance whether plaintiff was a corporation or not. From the opening statement of counsel it appears that the defendant dealt with plaintiff as the Delphos Milling Company, a corporation, and could not be heard to say or urge as a defense that plaintiff was not a corporation.

In the second case cited it is held that if plaintiff replies to the unverified answer and goes to trial on the issues of fact and introduces his evidence thereon, he cannot complain that the court tried out and determined the question of the alleged partnership on the evidence presented. Here, however, plaintiff's reply was a general denial, which went, not to any part of the answer requiring verification, but to that part pleading payment.

The Code does not provide for the filing of a reply except where new matter is alleged. The only traversable thing in the answer was the plea of payment. In other words, the answer admitted the correctness

of the account, but alleged payment. The reply traversed the plea of payment. On the trial plaintiff offered no evidence in support of the reply, and insisted that the burden on that issue was upon the defendant, which was true. On one immaterial matter the court held the burden to be on the plaintiff. But plaintiff confined its evidence to that issue alone. It would be carrying technical rules of pleading to the extreme to say that by filing a general denial plaintiff was estopped to insist upon the failure to verify the answer denying the correctness of the account. Plaintiff merely offered evidence to show that it was a corporation, which the court required it to do. It did not go to trial on the issue of the correctness of the account, and therefore the rule stated in the cases cited has no application.

The second point relied upon by defendant is that plaintiff was not relieved from proving the correctness of the account, because it is insisted that the petition contained no allegation of the correctness of the account. The language of the petition is not aptly chosen. But our Code provides that—

"In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." Section 117, Civil Code (Gen. St. 1915, § 7009).

It does not require a very liberal construction of this petition to hold that it alleges the correctness of the account. The petition states that the plaintiff purchased the merchandise at the times, dates, and in the amounts and prices set forth and alleged in plaintiff's Exhibit A, which is the verified itemized statement of the account. It then states the amount due plaintiff on the account, attached to the petition; and the affidavit of the president states, under oath, that he has read the petition and the statement of the account, and that all statements and items therein are just, true, and correct. The defendant selected the ground upon which he saw fit to place his demurrer, which was that there was no allegation in the petition as to the correctness of the account.

Judgment affirmed.

All the Justices concurring.

(111 Kan. 408)

CLEMENTS v. MANSON et al. (No. 23776.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. **Compromise and settlement** §23(3)—**Findings and verdict for plaintiff in action to recover sum for forbearance held supported by the evidence.**

The findings and verdict returned by the jury were supported by sufficient evidence.

2. **Compromise and settlement** §6(2)—**Oral contract for forbearance to sue held valid.**

The plaintiff claimed that her brothers, the defendants, agreed to pay her a certain sum for her withholding a suit to set aside the will and certain conveyances of their father. The record indicates that the plaintiff had been advised and believed that she had a good cause of action, and it is held that, under such circumstances, an oral agreement to pay a certain sum for forbearance was valid, and such alleged agreement was sufficiently supported by the evidence.

Appeal from District Court, Kingman County.

Action by Jessie Clements against Walter L. Manson and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

H. B. Walter, of Kingman, and J. H. Connaughton and Carr W. Taylor, both of Hutchinson, for appellant.

C. C. Calkin and S. S. Alexander, both of Kingman, for appellee.

WEST, J. The plaintiff sued her two brothers, Walter L. Manson and William Thomas Manson, for \$5,000, alleging that they had agreed to pay her that sum in consideration of her forbearance to bring a suit to set aside their father's will and certain conveyances. The petition alleged that prior to his death in February, 1916, the father, Walter Manson, Sr., had made conveyances of a large part of his property, and that immediately after his death the defendants produced what they asserted was his last will and testament, with codicil, containing a bequest to the plaintiff of \$500, and no more; that she, the plaintiff, took the position that the will and codicil were void, because procured by the brothers through fraud, duress, and undue influence, and that the conveyances preceding the will were void for the same reasons; that she claimed her rights as a daughter and heir at law, as though her father had died intestate without making such conveyances, and that she advised the defendants that she would begin litigation to recover her interest as a legal heir; that controversy thus arising and existing in good faith on her part; that a com-

promise and settlement between her and her brothers was orally agreed upon.

"That for and in consideration of this plaintiff giving up, foregoing, waiving, and abandoning her said claims and her said threatened litigation and in addition thereto that this plaintiff should not contest the said will and codicil, but would receive and accept the bequest therein in her favor in the said sum of \$500, the said defendants would in addition thereto pay to this plaintiff, within the time and on the conditions hereinafter set forth, the sum of five thousand dollars (\$5,000). That as a further part of said settlement and agreement it was agreed that said sum of \$5,000 should be paid by said defendants to this plaintiff immediately upon the expiration of one year from the date of the death of the said Walter Manson, and on the further condition that this plaintiff had not, within said year, brought any action to contest the will and codicil of the said Walter Manson, deceased, or to cancel and set aside the conveyances. * * *

The answer denied generally all the allegations, and denied that William Thomas Manson had any authority to act for his brother, Walter L. Manson, in making any contract with the plaintiff, and alleged that there was a total failure of consideration to support the pretended oral contract alleged, and that the pretended cause of action set out by plaintiff was barred by the five, three, two, and one year statutes of limitation.

The plaintiff testified to a conversation had with Thomas Manson in the presence of his wife:

"I told him that I wanted to get the \$5,000 apiece and the \$1,000 that was given us in the will, and if he would do that we would not bring suit against them, and would not tie up the property, and that they said they thought that was a little too much. Finally I said I will take \$4,000 for myself, but I would not take less than \$5,000 for my sister. He (Tom) said: 'I will give you \$4,000 if you don't sue.' And they wanted me to write my sister and find out about her part, if she would not take \$4,000, instead of \$5,000. I wrote to her, and she sent me a telegram, which came on February 25th."

She testified that at the time of the funeral she had a talk with her brother Walter, and after telling him what she thought about the condition of affairs he said:

"It did not look just right, and he said for me to talk it over with brother Thomas, and we could talk it over, and then he would see brother Thomas and talk it over with him, and then he said whatever brother Tom said would be all right with him."

Further, a few days after her father's death the plaintiff went to see two of the attorneys for the defendants and was advised to bring suit; that she had a good case. She then went to her brother Thomas' house, and after she had told him her side of the

case he said that it was wrong for him to do the way he had done, and he was sorry for the part he had in it. He said he had seen Walter, and had been to Kingman to see an attorney, and they had agreed to pay the money to her and her sister one year after the date of her father's death. Thomas said he had received a letter from Walter, but would not let the plaintiff see it, but that Walter would come through with his part of the agreement. In 1917 Walter had a talk with the plaintiff, and said that whatever Thomas had agreed to do would be all right with him, and agreed to carry out the details as Thomas had made them.

The plaintiff recovered, and the defendant Walter L. Manson appeals, assigning as error certain rulings touching instructions and the denial of a new trial.

[1, 2] The defendants requested the court to instruct that any agreement on the part of the defendants to pay or do anything in consideration of forbearance on the part of the plaintiff to bring suit would be without consideration and void. This was refused. The court charged that if the plaintiff had expressed dissatisfaction with the will and in good faith threatened to contest it, and that thereafter, in order to compromise and settle the difference between the members of the family, the plaintiff agreed not to contest the will and not to involve the estate in litigation, and in pursuance thereof the defendants, or either of them, agreed to pay a certain sum of money to the plaintiff, the jury would be warranted in finding that there was a sufficient consideration to support such oral agreement, if one were made. The jury were told in substance that in order for the plaintiff to recover she must have believed in good faith that she had a valid cause of action.

It is contended that the negotiations did not constitute an oral contract; that the agreement claimed to have been made was for forbearance to bring a groundless suit, and it is also argued that before the plaintiff could recover she must show that her father was incapacitated or under duress when he made conveyances and the will.

The jury, in answer to special questions, found that the agreement was made, and that its terms were that, in consideration of the plaintiff's foregoing litigation, the defendants would pay her \$4,000 upon the expiration of the year after the death of the testator. From an examination of the record we find that the evidence was sufficient to justify these findings and the verdict reached by the jury.

There is nothing to indicate that the plaintiff was acting in bad faith in her threat to bring suit, but, on the contrary, she had been advised by good lawyers that she had a good case, and she evidently felt that she

had been unfairly treated in the distribution of her father's estate. While the alleged oral contract was denied, the testimony already quoted was sufficient, if believed, as it manifestly was, to substantiate the claim of the plaintiff.

Finding no material error in the record, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 409)

MESLOH v. LAFAYETTE LIFE INS. CO.
(No. 23780.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Insurance — 137(3), 141(8)—Condition of application that insurer should incur no liability until payment of premium held not complied with; insurer held not to have waived condition of application.

The pleadings, a stipulation relating to certain facts, and the opening statements of counsel, in an action to recover on a contract for life insurance, examined, and *held*, a condition of the application that the company should incur no liability until the first annual premium was paid was not complied with, and the company did nothing to waive the condition.

Appeal from District Court, Republic County.

Action by Anna Mesloh against the Lafayette Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Stone, Gamble, McDermott & Webb, of Topeka, and Vance & McTaggart, of Belleville, for appellant.

E. S. Nelson and N. J. Ward, both of Belleville, for appellee.

BURCH, J. The action was one to recover on a contract for life insurance applied for by Herman Mesloh. The plaintiff moved for judgment on the pleadings, a stipulation relating to certain facts and the opening statement of counsel for the defendant. The defendant moved for judgment on the pleadings, the stipulation, and the opening statement of counsel for the plaintiff. The motion of the defendant was denied, the motion of the plaintiff was allowed, judgment was rendered accordingly, and the defendant appeals.

Fred Fleer, a soliciting agent of the company, took Mesloh's application. The application was subsequently approved, and the policy was written. The policy was sent to a state agent of the company, and by him to Fleer, for delivery, but before it was de-

livered Mesloh died. The application signed by Mesloh was dated September 1, 1918, and contained the following provision:

"I hereby agree * * * that the company shall incur no liability until this application has been approved by it at its home office, the policy delivered during my good health, and the first annual premium thereon shall have been paid by me; provided that, if the first annual premium be paid at the time of making this application, the insurance shall be in force from the date of the approval of the application by the company at the home office."

The application also contained the following statement by Mesloh:

"I have paid the first premium of \$108.85 to Mr. Fred Fleer."

The petition stated that the first annual premium was paid and satisfied at the time the application was signed, but that the plaintiff was unable to state how. The payment was either in cash, or by agreement to pay at some later date. The plaintiff was unable to state whether the agreement was oral or in writing, but, if a promise was given in settlement and payment of the premium, the time when such promise required payment in cash was January 1, 1919. The opening statement of counsel for plaintiff did not clarify the matter of payment. With the jury in the box, and the burden resting on the plaintiff to proceed with the production of evidence of payment, counsel was unable to specify what his evidence would be, and said:

"I think the evidence will show it was either done by note or by cash or by some oral arrangement; the evidence will show just exactly the method; but I think the evidence will show clearly that the first annual premium was actually settled in some way on the date the application was taken. * * *"

The defendant's answer undertook to state the facts:

"The defendant alleges that it is informed and believes, and therefore alleges the fact to be, that at the time such application was taken, and after the same had been filled out and signed, the said Herman Mesloh told the said Fleer that he was unable to pay the premium at that time, but that it would be necessary for him to first sell property belonging to him, and realize the money necessary therefor; that thereupon it was agreed that the said Mesloh would raise the money necessary and would send the same to one Brettman, a relative of the said Mesloh, and that the said Fleer would deliver the policy, when it came, to the said Brettman, who would have the money therefor; that such arrangement was satisfactory to the said Fleer, and the application was sent to the company. The defendant alleges that the said Mesloh did not send such money to the said Brettman, or any part thereof, and that on that account the said policy was never delivered to the said Mesloh, or to Brettman, or to any one else."

The facts were amplified in the opening statement for the defendant:

"Now, gentlemen, there is no doubt in the world but what the evidence will show exactly what happened at the time this application was taken.

"There were only three persons present, Fred Fleer, Mr. Brettman, a cousin of Herman Mesloh's, and Herman Mesloh, who is now dead.

"Now the arrangement that was made, as the evidence will substantiate to you, is simply this: Mr. Fleer, after they had agreed upon the amount of insurance, filled out the application for insurance, and filled out all blanks, assuming that Mr. Mesloh would pay him for the insurance, which is the hope of all agents that a man will pay for his insurance at the time they write the application, and he filled out the blank that 'I have paid the first premium of \$107.85 to Mr. Fred Fleer.' And Mr. Mesloh, in signing the application, said to him, 'I cannot pay the first premium; I have got to sell some stock before I can pay the money.' If he had been able to pay the money at that time, the company has, and Mr. Fleer had, a receipt which the company calls a binding receipt to be given to Mr. Mesloh if he paid the first premium in which receipt it is stated that the applicant having paid the first annual premium, this insurance will be effective from the time your application is approved by the home office. But Mr. Mesloh said he did not want to pay the premium at that time, and the arrangement made was this: Mr. Herman Mesloh said, 'I will have to sell some stock; I am going in the army.' I think he said shortly or the next day, 'and I will send the money, after I sell my stock, up to Mr. Brettman,' who was his cousin and lived up in or near Deshler, Neb. And that arrangement was made, and Mr. Fleer was to deliver the policy to Mr. Brettman and get the money at the time the policy was delivered; that was the arrangement.

"Now the policy got to Mr. Worth, who was state agent, living at St. Joe, Mo., along around the 22d, 23d, or 24th of September. Mr. Fleer was out on the road at the time, and by the time Mr. Worth could get the policy to Mr. Fleer, and Mr. Fleer down to Deshler, Mr. Herman Mesloh was dead. I think he died the 5th of October.

"Mr. Fleer inquired of Mr. Brettman, who said no money or anything else had ever been paid to him on account of the policy. Now there is the case. It was simply where a man had applied for insurance, and never completed the transaction by paying his premium. * * *"

The court held the defendant was bound up to the time it discovered it could not get the money from Brettman, and rendered judgment for the face of the policy, with interest, less the unpaid first annual premium, with interest.

The district court erred. The applicant agreed the company should be under no liability until the first annual premium was paid, and the first annual premium was not paid.

For present purposes it may be conceded

Fleer had all the authority the board of directors of the company would have possessed if it had been dealing directly with the applicant. The applicant entered into an arrangement respecting payment of the premium, which was perfectly satisfactory to Fleer, and, under the concession, to the company. The arrangement was partly oral and partly in writing, and was to this effect: The applicant was to obtain money with which to pay; payment was to be made in money when the policy was delivered to Brettman; meanwhile there should be no liability on the part of the company. It is elementary law in this state that there could be no payment unless what was done extinguished all right of the company to collect premium for the first year, and rendered all obligation of the applicant to pay premium for the first year nonexistent. Plainly nothing of the kind occurred. Payment was not made, and neither time of payment nor credit was extended. The oral arrangement was consistent in every detail with the written agreement, and liability waited on the sale of the applicant's stock, the placing of the proceeds of sale in the hands of Brettman, and Brettman's payment of the premium in cash at the time the policy was delivered to him.

The plaintiff contends the defendant is concluded by the statement in the application, "I have paid the first premium of \$108.85 to Mr. Fred Fleer." In support of the contention, the plaintiff cites the case of *Harrington v. Mutual L. Ins. Co.*, 21 N. D. 447, 181 N. W. 246, 34 L. R. A. (N. S.) 373. The decision in that case was rested on a statute of the state of North Dakota making acknowledgment of receipt of premium conclusive evidence of payment of premium, notwithstanding a stipulation liability should not attach until actual payment. The court took occasion to cite the case of *Basch v. Humboldt Mut. F. & M. Ins. Co.*, 35 N. J. Law, 429, in which the New Jersey court, without a statute, held in accordance with the North Dakota statute. The ground of the decision in the New Jersey case is interesting. The court said:

"Such an acknowledgment appears to be analogous, and equivalent to the acknowledgment of the receipt of a valuable consideration in a conveyance operative by force of the statute of uses, such acknowledgment being always considered conclusive for the purpose of giving a legal force to the transaction." 35 N. J. Law, 431.

This court prefers to find legal force, if there be any, in the facts of a given transaction, rather than in a fiction useful in administering the law of Henry VIII, and in making search for legal efficiency receipts do not count for much as against the truth. They do not even shift the burden of proving payment. *Bridge Co. v. Wayland*, 107 Kan. 532, 192 Pac. 752. In this instance,

however, no receipt was given. Fleer had with him, when the application was taken, receipts which, if one had been issued, would have given the applicant insurance from the date his application was approved. Those receipts, however, were for payment of premium, and the applicant lacked money with which to qualify himself to receive one. The statement in the application was merely Mesloh's own self-serving representation, and was not true. It has been decided many times that an application which does not truthfully state the agreement between applicant and soliciting agent does not bind the applicant; the actual agreement controls. The sauce has equal piquancy for the insurer. The actual arrangement between Fleer and Mesloh controls, and under that arrangement payment of premium was to accompany delivery of the policy.

The plaintiff asserts that delivery of the policy to Fleer with unconditional instruction to deliver it to Mesloh, made a contract of insurance. The policy was not delivered to Fleer, in the sense that anything was effectuated between the company and the applicant. Sending the policy to Fleer merely amounted to passing it from one hand of the company to another, from a general agent at the home office to a special agent in the field. Fleer was not agent of the applicant to receive the policy, and the policy remained in the custody and control of the company, undelivered to anybody, so far as the applicant was concerned.

The plaintiff pleaded the instruction to Fleer, which read as follows: "We are inclosing policy No. 15,778 for Herman Mesloh for delivery. * * *" This letter was not an unconditional instruction to deliver, much less an instruction to deliver under such circumstances as to nullify an express condition of the document to be delivered. The policy was simply placed in the hands of Fleer for the purpose of consummating the relation between the applicant and the company formed by acceptance of the application and by the oral arrangement with Fleer regarding payment of premium. Let it be assumed there was a contract relation between the applicant and the company when the policy was sent to Fleer. The application was incorporated in the policy, and the contract was the company should incur no liability until the first annual premium was paid.

The plaintiff pleaded the arrangement between the company and Fleer for division of the first annual premium and the book-keeping which followed acceptance of the application. Those matters were of no concern to the plaintiff, and were irrelevant to the subject of payment of premium by the applicant. *Marshall v. Insurance Co.*, 98 Kan. 502, 159 Pac. 17.

The plaintiff pleaded a letter from the com-

pany to Mesloh, congratulating him on his good judgment in selecting the company as his insurer, and referring to him as a policy holder. The letter followed approval of the application which contained Mesloh's false statement that he had paid the first annual premium, instead of the actual arrangement with Fleeer.

In his opening statement to the jury counsel for plaintiff related a conversation between Fleeer and the applicant's brother occurring after the application had been taken, in which Fleeer said the premium had been settled and taken care of for the first year. The statement embodied a fair interpretation of the nature of the arrangement Fleeer had with Mesloh and Brettman for payment of the premium, but the statement afforded no ground for assuming payment of premium as a condition to liability was waived, and in no event could the statement bind the company.

The result is payment was not made, there is no basis on which to predicate waiver of payment or estoppel to deny liability, and the indispensable condition to liability on the part of the company was not complied with.

The plaintiff contends in her brief that, should the judgment of the district court be reversed, she should be allowed to submit the case to a jury. As the case stands, there is nothing to submit to a jury. The plaintiff speaks of an uncertainty respecting method of payment, which the jury should resolve. There is no uncertainty respecting method, because the facts disclose nothing resembling payment, and an inference of payment would be contrary to the law defining payment. Other suggestions regarding sending the case to a jury ignore the fact, which the plaintiff cannot be permitted to evade or minimize, that the applicant failed to perfect insurance.

In strictness the petition failed to state a cause of action. None of the facts proposed for the purpose was sufficient to show waiver. While payment was alleged, the allegation was accompanied by a statement that the plaintiff did not know how payment was made. The allegation therefore reduces to a conclusion, accompanied by a confession that the plaintiff is not able to state facts on which to rest the conclusion; that is, facts stating a cause of action. The opening statement of counsel for plaintiff has been quoted. When counsel for the defendant had concluded his opening statement, the whole case was in fact before the court, and the court evidently regarded the motions for judgment as a final submission. In announcing its decision the court said:

"The plaintiff having asked judgment upon the pleadings, statements, and stipulation, and the defendant having asked the same relief, the court has considered them both together.

"It is apparent to the court that the parties have framed the pleadings and made the admissions for the purpose of having the matter settled in this manner if possible, and, while it is not perhaps a part of this lawsuit, I think it is very commendable on the part of counsel to endeavor to get together in that way, and shorten suits of this character, if they can. I certainly want to put on record my approval of that method of trying it."

The brief for the plaintiff contains no suggestion that, if the case were returned to the district court, any fact favorable to the plaintiff could be produced in addition to those which have already been discussed. Under these circumstances, the litigation ought to end.

The judgment of the district court is reversed, and the cause is remanded, with directions to enter judgment for the defendant. All the Justices concurring.

(111 Kan. 539)

HOPPER v. WILSON & CO. (No. 23793.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

Master and servant §398—Compensation claimant's widow must make claim within six months.

Where an employer makes settlement with an injured employee, obtaining a release of all claims on his part under the Workmen's Compensation Act, and some months later the employee dies, an action by his widow under that law cannot be maintained unless a claim upon the employer has been made in her behalf within six months after her husband's death.

Appeal from District Court, Wyandotte, County.

Action by Mary E. Hopper against Wilson & Co., in which a demurrer to plaintiff's evidence was sustained and she appeals. Affirmed.

C. A. Bowman, of Kansas City, for appellant.

O. L. Miller, of Kansas City, for appellee.

MASON, J. The widow of J. N. Hopper brought this action under the Workmen's Compensation Act, alleging that his death was due to injuries received while in the employ of the defendant. A demurrer to her evidence was sustained, and she appeals. One ground upon which liability is denied is that no claim for compensation was made within six months after the death of the plaintiff's husband.

Hopper was injured April 18, 1918. He executed a statutory release in consideration of the payment of \$25 May 7, 1918. He

died September 28, 1918, the certificate of death stating:

"The cause of death was as follows: Pneumonia (lobar). Contributory valvular heart disease."

The plaintiff made a demand for arbitration August 15, 1919, this being the first notice given to the defendant of a claim that her husband's death was due to the injury referred to. The statute provides:

"Proceedings for the recovery of compensation under this act shall not be maintainable unless written notice of the accident, stating the time, place and particulars thereof, and the name and address of the person injured, has been given within ten days after the accident, and unless a claim for compensation has been made within three months after the accident or in case of death, within six months from the date thereof. Such notice shall be delivered by registered mail, or by delivery to the employer. The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced, or if such want or defect was occasioned by mistake, physical or mental incapacity or other reasonable cause, and the failure to make a claim within the period above specified shall be a bar: Provided, however, That in case of incapacity of an injured employee the limitation herein shall not run during such incapacity." Gen. Stat. 1915, § 5916.

Whatever may be the rule under other circumstances we think in the situation here presented the statute is to be interpreted as requiring the making of a claim by the plaintiff after her husband's death and within six months of its occurrence. Such a requirement is in keeping with the spirit and policy of the law because the defendant, having settled with her husband during his lifetime, had no reason to anticipate the making of a further demand, and the assertion of one after the lapse of six months (in this instance over ten months) might well find it disabled from obtaining the information and preserving the evidence necessary for a defense. It does not appear that any claim for compensation was made upon the defendant by the injured employee, but the settlement made with him would render that fact immaterial as between them. But this settlement having been effected, the defendant was justified in assuming, in the absence of any notice to the contrary, that the whole affair was ended, and in treating it as a closed incident. While the plaintiff pleaded that the release was entered into under a mutual mistake of fact as to the nature and extent of the employee's injuries, and that the consideration therefor was so grossly inadequate as to amount to a fraud, these contentions were abandoned on the trial. Even if the defendant had known of the death, there was no reason to connect it with the accident especially in view of the

cause assigned in the certificate. Whatever considerations make it desirable that a claim for compensation shall be made upon the employer within six months after the death of the employee in any case apply fully here.

Under our Compensation Act the statute of limitations begins to run against the claim of the dependents, as well as that of the injured employee from the time of the accident, but we do not regard this fact as throwing any light on the interpretation of the language under consideration. The fixing of the period of limitation rests of course wholly with the Legislature, and the policy of requiring a compensation action by dependents to be brought within a fixed time from the accident does not necessarily rest upon the theory of the identity of their demand with that of the employee.

In British Columbia the making of a claim under the Compensation Act after the death of the injured employee has been held unnecessary, where one had previously been made in behalf of the injured workman. *Moffatt v. Crow's Nest Coal Co.*, 12 D. L. R. 1913, 642, 643. The statute there involved differed from our own in not containing the specific provision that "the failure to make a claim within the period above specified shall be a bar." The plaintiff suggests that such a provision is to be implied from the fact that the failure to give notice of the accident (as distinguished from making a claim for compensation) was made a bar only in case prejudice to the employer resulted therefrom. Such a distinction does not appear to have been the ground of the decision, which is based upon a purpose to carry out the intention of the act by a liberal construction thereof. The claim is treated much as a notice, and is so spoken of in the opinions, while the headnotes refer only to a "notice of injury." There the claim for compensation was made one week after the accident, and death ensued two weeks later, before any further proceedings had been taken, and while the claim was still pending. Quite obviously the claim then made may have been sufficient to protect the employer from a stale demand—to warn him that a claim was about to be made and thus put him on his guard. But such is far from the case here. The steps that had been taken—the settlement and release—so far from warning the employer of the prospect of a further demand, tended to lull him into security in the belief that the whole affair had been finally disposed of.

In Michigan a new claim in behalf of the dependents is required where the employee's injuries result in his death pending the allowance of his own demand. *Curtis v. Slater Const. Co.*, 202 Mich. 673, 168 N. W. 958. The statute there involved has some features which were given weight in reaching this conclusion, and which are not found in our law; for instance the dependents are ex-

pressly declared not to be parties in interest to a proceeding by the employee for the enforcement of his demand, and the claim of the dependents is required to be signed by them or by some one in their behalf. We regard the decision, however, in its general aspect as tending to support the view we have taken.

The defendant also urges that there was not sufficient evidence that the employee's death was due to the accident, and that the release barred the plaintiff's claim as well as that of her husband. In view of the conclusion already announced, it will not be necessary to consider these matters.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 571)

STATE ex rel. HOPKINS, Atty. Gen., v.
RAYL. (No. 23914.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by Editorial Staff.)

Officers \Rightarrow 74(2)—Supreme Court must try appeal from judgment of ouster like any other appeal and will not consider new evidence.

Gen. St. 1915, § 7615 (Code Civ. Proc. § 686m), and Gen. St. 1915, § 7484 (Code Civ. Proc. § 580), providing Supreme Court may receive further testimony, etc., did not confer original jurisdiction on the Supreme Court upon an appeal from a judgment of ouster from office under Laws 1911, c. 237, Gen. St. 1915, §§ 7603-7618 (Code Civ. Proc. §§ 686a-686p), and it will not consider new evidence.

Opinion denying a rehearing.

For main opinion, see 110 Kan. 576, 204 Pac. 1002.

PORTER, J. In a motion for rehearing it is urged that appellant's contention respecting the procedure in this court upon an appeal from a judgment of ouster under chapter 237, Laws 1911 (Gen. Stat. 1915, §§ 7603-7618 [Code Civ. Proc. §§ 686a-686p]), was not given sufficient consideration. In the original briefs the point was raised in the following language and without the citation of any authorities:

"Now as we understand proceedings of this character this honorable court retries this case, that is to say, this court passes upon questions of fact, as well as questions of law, and we respectfully submit that after reading all of this testimony, your honors must come to the conclusion that the testimony is insufficient to find this defendant guilty of willful misconduct in office."

The statute provides that—

"In all appeals * * * the Supreme Court may receive further testimony, and may adopt

any procedure, not inconsistent with this act, which it may deem necessary for a full and final hearing and determination of the cause; and said court, on appeal, shall either affirm the judgment of the lower court, or enter such final judgment as it deems that justice may require." Gen. Stat. 1915, § 7615 (Code Civ. Proc. § 686m).

This statute is substantially the same as section 580 of the amended Civil Code (Gen. St. 1915, § 7484), which reads:

"In all cases except those triable by a jury, as a matter of constitutional right, the Supreme Court may receive further testimony, allow amendments of pleadings or process, and adopt any procedure not inconsistent with this act which it may deem necessary or expedient for a full and final hearing and determination of the cause."

Section 580 was considered in the case of Hess v. Conway, 93 Kan. 246, 144 Pac. 205, and it was said in the opinion:

"This court cannot consider the new evidence. If it had a thought of doing so it would be obliged to grant the adverse party time to produce countervailing evidence, which might possibly include impeaching evidence. The appellants would then likely desire to make a showing in rebuttal. The result would be that the court would have before it for determination a case which the district court could not identify as one which it had decided, and so this court would be plunged into an exercise of original and not appellate jurisdiction.

"In the case of In re Burnette, 73 Kan. 609, 85 Pac. 575, the distinction between original and appellate jurisdiction was pointed out, as well as the lack of power on the part of the Legislature to confer original jurisdiction on this court. The constitution creates the court as it creates the legislature, and that instrument, which both the court and the legislature must respect and obey, expressly limited the court's original jurisdiction to proceedings in quo warranto, mandamus, and habeas corpus, and granted to the legislature no power to confer any but appellate jurisdiction." 93 Kan. pp. 248, 249, 144 Pac. 206.

The original opinion in the case at bar cited State v. Lyons, 97 Kan. 588, 155 Pac. 936, an appeal by the state from a judgment refusing to oust a member of the board of county commissioners, which was affirmed solely upon the ground that there was sufficient evidence in the abstracts to sustain the material portions of each finding. In the present case it might well have been said, as it was said in the Lyons Case:

"No useful purpose would be subserved by debating the matter, and the ordinary rules, long established and well understood, govern." 97 Kan. p. 589, 155 Pac. 936.

In Wideman v. Faivre, 100 Kan. 102, 163 Pac. 619, Ann. Cas. 1918B, 1168, it was said:

"The Supreme Court's jurisdiction is invariably and exclusively original or appellate. There

\Rightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

is never a confusion or blending of both" (citing *Hess v. Conway*, supra, and other decisions). 100 Kan. p. 108, 163 Pac. 621, Ann. Cas. 1918B, 1168.

In the original opinion we held that there was sufficient evidence to sustain the judgment of ouster. Nothing suggested in the petition for rehearing has altered our view of the matter, and the rehearing is denied.

All the Justices concurring.

(111 Kan. 420)

MOORE v. NORTH RIVER INS. CO.
(No. 23784.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Pleading \S 129(2)—Failure to answer allegation of petition as to agency held to constitute an admission of the agency.

In an action on an insurance policy, the petition alleged that the person who took the application was the agent of the insurance company. *Held*, that the court properly ruled that the failure of the answer to deny the fact under oath amounted to an admission of the agency. Code Civ. Proc. \S 110 (Gen. St. 1915, \S 7002); *Hornick v. Railroad Co.*, 85 Kan. 572, 118 Pac. 60, 38 L. R. A. (N. S.) 828, Ann. Cas. 1918A, 208.

2. Insurance \S 163(1/2)—That automobile owned by plaintiff had different factory number from that stated in policy insuring automobile against theft held not to preclude recovery on policy.

In an action upon a farm automobile policy, insuring a certain Ford roadster No. 2,973,641 against loss by theft, the principal defense was that the car was not the property of the plaintiff. The defendant's evidence showed that a car of the same description and make, bearing the same factory number, was purchased from the factory long prior to the issuance of the policy, and was then in the possession of the purchaser in New York City. *Held*, that the number of the car stated in the policy was a mere matter of description; it was the particular car which the defendant insured and not the number; and *held* further, that the court properly refused to instruct that, even if the jury believed from the evidence that plaintiff owned the Ford motor car when the policy was issued, they must find for the defendant, unless they believed from the evidence that the car bore the number stated in the policy.

3. Insurance \S 163(1/2)—Instruction that plaintiff could not recover on automobile policy, after third party had purchased and was in possession of automobile with same factory number as that described in policy properly refused.

In such a case, an instruction was properly refused, which charged that, if the jury believed from the evidence that in 1919 a third person purchased a Ford car of that number and

had since been in the continuous possession thereof, it was their duty to find for the defendant.

Appeal from District Court, Montgomery County.

Action by Chester Moore, a minor, by E. H. Moore, his father and next friend, against the North River Insurance Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

C. O. Crow and J. W. Broadbudd, both of Kansas City, Mo., and Lester G. Seacat, of Independence, for appellant.

Thos. E. Wagstaff and Grace A. Miles, both of Independence, for appellee.

PORTER, J. The action was upon a farm automobile policy insuring a certain Ford roadster, No. 2,973,641, against loss by theft for one year. The answer alleged that, when the policy was issued, the car was not the property of the plaintiff but belonged to some other person from whom it had been stolen. As a further defense, it was alleged that the plaintiff falsely stated to the agent of the company that he had paid \$500 for the car, which representation the plaintiff knew to be false; that defendant relied upon the statement; and that, by reason thereof, the policy become void. The answer tendered back to plaintiff the premium paid. The reply was a general denial. The trial resulted in a verdict and judgment for plaintiff. Defendant appeals.

The plaintiff, who was a minor, testified that his father purchased the automobile from plaintiff's uncle and paid \$475 for it; that his father gave the car to him; that he was present when the policy was issued; that Mr. Cunningham, the agent of the company, put the value on the car; that he himself did not know the number of the car, although he had looked at it; that his father gave the number to Cunningham. The plaintiff also called Mr. Cunningham, who testified that he wrote the application and sent it to the company's agent at Wellington, Kan.; that he insured two cars at the same time, one the roadster in question, and a touring car which belonged to plaintiff's father, who gave him the number of the roadster from the Kansas license receipt—"read it to me from the paper." The witness did not go to the car to examine the number; the car looked to him the same as a new one, and he knew the value of the car at the time; he wrote the application, and the plaintiff merely signed it. The plaintiff offered testimony showing that the car was in the garage on the farm the night before it was missing. The doors were locked; the next morning the lock showed that it had been pried off; the car was gone.

HARVEY v. MISSOURI PAC. R. CO.
(No. 23592.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Adverse possession \S 60(6)—Eminent domain \S 319—Fee owner of land condemned for railroad purposes may use such portion of the property not required by railroad; fee owner's occupancy of land condemned for railroad purposes not adverse to railroad.

The holder of the fee title to land taken under condemnation proceedings for railway purposes remains the owner of the property, and has the right to occupy and use such portion of the condemned property as the railway company does not actually require or use for the proper, safe, convenient, and efficient discharge of its duties as a public carrier; but such occupancy and use is neither adverse, hostile, nor inconsistent with the rights of the railway company, nor will the lapse of time bar the railway company of its rights acquired and paid for under the condemnation proceedings.

2. Adverse possession \S 60(6)—Fee owner's occupancy of land condemned by railroad, but not used by it for 15 years, held not to give him adverse possession.

Certain lands of plaintiff's predecessor in title were condemned in 1879 for railway purposes. Hitherto the defendant company has not used or needed all the land condemned, and a portion of it has been continually occupied and used by the plaintiff and his predecessors in title. *Held* that, as plaintiff and his predecessors in title were strictly within their rights in occupying and using that portion of the property not yet required for railway purposes, there has been no adverse, hostile, inconsistent use to the prejudice of the railway company, nor has the latter been excluded so as to give rise to an independent right founded on 15 years' adverse possession; and an action on the part of the fee title holder to quiet his title against the railway company cannot be maintained.

Appeal from District Court, Osborne County.

Suit by J. W. Harvey against the Missouri Pacific Railroad Company. Judgment for plaintiff and defendant appeals. Reversed and remanded, with instructions to enter judgment for defendant.

Waggener, Challis & Brown, of Atchison, and N. C. Else, of Osborne, for appellant. H. McCaslin and Edgar C. Bennett, both of Osborne, for appellee.

DAWSON, J. The plaintiff brought this suit to quiet his title to some land in Osborne which was condemned in 1879 for railway side tracks, depots, workshops, water station, and stockyards. Plaintiff is the successor in title to the fee holder of 1879, and the defendant is the successor of the railway

[1] On the cross-examination of Mr. Cunningham, the defendant sought to show that he was not the agent of the company but merely a solicitor. The court very properly held that, as the petition alleged that he was defendant's agent, the failure of the answer to deny that fact under oath amounted to an admission of agency. The ruling was correct. Civil Code, \S 110 (Gen. St. 1915, \S 7002); *Hornick v. Railroad Co.*, 85 Kan. 572, 118 Pac. 60, 38 L. R. A. (N. S.) 826, Ann. Cas. 1913A, 208.

The defendant read the deposition of one Charles L. Wachter, taken in New York City, who testified that he was the owner of and in possession of Ford car No. 2,973,641; that he purchased it from the Ford factory long prior to the issuance of this policy. The depositions of two other witnesses were read, who testified that they had examined the car and that the number given by Mr. Wachter was correct. In rebuttal, the plaintiff offered in evidence the Kansas automobile license which gave the number the same as that stated in the policy.

[2] We are unable to find anything substantial in the defendant's contentions. There was evidence to sustain the verdict, and, of course, an instruction directing a verdict for the defendant would have been improper. The court was right in refusing to instruct that, even if the jury believed from the evidence that plaintiff owned the Ford motor car at the time the policy was issued, still they must find for the defendant, unless they believed from the evidence that the car bore the number stated in the policy. The number of the car, as recited in the policy, was merely a matter of description. It was the particular car which the defendant insured and not the number. It is possible that there was a mistake in issuing the state license, and the wrong number might have been given, which would account for the same error in the policy. On the other hand, there was evidence justifying the jury in finding that the number stated in the policy was correct.

[3] Another requested instruction charged that, if the jury believed from the evidence that in 1919 Charles L. Wachter purchased a Ford car No. 2,973,641, and that he had since been in the continuous possession thereof, then it was their duty to find for the defendant. To have given such an instruction would have been error. The court correctly charged that, if plaintiff was not the owner of the automobile which defendant company attempted to insure, then the verdict should be for the defendant.

The case presents nothing but issues of fact, with no conflict in the evidence upon any matter of real consequence. The judgment is affirmed.

All the Justices concurring.

corporation for whose use the property was condemned.

Notwithstanding the lapse of years and the general development of that community, only a limited portion of the land condemned in 1879 has yet been used or needed for railway purposes—the usual hundred-foot strip for a right of way. During this long interim successive holders of the fee title have had uninterrupted use and enjoyment of the condemned land to within 50 feet of the center of the railway track. Encroaching to that limit there were built and maintained for many years (from 1885 to 1901) the stables and buildings of a county fair association which then owned the property. These structures have now been removed, but the present owner and plaintiff has a stockyard and scales worth \$200 on the property involved herein. The plaintiff says: "I brought this suit to find out if I did own it or didn't."

[1, 2] Since the plaintiff holds the fee title, he is, of course, the owner, nor did he need to bring any suit to quiet his title. *Kansas Cent. Ry. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190. One whose property is subjected to condemnation for railway or other public uses is none the less the owner of the fee and holder of the ultimate title. He has what the law calls the servient estate. The party for whose use the condemnation was made has what is called the dominant estate. And, while the fee holder, after condemnation and compensation, may not interfere with the rights of the holder of the dominant estate, yet as owner he may still continue to use the property for any purpose which does not frustrate the public aims and ends for which the property was condemned. If gold, diamonds, or other minerals lay beneath the main line of this railway within the hundred-foot limit now actually used for railway purposes, these minerals would belong to the plaintiff, and he might mine for them so long as he did not interfere with the operation of the railway nor imperil the surface support. *Railroad Co. v. Schmuck*, 69 Kan. 272, 76 Pac. 836. If the railway at Osborne should be abandoned or relocated elsewhere than on plaintiff's property, the dominant estate would terminate, and the defendant's rights acquired by condemnation would terminate and revert to the plaintiff.

It was not necessary for the condemnation commissioners in 1879 to limit the amount of land to be condemned for railway purposes to the actual acreage required at that time. In the exercise of their discretion they could look to the future, and to the gradually expanding need for switchyards, sidings, workshops, and the like, and condemn such amount as seemed reasonable to them. Nor was this any hardship on the owner. He was paid for the land taken; and yet he and

his successors in title, down to and including the plaintiff, have none the less enjoyed the possession, emblements, and profits of most of the condemned property for all these years. Of course, so long as the railway company did not need all the property condemned, the successive fee title holders were strictly within their rights in occupying and using it. But, since they were within their rights in using and occupying the property, and because hitherto the defendant and its predecessors have not needed all the property condemned in 1879, there could be no such thing as adverse or inconsistent use, nor could there be adverse possession for 15 years so as to found an independent title, and thus bar the railway company of its rights acquired by condemnation. Before the 15 years' bar could give rise to a right to exclude the defendant, it would be necessary to show that during that time the plaintiff had occupied the property to the prejudice of the defendant; that the defendant during that interval had needed the property for railway purposes, but had been excluded therefrom by the plaintiff or his predecessors in title. It was not necessary for the railway company to make some pretended use of all the condemned property, to the exclusion of the successive fee title holders, in order to preserve its rights. The defendant was not required to clutter up the outlying portions of the tract with old ties, rails, or other junk merely to assert its dominant estate and discommode the owner of the fee. Such mere pretended use would have been an invasion of the rights of the fee title holder, who always had and still has such rights of enjoyment, use, and possession as do in no way impair or interfere with the proper, safe, convenient, and efficient discharge of the defendant's duties as a public carrier. In *U. P. Ry. Co. v. Kindred*, 43 Kan. 134, 136, 23 Pac. 112, it was said:

"In *Railway Co. v. Allen*, 22 Kan. 285, this court decided that, where the railway company has only an easement, the proprietor of the soil retains the fee of the land, and his right for every purpose not incompatible with the rights of the railway company. This rule is recognized everywhere. Although the abutting landowners have cultivated and inclosed part of the right of way granted by Congress, this possession cannot be considered as hostile or adverse. * * * If the abutting landowners own the fee of the right of way, they may use the land in any way not inconsistent with the paramount rights of the railway company; but such use will not give them adverse possession so as to confer title."

In *Railway Co. v. Burns*, 70 Kan. 627, 629, 79 Pac. 235, it was said:

"The right acquired by a railroad company by condemnation proceedings for right of way, depot grounds and terminal facilities dominates every right of possession, except as to the owner of the fee, and he may use only that

portion which is not in immediate use by the company, and not necessary to the safe and convenient use of that which is in actual service."

We recognize that this case is not necessarily controlled by those decisions which have had to deal with the rights of occupants of unused portions of the rights of way granted by Congress to the Pacific railroads, like *Railway Co. v. Watson*, 74 Kan. 494, 87 Pac. 687, and *Railway Co. v. Davenport*, 102 Kan. 513, 170 Pac. 993; and we note, also, that there are two opposing lines of authorities on the present question, 2 C. J. 225, 226; 1 R. C. L. 737, 738, and citations; but when it is kept in mind that these condemnation proceedings are authorized not as a mere special privilege to the persons who form the railway corporation nor for its private profit, but are in fact an exercise of the state's power of eminent domain to provide the public with a modern system of transportation and a modern commercial highway, it seems more logical to hold that rights acquired under such proceedings are not lost through lapse of time and nonuse, so long as the railway has a potential need of them, and, where there has been in fact no adverse, hostile, inconsistent use, nor prejudicial exclusion of the holder of the dominant estate. If at some future time the hitherto unused property condemned in 1879 should be required for railway purposes, it would seem illogical to say that the state's power of eminent domain would have to be reinvoked, and that condemnation proceedings would have to be undertaken again. If the property in dispute is never needed for railway purposes, the plaintiff remains not only the owner of the fee, but will continue as heretofore to possess and enjoy it. Under the circumstances, however, he has established no cause of action against the railway company.

Reversed and remanded, with instructions to enter judgment for defendant.

All the Justices concurring.

(111 Kan. 452)

KANSAS CITY LONG DISTANCE TELEPHONE CO. v. REED et al.
(No. 23943.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Public service commissions —21—District Court may grant temporary injunction against a rate order of the Public Utilities Commission.

It is not error for a district court to grant a temporary injunction against an order made by the Public Utilities Commission adjudging current telephone rates to be "just, reasonable, compensatory, and lawful," where the evidence

submitted on the application for the temporary injunction tends to show that the rates are unjust and unreasonable, and do not provide an adequate return on the property, according to the valuation placed upon it by its owners, and the order was made without certain evidence which the company, at the request of the Commission, had agreed to furnish, and was made without notice to the company that it would be made at that time in the absence of the evidence requested.

Appeal from District Court, Shawnee County.

Action by the Kansas City Long Distance Telephone Company against C. M. Reed and others, constituting the Public Utilities Commission, and Richard J. Hopkins, Attorney General, to vacate and set aside an order of the Public Utilities Commission. From an order granting a temporary injunction, the defendants appeal. Judgment affirmed.

A. E. Helm, Wm. A. Smith, and R. C. Harvey, all of Topeka, for appellants.

J. B. Tomlinson, of Independence, Godard & Myers, of Topeka, and L. E. Durham, of Kansas City, Mo., for appellees.

MARSHALL, J. The plaintiff commenced this action to vacate and set aside an order made by the Public Utilities Commission on August 27, 1921. The defendants appeal from an order granting a temporary injunction.

On October 12, 1920, the plaintiff, which operates a telephone system in the city of Independence, filed an application with the court of industrial relations asking for permission to charge higher rates for telephone service in that city. On August 3, 1921, H. A. Russell, a member of the Public Utilities Commission—that commission, under chapter 260 of the Laws of 1921, having taken over the regulation of the rates of telephone companies—heard the application, and then requested certain additional information, and stated that a final order under the application could not be made until that information had been furnished by the plaintiff. The plaintiff agreed to furnish the information, but no time was fixed within which it should be furnished, although it was understood by Commissioner Russell that the information would be furnished in a week or two. The information asked involved much calculation. It had not been furnished on August 27, 1921, and on that day, without further notice to the plaintiff, findings and an order were made by the Public Utilities Commission, as follows:

"That there is nothing in the evidence to enable the Commission to determine that the rates now in effect and authorized to be charged by the said Kansas City Long Distance Telephone Company at its exchange in Independ-

ence, Kan., are not just, compensatory, and lawful rates to be charged by said company.

"The Commission further finds that, assuming that the present rates are too low, then the applicant has failed to furnish evidence upon which this commission could base a fair, equitable, and lawful rate for service by said company in said city of Independence.

"It is therefore by the Commission considered and ordered, and the Commission finds: That the present rates authorized and charged for telephone service by the Kansas City Long Distance Telephone Company in the city of Independence are just, reasonable, compensatory, and lawful rates for the services rendered. The application is denied."

On the hearing of the application for a temporary injunction, the district court made findings of fact, the tenth finding of which was as follows:

"The testimony introduced at this hearing tends to show that the rates now in effect at plaintiff's exchange at Independence, Kan., are unjust and unreasonable, and do not provide plaintiff with an adequate return upon the valuation placed by it upon its property used and useful at such exchange."

The defendants argue that the order made by the Public Utilities Commission amounted to a dismissal of the application. So far as the rights of the plaintiff are concerned, this may be the effect of the order; the plaintiff has an undoubted right to present another application asking for an increase in its rates, but the order of the Commission was not a dismissal of the application. The order was that the rates were "just, reasonable, compensatory, and lawful"—quite a different proposition from an order dismissing the application.

The Commission had unqualified authority to ask for additional information, but sufficient time should have been given in which to furnish it. If the Commission desired that it be furnished within a given time, that time should have been named, and the plaintiff should have been notified concerning it. The Commission was not justified in making the order that it did make without fixing a time within which the information should have been furnished, and without notifying the defendant that the order would be made unless the information was given within that time.

There was evidence to support all that was said by the court in the tenth finding of fact. It is true that the finding does not state that the rates were unjust, unreasonable, or that they did not provide an adequate return on the property, but it was not necessary that the court should finally and conclusively find those facts before granting a temporary injunction.

The judgment of the district court granting a temporary injunction is affirmed.

All the Justices concurring.

(111 Kan. 598)

STATE ex rel. WHEELER, Co. Atty., v. BOARD OF EDUCATION OF CITY OF FLORENCE et al. (No. 24201.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Schools and school districts \S 42(2)—Statute regulating annexation to consolidated district of a district already "established" under specified act construed.

The provisions of chapter 230, Session Laws of 1921, regulating the manner in which a school district contiguous to a consolidated or union district "already established under the act of 1911" might become a part of such consolidated district, is held to apply to a consolidated or union district already in existence at the time chapter 275, Laws of 1911, was enacted; the expression "already established," as used in section 1 of the act of 1921, being construed to mean putting in a settled or an efficient state or condition an existing legal organization. *Armstrong v. George*, 84 Kan. 248, 114 Pac. 209.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Establish.]

2. Schools and school districts \S 42(2)—Consolidation proceedings not in accordance with statutory requirements void.

In an action attacking the validity of proceedings by which it was attempted to consolidate a school district with a union district which had been in existence since 1908, it is held, that the failure to comply with the requirements of chapter 230 of the Session Laws of 1921 rendered the proceedings void.

Appeal from District Court, Marion County.

Action by the State of Kansas, on the relation of John E. Wheeler, County Attorney of Marion County, against the Board of Education of the City of Florence, Kan., and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Garne & Frith, of Emporia, and J. C. Ruppenthal and Geo. W. Holland, both of Russell, for appellants.

John E. Wheeler and Carpenter & Carpenter, all of Marion, for appellee.

PORTER, J. Under the law as it existed in 1908, school districts No. 4 and No. 23, which include the city of Florence, in Marion county, were consolidated as union district No. 4. Subsequently the Legislature enacted chapter 275 of the Laws of 1911, governing the consolidation of school districts, and under that act school district No. 3 was attached to union district No. 4.

Under chapter 230 of the Session Laws of 1921, the Legislature provided the manner in which a school district contiguous to a consolidated or union district already establish-

ed under the act of 1911 might become a part of such union district. School district No. 77 of Marion county lies contiguous to union district No. 4, and in July, 1921, an attempt was made to attach it to No. 4; but in the proceedings the requirements and provisions of chapter 230 of the Laws of 1921 were entirely ignored. The purpose of this action is to prevent the board of education of the city of Florence from exercising jurisdiction and control over the property and affairs of school district No. 77. The plaintiff prevailed, and the defendants appeal.

[1, 2] The question in the case arises over the construction to be given to certain language in section 1 of the act of 1921, which reads:

"That any school district in the state of Kansas, adjacent or contiguous to a consolidated or union district already established under the provisions of chapter 275 of the Session Laws of the State of Kansas for 1911, shall become a part of said consolidated or union district upon complying with the following requirements."

The defendants insist that union school district No. 4 was not already established under this act of 1911, but on the contrary that it was established under the law as it stood in 1908. In the last analysis, the case turns upon the meaning of the word "established" as used in the statute of 1921. A similar question was before the court in *Armstrong v. George*, 84 Kan. 248, 114 Pac. 209, where it was ruled:

"A high school is established within the purview of chapter 210 of the Laws of 1909, concerning high schools, when it is brought up to the standard and meets the requirements prescribed in the Barnes high school law (Laws 1906, ch. 397), although the school was in existence when the last-named act took effect." (Syl. par. 1.)

In the course of the opinion, Justice Benson said:

"It is contended that a school which was in existence when the Barnes law took effect is not established under that law—that to establish means to create, to found, or to institute. On the other hand the defendants' contention is that to establish, as used in the statute, means to make stable; to confirm; to secure on a firm basis, as by recognition or favor. These definitions are taken from Webster's dictionary, and merely show that the word may be used in different senses. * * * The status of any high school by which it may come under the operation of the law is established when it is made to conform to the requirements of the Barnes law. If it has been so established and maintained for one year, it is

within the operation of the act of 1909. Reported cases might be cited wherein the word 'establish' has been held practically synonymous with create, while others have held the meaning of the word to be to confirm, or to ascertain and fix, or settle. (3 Words and Ph. Jud. Def. pp. 2469-2474; 16 Cyc. 591.) The particular sense in which the word is used must be determined by the context and the manifest intent and scope of the statute. In determining the import of this word in a statute of Alabama the Supreme Court of that state said: 'It is as often employed to signify the putting or fixing on a firm basis, of putting in a settled or an efficient state or condition, an existing legal organization or institution, as it is to found or set up such organization or institution; the one meaning is as little recon-dite, abstruse, or obscure as the other.' (The State ex rel., etc., v. Rogers et al., 107 Ala. 444, 453.)" 84 Kan. 250, 251, 114 Pac. 210.

We think beyond question that since the enactment of chapter 275 of the Laws of 1911, union school district No. 4 has performed its functions solely under the provisions of that act, although the district existed as a union district under previous statutes. The effect of chapter 275, Laws of 1911, was to settle upon a firm basis the organization of district No. 4 which was already in existence. The act of 1911 expressly repealed all previous laws under which district No. 4 had been established. Therefore it must be held that at the time the act of 1921 was passed, district No. 4 was a consolidated or union district already established and performing its functions under the provisions of the act of 1911. We have not set forth any of the requirements of the act of 1921 because it is conceded that in the attempt to attach district No. 77 to union district No. 4, the requirements and provisions of the act of 1921 were wholly ignored.

We agree with defendants' suggestion in the brief that the law is cumbersome and inaptly worded. Apparently the draughtsman was much concerned lest it might be thought the Legislature was attempting to enact a law which would affect the people of Arkansas or Massachusetts or some other state. Twice the superfluous expression, "in the state of Kansas," appears. We agree, also, that the law might well have read, "any school district adjacent or contiguous to a consolidated or union district shall become a part of such consolidated or union district," etc. However, the intention of the Legislature is not in doubt.

This disposes of the only question presented to the trial court, and it follows that the judgment is affirmed.

All the Justices concurring.

(111 Kan. 467)

BROWN et al. v. HAMILTON, Mayor, et al.
(No. 24114.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Municipal corporations §292(3) — Religious and benevolent corporations held "resident property owners," to be counted in determining the validity of petition for improvements.

The proceedings examined, and held certain religious and benevolent corporations were resident property owners, within the meaning of the statute relating to street improvements in cities of the second class.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Resident Owner.]

Appeal from District Court, Reno County.

Action by L. C. Brown and others against Wallace Hamilton, as Mayor of the City of Nickerson, and others for injunction. The relief prayed for was denied, and the plaintiffs appeal. Reversed and remanded, with directions to grant injunction.

Williams & Martindell, of Hutchinson, for appellants.

W. F. Jones and Malloy, Davis & White, all of Hutchinson, for appellees.

BURCH, J. The action was one to enjoin the issuance of bonds to pay for street improvements in the city of Nickerson, a city of the second class. The relief prayed for was denied, and the plaintiffs appeal.

The Christian Church and the Baptist Church are religious corporations, owning property fronting on the street to be improved. The G. A. R. Hall Association and I. O. O. F. lodge are corporations organized for benevolent purposes, and own property fronting on the street to be improved. The secular affairs of the religious corporations are controlled by a board of trustees, in whom title to all property of the corporation vests. The corporations as such have the general privileges of corporations, to the extent necessary for transaction of ordinary affairs, and to the extent necessary to accomplish their corporate purposes. The benevolent corporations have similar privileges. Title to their property vests in the corporations, whose affairs are managed by boards of directors or trustees. The question is whether these corporations are resident property owners, within the meaning of the statute relating to street improvements in cities of the second class, the cost of which is chargeable to abutting property. Gen. Stat. 1915, § 1764. In strictness, residence is an attribute of natural persons, but a corporation is treated as a person and as a resident of a locality for many legal purposes, and the question is one of statutory interpretation.

This court has held that public corporations, in one case a county and in another a board of education, are not residents of taxing districts, within the meaning of the statute. *Osborne County v. City of Osborne*, 104 Kan. 671, 180 Pac. 233; *Dunsworth v. City of Hutchinson*, 109 Kan. 538, 199 Pac. 89. In the case of *Kimmerle v. City of Topeka*, 88 Kan. 370, 128 Pac. 367, 43 L. R. A. (N. S.) 272, it was held the Rock Island Railway Company was not a resident of the city of Topeka, and the corporation, being a unit, had no residence outside the city of Chicago, within the meaning of the statute. In the *Osborne County Case*, three justices dissented, holding the locality of the corporate organization was at the county seat, and, because the board of county commissioners had statutory authority to manage the business interests of the county, none of which is more important than protection of property from imposition of financial burdens, the corporation should be considered a resident of the county seat. In the *Dunsworth Case* it was said:

"In committing the question whether or not a street should be paved to the resident owners of abutting property, and allowing no voice in the matter to nonresidents whose property would be affected in the same way and be equally subject to assessment to pay for the cost, the Legislature clearly intended a distinction based upon the different attitude toward the matter of one who, in addition to his interest in the increased value of his holdings, would presumably be actuated by what may be described as personal considerations growing out of the fact of his residence. It is difficult to conceive these considerations as applicable to a corporation at all, and especially to a public corporation—a body existing for purely governmental purposes." *Dunsworth v. City of Hutchinson*, 109 Kan. 538, 539, 199 Pac. 89.

It is not difficult to administer statutory provisions which do treat corporations as having local habitations. Perhaps the Legislature made the distinction between residents and nonresidents in this state, not on account of the intangible nature of corporations, but to avoid inconvenience and delay in initiating and consummating street improvement enterprises. The court could not be charged with employing an inappropriate metaphor, if it were to speak of the properties in question as church and lodge homes, to which members resort as the vital centers and seats of fellowship for purposes bearing a distinct relation to the civic life of the community, and from which the spiritual and benevolent activities of the societies radiate. The interest of the corporations, in inviting or opposing special assessments for improvement of the abutting street, and the power of their trustees to act in respect to such subjects, is unquestioned, and the court

holds the corporations are resident property owners, within the meaning of the statute.

Counting these corporations as resident property owners, the petition which was the foundation of the improvement proceeding was not signed by a majority of those whose signatures were necessary to authorize the mayor and council to make the improvement.

The judgment of the district court is reversed, and the cause is remanded, with direction to grant the injunction.

All the Justices concurring.

(111 Kan. 461)

LANTZ v. HANNA, Treasurer, et al.
(No. 24093.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Constitutional law §229(1)—Taxation §7, 41—Statute providing for taxing government bonds held unconstitutional.

The portion of section 11163 of the General Statutes of 1915, which provides that, where bonds of the United States have been purchased during the year preceding March 1, a sum shall be listed for taxation as money on hand on March 1, computed by dividing the value of the bonds by 12, and multiplying the quotient by the number of months of the year remaining after deducting the time the bonds were owned, violates the constitutional principles of equality and uniformity in property taxation in this state, denies purchasers of government bonds the equal protection of the laws guaranteed by the federal Constitution, and violates the federal statute exempting bonds of the federal government from state taxation.

Appeal from District Court, Cowley County.

Action by J. B. Lantz against R. B. Hanna, as Treasurer, etc., and others, to recover taxation paid under protest. A demurrer to the petition was sustained, and the plaintiff appeals. Judgment of the district court reversed, and cause remanded, with directions to enter judgment in favor of plaintiff.

C. Ward Wright, of Arkansas City, and S. C. Bloss, of Winfield, for appellant.

Richard J. Hopkins, Atty. Gen., E. W. Clausen, of St. Louis, Mo., and Ellis Fink, of Winfield, for appellees.

BURCH, J. The action was one to recover taxes paid under protest. A demurrer to the plaintiff's petition was sustained, and he appeals.

In this state, March 1 is taxing day. In March, 1919, the plaintiff duly listed for taxation all property subject to taxes which he owned on March 1. At that time he was operating for oil in Texas. His operations were financed by another, under an arrangement that he should receive a percentage of the net profits. On August 8, 1919, all property

which the plaintiff was operating, including operating equipment, was sold, and he received, as his share of the profits, more than \$1,000,000. Anticipating the sale, the plaintiff had arranged to invest his prospective profits in bonds of the United States. On August 8, within a matter of moments after receiving his profits, he purchased First Liberty Loan Bonds of the par value of \$1,000,000, for which he paid \$997,200. In May, 1920, the assessor coerced the plaintiff to list his investment in government bonds as of March 1, under section 11163 of the General Statutes of 1915, which reads as follows:

"All property shall be listed and valued as on the first day of March in the year in which the same is assessed, and the transfer or sale of any taxable personal property subsequently to the first day of March shall not authorize any person to omit the same from his list, although such list be not made until after the sale or transfer of such property; but all such property shall be listed for taxation in the same manner as if no sale or transfer thereof had been made. But where bonds of the United States have been purchased by any person during the year prior to the first day of March, where property is required to be listed as of that day, the value of such bonds in money shall be divided by twelve, and the quotient shall be multiplied by the number of months or fractional parts of months remaining after deducting the time which such bonds were owned, and such product shall be listed as money on hand on the first day of March by the party."

Having paid, under protest, the first half of the taxes levied pursuant to such listing, the plaintiff sued to recover the money, amounting to \$7,446.65.

The plaintiff contends the statute deprives him of the equal protection of the law, contrary to the guaranty of the federal Constitution, and violates the constitutional principles of equality and uniformity in property taxation in this state, by arbitrariness of classification.

When the Constitution of this state was adopted, the theory of taxation was the theory of reciprocal protection and duty to support. *Washburn College v. Comm'rs of Shawnee County*, 8 Kan. 344. The theory which now prevails is the faculty theory. *City of Hutchinson v. Stewart*, 105 Kan. 743, 185 Pac. 740. The Constitution stands in the way of full application of the modern theory, but the change in theory is not of practical consequence in this case. In the case of *Wheeler v. Weightman*, 96 Kan. 50, 149 Pac. 977, L. R. A. 1916A, 846, the court critically examined all cases previously decided, and stated the following conclusions respecting taxation of property:

"The essentials are that each man in city, county, and state is interested in maintaining the state and local governments. The protection which they afford and the duty to main-

tain them are reciprocal. The burden of supporting them should be borne equally by all, and this equality consists in each one contributing in proportion to the amount of his property. To this end all property in the state must be listed and valued for the purpose of taxation, the rate of assessment and taxation to be uniform and equal throughout the jurisdiction levying the tax. The imposition of taxes upon selected classes of property to the exclusion of others, and the exemption of selected classes to the exclusion of others, constitute invidious discriminations which destroy uniformity." 96 Kan. 58, 149 Pac. 980, L. R. A. 1916A, 846.

In the same opinion the subject of exemption from taxation was fully considered, and the following conclusions were stated:

"An exemption from taxation, granted through favoritism or other arbitrary motive, of property not benefiting the public in any way different from other property of the state, could not be sustained even although the financial effect of the exemption might not be appreciably felt.

"It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation." 1 Cooley on Taxation (3d Ed.) p. 381." 96 Kan. 61, 149 Pac. 982, L. R. A. 1916A, 846.

Within constitutional limitations, and limitations imposed by paramount federal law, the Legislature has full discretion in the formulation of its scheme of taxation. Since the tax law must be a general law, perfect uniformity and equality are impossible, and it is unavoidable that some persons should be affected differently from others. In this instance, however, money invested in a single kind of tax-exempt security is taxed, while money invested in all other kinds is not taxed. The inequality is not incidental, but results from invidious discrimination between classes of tax-exempt securities and between bonds of the United States and securities issued under the laws of this state, produced by revision of the tax law in 1907:

"No person shall be required to list for taxation any state, county, city, school district and municipal bonds of the state of Kansas, or other evidences of indebtedness of municipal corporation[s] of this state." Laws 1907, c. 408, § 15; Gen. Stat. 1915, § 11302.

There is no difference in principle between this case and the case of *Graham v. Comm'rs of Chautauqua County*, 31 Kan. 473, 2 Pac. 549, in which one kind of property, brought into the state after March 1, was taxed, while other kinds were not taxed; or the case of *M. & M. Rly. Co. v. Champlin, Treas.*, 37 Kan. 682, 16 Pac. 222, in which property of residents of a township was subjected to taxation, without taxing the property of oth-

ers; or the case of *In re Page*, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68, in which some insurance policies were taxed, and not others; or the case of *Hamilton v. Wilson*, 61 Kan. 511, 59 Pac. 1069, 48 L. R. A. 238, in which some kinds of judgments were taxed, and not others.

It is said the term "bonds of the United States" was used in a generic sense, and the state tax commission interprets the statute as applying to all obligations of the United States. When the statute took effect (March 11, 1876) the term had a definite legal meaning, which accorded with its popular meaning, and applied to a single class of obligations. The Legislature could not have been ignorant of the existence of the federal statute of 1864, which appears as section 3701 of the Revised Statutes of the United States (revision of June 22, 1874, published February 22, 1875 [U. S. Comp. St. § 6816]). This statute distinguished between bonds and other obligations of the United States, and reads as follows:

"All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority."

Therefore the interpretation of the tax commission is incorrect, and, if applied, would amount to an amendment of the statute.

It is said money invested in securities of this state benefits the public in a different way from money invested in federal securities, and so becomes a proper subject of exemption. The theory of exemption is fully satisfied by relieving the state securities themselves from taxation, and there is no evidence of legislative intention to rest exemption of money invested in state securities the day before taxing day, on the ground the money is thus made of special service to the state. Conceding, however, money and securities virtually constitute a unit which is a proper subject of exemption, there can be no basis for discrimination between money invested in government bonds and money invested in other forms of federal securities. If money invested in state securities, and the securities themselves, are to be regarded as one fund for the purpose of exemption from taxation under state law, it is quite arbitrary to treat money invested in government bonds, and the bonds themselves, as distinct subjects of exemption under the federal law, and the plaintiff's contention that the statute purposely, but by indirection, taxes bonds of the United States contrary to the federal statute, must be sustained. The borrowing power of the United States depends on its ability to market its bonds. A tax on money invested in bonds of the United States, like a tax on the bonds themselves—

"makes the possession of the bonds less valuable, it makes the net income from them

less, it renders them less desirable as an investment, and consequently impedes and impairs the borrowing power of the federal government." Gray on Limitations of Taxing Power and Public Indebtedness, § 755.

It is said the Supreme Court of the United States has held contrary to the view just stated, in the case of *Shotwell v. Moore*, 129 U. S. 590, 9 Sup. Ct. 362, 32 L. Ed. 827. In that case the court had under consideration a statute of the state of Ohio, the pertinent portion of which reads as follows:

"Sec. 2737. * * * Sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into, bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April. * * *" 129 U. S. 594 (9 Sup. Ct. 362, 32 L. Ed. 827).

Shotwell was in the habit of withdrawing his bank deposit just before taxing day, taking greenbacks for the amount, and making a special deposit of the greenbacks until after taxing day. In the opinion the court said:

"The state of Ohio, like many and perhaps most of the other states, collects from the business and property subject to taxation for the year preceding the specified date, the elements of an assessment of a tax to be paid by the taxpayer for the year succeeding that date, and it has in several instances recognized the fact that an assessment which assumed that all property should only be assessed to those who were the owners of it on the precise date named was not a just apportionment. * * *

"To avoid this evil the statute in Ohio provides for the ascertainment of the monthly average amount or value of the property or goods in which such parties were dealing, and for the assessment for taxation on that basis. Many kinds of business must be of this character.

"The Legislature, perceiving the facility with which negotiable securities and other rights and credits which were liable to taxation might be exchanged for greenbacks at the time the assessment for taxation was made, and after the assessment was over replaced in the form in which they had been, applied this principle, by special provision of the statute, to that form of property. In this they showed a wise forecast. So far as we can see, the statute which does this does not tax the citizen for the greenbacks which he may have held at any time during the year, but taxes him upon the money, credits, or other capital which he has had and used, according to the average monthly amount he has so held.

"Such we understand to be the purpose and effect of the section complained of by counsel, to wit, subdivision 16 of section 2737 of the Revised Statutes of Ohio. We do not see any objection to that state endeavoring to arrive at the average monthly amount or value of the moneys, credits, or other effects of the citizen subject to taxation within the preceding year, and ascertaining in a similar manner the aver-

age amount of his securities, either state or national, for the same period, not subject to taxation, in order to fix a basis for assessment." 129 U. S. 598, 9 Sup. Ct. 364, 32 L. Ed. 827.

It will be observed the Ohio statute was not discriminatory. As the Supreme Court of the United States said, it was "a wise and equitable law." It applied to money invested in tax-exempt securities of all kinds, federal and state, treated such money as part of the taxable property of the state, and used the amount of the securities as a factor in computing an average taxable value for the year. Under the Kansas statute, no money invested in exempt securities is taxed, except that invested in government bonds.

The effect of the statute on the sale of government bonds during the World War became a subject of importance. In the report of the proceedings of the sixth biennial conference convention of the tax commission and the county assessors of the state of Kansas, held at Topeka December 10 and 11, 1917, appears the following:

"During the conference many questions were asked as to whether or not moneys invested in 'Liberty Bonds' were subject to the provisions of section 11163, General Statutes of 1915. Suggestions were made concerning the subject, with a reservation on the part of the commission to give the matter careful consideration for the purpose of later announcing the rule to be followed.

"It was intimated by the commission at the time that it was very desirable to arrive at a conclusion that such moneys were not taxable, and since the conference adjourned the question has been taken up with the Attorney General, and it is with much satisfaction that, upon the advice of the Attorney General, it is now held that moneys invested in Liberty Bonds are not subject to the provisions of the said section.

"The conclusion is reached that the statute was enacted solely to prevent tax evasion on the part of owners of money who, on or about March 1, temporarily invested in ordinary government bonds for the purpose of being able to withhold from the assessment roll such moneys, and that moneys invested in the bonds now offered for sale in an emergency of the government, and known as Liberty Bonds, and which investments are made, not as investments for the purposes of income, but in a pure spirit of patriotism, to help the government out in its time of need, are not within the intent of the law." Page 63.

There is an intimation here that money used to purchase government bonds as an investment may be taxed, and such now appears to be the view of the taxing officials. There is no reason to believe the statute was framed to prevent tax evasion. At the time the statute was enacted the country was only beginning to recover from severe financial panic and business depression. Problems of currency and finance were agitating the country, and monetary heresies were rife. The

paper-money volcano still smoked and threatened eruption. The bondholder, who clipped coupons while others toiled, was not popular. The national banking system, built upon government bonds, was under severe criticism. The long duel between gold and silver had commenced, and it was assumed it would be necessary to issue bonds to procure gold to make the resumption act effective. To maintain faith in the integrity of the government, interest on bonds, not specified as payable in gold, was paid in gold, which reached the price of 115 in 1876, and this fact served to increase resentment toward bondholders, as an unduly favored class. Tax evasion in this state by converting money into bonds of the United States was negligible. The tax dodger resorted to greenbacks, which were exempt from taxation until 1894, and the Legislature of Kansas believed it had discovered a method of reaching bondholders, by taxing money invested in bonds. The legal effect was to penalize investments in bonds of the United States.

The result is, the money which the plaintiff invested in Liberty Bonds was not taxable, and the taxes he was compelled to pay should be refunded.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiff.

All the Justices concurring.

(111 Kan. 596)

CLAYTON v. HILL CITY et al. (No. 24182.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Municipal corporations §918(1)—Statute authorizing issuance of bonds on a vote of a "majority of the qualified electors" held to require majority of all entitled to vote.

A provision of the statute authorizing cities among other things to construct a transmission line to obtain electricity from a plant outside its boundaries that no bonds shall be issued under it except upon "a vote of a majority of the qualified electors of such city" means that those voting in favor of the bonds must form a majority of all entitled to vote at the election, and not simply a majority of those voting thereat.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Majority.]

Appeal from District Court, Graham County.

Action by H. D. Clayton against the City of Hill City and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Sayers & Parker, of Hill City, and J. B. Larimer and W. Glenn Hamilton, both of Topeka, for appellants.

Chas. L. Hunt, of Concordia, John Q. Sayers, of Hill City, and C. J. Putt, of Concordia, for appellee.

MASON, J. A special election was held in Hill City to vote upon a proposition to issue bonds to construct a transmission line connecting with an electrical power plant in Plainville. A majority of the votes cast favored the proposition. The plaintiff obtained a judgment enjoining the issuance of the bonds on the ground that authority for that purpose could be given only by the affirmative consent of a majority of all those entitled to vote at the election, whether they actually did so or not. The defendants appeal, the sole controversy being as to the true interpretation in this regard of the statute, which provides that—

"No bonds shall be issued except upon a vote of a majority of the qualified electors of such city." Gen. Stat. 1915, § 864.

Where a popular vote is required to authorize certain action, a majority (or other stated proportion) of those actually voting is regarded as sufficient for the purpose, unless the statute affirmatively and clearly shows a different intention. But we regard the language quoted as too explicit to admit of any other construction than that the bonds referred to shall not be issued without the consent, expressed by voting at the election, of a majority of all the persons lawfully entitled to vote thereat. True there are difficulties in ascertaining the exact number of qualified electors of a given city or other governmental body, but they are not insuperable. Many statutes require petitions to be signed by a certain proportion of the electors of a district without indicating how the total number is to be arrived at, yet their administration has not proved impracticable on that account. Nearly all the many Kansas statutes regarding special elections provide in so many words that the result shall be determined by a majority (or other proportion) of the votes cast. A provision that a majority of the qualified electors shall be necessary is so unusual as clearly to indicate a purpose to apply a different rule. The use of the word "electors" rather than "voters" tends to the same conclusion. While the terms are sometimes used interchangeably, their meaning is not precisely the same, "electors" being properly applied to those entitled to vote, rather than to those actually voting, while "voters" is employed in both senses. For illustration, see *Mills v. Hallgren*, 146 Iowa, 215, 124 N. W. 1077.

The defendants regard *Patrick v. Johnson*, 90 Kan. 140, 133 Pac. 161, as interpreting a

similar statute in accordance with their contention. The question whether a statute referred to three-fifths of those eligible to vote or to three-fifths of those who did vote was there discussed, but did not require to be decided, and was not decided, because the proposition involved had not received three-fifths of either number. It was said in the syllabus, and also in the opinion, that the majority did not need to be determined by an examination of the registration list; but that was a different matter. This court has interpreted a provision that school districts may be consolidated if a majority of the voters of each district vote to unite, as making the consent of a majority of those qualified to vote in each district necessary to the union. *Gardner v. State*, 77 Kan. 742, 95 Pac. 588.

The federal Supreme Court originally held a statute of Missouri which authorized township bonds to be issued upon a vote of two-thirds of those voting at a special election to be void because repugnant to a provision of the state Constitution forbidding their issuance unless "two-thirds of the qualified voters of such * * * town, at a regular or special election to be held therein," should assent thereto. *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747. Later this case was overruled, the court holding (two of the justices dissenting) that the constitutional requirement was satisfied by the assent of two-thirds of those voting at the election. *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416. The second decision, however, was expressly based upon the ground that the court was concluded by earlier rulings of the state Supreme Court, to which attention had not been called at the hearing of the first case. The rule of the second case was applied in interpreting the same language found in the Constitution of Mississippi, although the state Supreme Court had already construed it as requiring the consent of two-thirds of those entitled to vote (*Hawkins v. Carroll Co.*, 50 Miss. 735); the refusal to follow that construction being justified by the fact that the rights of the holder of the bonds in controversy had accrued before the decision by the state court (*Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517). The federal rule has been followed in the interpretation of a similar provision of the Constitution of another state. *Vance v. Austell*, 45 Ark. 400. The same interpretation of equivalent language was adopted in *Sanford v. Prentice*, 28 Wis. 358, but there the court said:

"If the Legislature had intended a majority of the qualified electors of the district, they would undoubtedly have used those words instead of the words 'legal voters,' or in some other way have made their intention plain." 28 Wis. 363.

A constitutional requirement of a vote of "two-thirds of the qualified electors of the parish" has been held not to be met by a two-thirds majority of those voting, the court saying:

"If the framers of the Constitution intended that meaning, they could readily have found words in which to express it, instead of declaring what they meant by saying 'two-thirds of the qualified electors of the parish or parishes affected.'" *Hobgood v. Police Jury*, 147 La. 279, 84 South. 656.

See, also, 9 R. C. L. 1116, 1117, note 4. Even the phrase "a majority of the qualified voters of the county" has been given the same effect. *Long v. Commissioners of Brunswick County*, 181 N. C. 146, 106 S. E. 481.

Upon a hasty search we find no other Kansas statute in which the result of an election is made to turn upon the concurrence of "a majority of the qualified electors" of the public body or district affected. Of some 55 election statutes examined one uses the phrase "a majority of the electors" (section 1776); another "a two-thirds vote of the legal voters" (section 8654); another "two-thirds of the legal voters" and "a majority of the legal voters" (section 8915). The others employ language indicating clearly that a majority (or other proportion) of those voting shall determine the result. The act here under consideration among other things authorizes the municipality to purchase or contract for the construction of oil wells, to lease or buy natural gas and oil lands, and construct pipe lines to the city. It is natural that, with respect to undertakings extending beyond a city's limits, stricter methods of ascertaining in advance the wishes of its inhabitants should be employed than where the project involved is confined within its borders, and we regard the language used by the Legislature in the present instance as indicating a purpose to make a more exacting requirement than in the case of ordinary bond elections.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, PORTER, WEST, and MARSHALL, JJ., concurring.
DAWSON, J., not sitting.

(111 Kan. 484)

OWEN v. SPANGLER. (No. 23515.)(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)*(Syllabus by the Court.)*

1. Brokers \S 51, 52—Not required to bring purchaser and owner together personally or introduce them; not required to procure a binding contract signed by purchaser.

Where a real estate agent is employed to find a purchaser ready, able, and willing to buy on terms acceptable to the seller, it is not required, in order to earn his commission, that he bring the parties together personally or introduce them, nor is it the law that, in order to earn his commission, he must procure a binding contract signed by the purchaser.

2. Brokers \S 63(1)—For procuring purchaser on accepted terms broker held entitled to commission, though owner refused to contract on such terms.

In this case land had been listed on certain terms for sale. The agent procured a purchaser at terms slightly different and communicated the fact to the owner, who, on April 21, telegraphed in reply, "Will take offer and vacate May fifth, sooner if possible." He was informed by letter that the terms stated in his telegram were satisfactory to the purchaser, and that there was no need of a written agreement. The purchaser was ready, able, and willing to complete the sale; the only reason it fell through was because the defendant insisted upon the purchaser signing a written contract, dated about April 27, providing for possession to be given within 30 days from that date, or sooner if possible. *Held*, that the agent had earned his commission when he brought the parties together upon terms agreeable to them, and that the seller could not relieve himself from liability to his agent by insisting upon different terms which prevented a sale.

3. Appeal and error \S 1176(5)—Where verdict was set aside on a mistaken view of the law, the judgment will be reversed, with directions to enter judgment on verdict.

Because, upon the undisputed facts, it is apparent that the court set the verdict aside and granted a new trial on a mistaken view of the law, the judgment is reversed, and the cause remanded, with directions to enter judgment on the verdict.

Appeal from District Court, Lane County.

Action by C. N. Owen against John F. Spangler. Verdict for plaintiff was set aside, and a new trial granted, and plaintiff appeals. Reversed, with direction to enter judgment for plaintiff on the verdict.

R. D. Armstrong, of Scott City, and J. E. Mowery, of Dighton, for appellant.

Roscoe H. Wilson, of Jetmore, and W. H. Russell, of La Crosse, for appellee.

PORTER, J. The action was to recover a real estate agent's commission. The court

set aside a verdict for the plaintiff and granted a new trial. The plaintiff appeals.

John Spangler owned 320 acres of land in Lane county. He lived at Ness City. He listed the land with the plaintiff for sale at \$35 an acre on terms of \$4,500 cash, balance in four years at 7 per cent. interest. There was no dispute about the material facts in the case. The plaintiff's evidence showed that on April 21 he procured one G. L. Cremer to inspect the property, and Cremer made an offer to purchase the land. Owen, the plaintiff, communicated this offer to Spangler by telegram which reads:

"Have offer \$35 per acre \$4,000 cash balance 5 years seven per cent. option paying at any time possession May first, improvement silo and tanks included. Wire answer."

On the same day he received a telegram from Spangler as follows:

"Will take offer and vacate May fifth, sooner if possible will write to-night."

Upon receipt of this telegram Owen communicated with Cremer by telephone and read the telegram to him. The terms were satisfactory to Cremer. Two days later plaintiff received word from Spangler wanting to know if the deal was going through, and directing plaintiff to prepare and send a contract, and stating that if the contract did not suit him he would prepare a new one. Plaintiff immediately wrote Spangler in substance that he did not think there was any need of a contract, as Mr. Cremer was ready to close the deal as soon as the abstract was brought to date and the deed was ready, but said:

"However, I am inclosing a couple of contracts if you want to use them."

Spangler prepared contracts in duplicate and sent to plaintiff for Mr. Cremer's signature, but he made a change in the terms he had stated in his telegram. Instead of agreeing to vacate May 5th, sooner, if possible, the contract provided for possession 30 days from its date. The change was not acceptable to Mr. Cremer, and his testimony is that for that reason he refused to sign the contract. There is no dispute over the fact that he was ready, able, and willing to complete the purchase upon the terms stated in Spangler's telegram agreeing to vacate May 5th, "sooner if possible."

The defense relied upon in this action was that plaintiff never earned his commission because he had not procured a contract signed by Cremer, and also because he had never introduced Cremer to Spangler. The jury returned a verdict in favor of plaintiff and made the following answers to special questions:

"(1) Was this land listed by the defendant with the plaintiff for sale? Answer: Yes.

"(2) Were the terms upon which the purchaser, Cremer, proposed to buy different from those of the original listing? Answer: Yes.

"(3) Did the plaintiff ever bring Cremer, the proposed purchaser, and the defendant together or introduce them to each other? Answer: No.

"(4) Did the plaintiff ever procure a contract for the purchase of the land signed by Cremer, the proposed purchaser? Answer: No.

"(5) Could the plaintiff by the exercise of the utmost diligence have procured such a contract from Cremer, the proposed purchaser, before April 29, 1919? Answer: We don't know.

"(6) Was a sale of this land ever consummated between the defendant and Cremer, the proposed purchaser? Answer: No."

[1, 3] The ground upon which the court granted the motion for a new trial is apparent. It was on the mistaken theory that the commission was not earned because Owen did not disclose the name of his customer to Spangler, did not introduce or bring the parties together personally, and did not procure a contract signed by the proposed purchaser. Upon the undisputed facts, we think it was error to set the verdict aside and to grant a new trial. It is not the law that in order for an agent to earn his commission, where he is employed to find a purchaser able and willing to buy on terms acceptable to the seller, that he shall bring the parties together personally, or introduce them; nor is it the law that in order to earn his commission he must procure a binding contract signed by the purchaser. This is evident from the fact that his contract is not that he will procure a person who will sign a contract to buy, but one ready, able, and willing to purchase on the terms stated or agreed to by the seller. Decisions which refer to the necessity of bringing the parties together have reference to bringing their minds together upon a contract. Physically, the persons may be thousands of miles away from each other. It is not necessary that they ever see one another or communicate otherwise than through the agent.

[2] In this case the land had been listed on certain terms for sale. The agent procured a purchaser at terms slightly different and communicated the fact to Spangler. When Spangler telegraphed to his agent, "Will take offer and vacate May fifth, sooner if possible," he put himself where the agent would be entitled to recover his commission provided the proposed purchaser accepted Spangler's terms. And Spangler could not avoid paying the commission by merely refusing to abide by his proposition and by preparing a written contract with new terms not acceptable to the purchaser. On April 23 the plaintiff wrote the defendant, informing him who the purchaser was and that

the terms stated in Spangler's telegram were satisfactory. He informed him further that, so far as he could see, there was no need of a written agreement, but inclosed blanks if Spangler desired to make use of them. In this situation it cannot be doubted that Spangler would have been liable for the commission had the trade fallen through by reason of his sending a contract agreeing to sell only upon condition that the purchaser would pay \$1,000 more than the offer of April 21. For the same reason it follows that, if he changed any other terms of the contract—that is, inserted in the written contract terms different from those already agreed upon—and the purchaser refused for that reason to complete the deal, he would be liable for payment of the commission. The record shows beyond dispute that the only reason the sale was not completed according to the terms of the contract made by telegram was because the defendant required the purchaser to sign a different contract by which he was to have 30 days, in place of 5, in which to surrender possession of the property. Conceding his right to change his mind about the sale and to change the terms upon which he had agreed to sell, he could not thereby avoid his obligation to pay to the agent the commission which had already been earned.

It was error to grant a new trial, and the judgment is reversed, with directions to enter judgment for the plaintiff on the verdict.

All the Justices concurring.

(111 Kan. 458)

STATE v. HALL. (No. 23992.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Indictment and Information \S 125(45)—Larceny \S 62(1)—Stealing of articles on different floors of a department store during one visit may be charged as one offense; finding that articles were taken without defendant having left the building sustained.

The stealing of several articles upon different floors of a department store during one visit of the defendant thereto may properly be charged as a single offense in one count of an information. And it is held, that the evidence justified a finding that the articles here involved were taken without the defendant having left the building.

2. Criminal law \S 776(4) — Where jury is instructed to consider evidence of defendant's previous good reputation as bearing on his credibility, refusal to add that it is a recommendation that he will speak the truth proper.

When the jury is told that evidence of the previous good reputation of the defendant in a criminal case should be considered for its bearing upon his credibility as a witness as well as upon the broader question whether there is a

reasonable doubt of his guilt, no error is committed in refusing to add that such evidence stands as a recommendation that he will speak the truth.

Appeal from District Court, Shawnee County.

Joe Hall, alias Joe Frank Hanley, was convicted of grand larceny, and he appeals. Affirmed.

R. M. Lee and W. E. Atchison, both of Topeka, for appellant.

Richard J. Hopkins, Atty. Gen., and Tinkham Veale and R. H. Gaw, both of Topeka, for the State.

MASON, J. The defendant was convicted of grand larceny, and appeals. He was charged in one count with stealing a lady's suit worth \$99.50, a lady's waist worth \$6.75, and a wrist watch worth \$6.75, and was found guilty of stealing property worth \$75. The suit and waist were stolen on the third floor of a department store and the watch on the first. The defendant contends that the evidence conclusively shows that the goods in the different floors were taken by at least two separate acts constituting distinct offenses, and on that account complains of the overruling of his motion to require the state to elect as to the taking of which article the state would rely upon for conviction.

[1] One witness for the state testified that she saw the defendant and a woman who accompanied him enter and leave the first floor by the street door, and that they were in her sight during all the intervening time—about 10 minutes. The jury, however, may have thought she was mistaken in part and that without her noticing it they may have visited the upper floor in the meantime. The defendant testified that he went to the store after he had eaten lunch, which was about 1 o'clock. The state's witness already referred to said that he and the woman entered the store a few minutes after one. Another witness testified to seeing them on the third floor about 1 o'clock. This evidence justified a finding that all the goods were taken on the same visit to the store, and there is no occasion to consider whether it would have made any difference if they had gone outside of the building in the interval between the taking of the goods on the different floors. In these circumstances the treatment of the taking of the several articles as constituting a single offense gives the defendant no just cause of complaint.

"Where several articles are taken from the same owner at or about the same time by the same thief, the better practice, in spite of the fact that there are technically several takings, is to regard the takings as a single offense, and to indict and punish but once. This is clearly the case when the goods are taken at the same time by one act of taking. But it is equally

true where the goods, although taken at substantially the same time, are taken independently." 25 Cyc. 61.

"But a series of larcenous acts, regardless of the amount and value of the separate parcels or articles taken, and regardless of the time occupied in the performance, may and will constitute, in contemplation of law, a single larceny, provided the several acts are done pursuant to a single impulse and in execution of a general fraudulent scheme." West v. Commonwealth, 125 Va. 747, 99 S. E. 654.

"From the great number and variety in the character of the articles found, it is manifest that complainant [the defendant in the larceny prosecution] must have begun her thefts immediately after she entered the employ of the company, and that she continued them daily until the time of her arrest. * * * Though the larceny is of several different articles, if they are taken in substantially the same transaction, their value may be aggregated, in order to make out a charge of grand larceny. * * * Each case must be determined upon its own special facts and circumstances. If, as it is said by some of the courts, the different asportations are prompted by one design, one purpose, one impulse, they are a single act, without regard to time." Ex parte Jones, 46 Mont. 122, 126 Pac. 929.

"The testimony indicates there was more than \$50 worth of the property taken the night before. If they were taken that night, it would necessarily follow that they were taken in pursuance of one purpose and design, and not taken at different dates. The fact they were taken from different sections of the store under the circumstances of this case would not constitute different takings, and would support the proposition that they were taken in pursuance of one purpose, and, legally speaking, at the same time, so far as the doctrine of theft is concerned when applied to different takings." Wilson v. State, 70 Tex. Cr. R. 631, 158 S. W. 516.

There was evidence that the stolen goods were worth the amount alleged in the information. The defendant argues that the value found by the jury shows that the verdict was the result of a compromise. One witness testified that there had been a depreciation in value—probably as much as 33½ per cent. A deduction of one-third from the total amount alleged would give in round numbers \$75, and this was probably the basis of the amount returned in the verdict—at all events, it may have been.

It is suggested that some of the jurors may have thought the defendant took the watch but not the suit or waist, while others may have thought he took the suit and waist but not the watch. The verdict indicated that all of them must have believed he stole the suit, for that was necessary to bring the amount of the stolen property up to \$75 or to make the offense a felony. It is obvious therefore that no substantial prejudice could have resulted even if the contention of the defendant in this regard were otherwise sound.

[2] 2. The defendant also complains of the refusal of a requested instruction regarding the effect of evidence of his previous good reputation, couched in the language of the fourth paragraph of the syllabus in *State v. Deuel*, 63 Kan. 811, 66 Pac. 1037. The instruction was given substantially in the form asked, except that it omitted the statement that such evidence "stands as a recommendation that he will speak the truth." The language of the syllabus was evidently chosen to make clear the respect in which the instruction then under consideration fell short of what was required. Its use in that connection carried no implication that it is necessary to use the quoted words in charging the jury on the subject of the weight to be given to character evidence, and no such necessity exists. The jury were properly told that they should consider the testimony covering the defendant's reputation for its bearing upon his credibility as a witness as well as upon the broader question whether there was a reasonable doubt of his guilt. This was sufficient.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 436)

FORBES et al. v. MAIN et ux. (No. 23811.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Mortgages ~~§~~369(2)—One who was adjudged insane after confirmation of foreclosure sale not entitled to have sale set aside.

One who was adjudged insane after an action to foreclose a real estate mortgage had been commenced, summons had been served, judgment had been rendered, order of sale had been issued, and sale had been made and confirmed, cannot, after he has been discharged from the state hospital as restored to sanity and after the period of redemption from the sale has expired, successfully prosecute a proceeding in the foreclosure action to set aside and vacate the judgment, the order of sale, the sale, and the confirmation thereof, on the ground of his incapacity.

Appeal from District Court, Shawnee County.

Action by W. M. Forbes and others against John J. Main and wife. Judgment was rendered for plaintiffs by default, and from an order denying the application of named defendant to vacate the judgment, the named defendant appeals. Affirmed.

W. H. Cowles and J. M. Stark, both of Topeka, for appellant.

Hugh T. Fisher and E. B. Smith, both of Topeka, for appellees.

MARSHALL, J. The plaintiffs recovered judgment, by default, foreclosing a real estate mortgage given by John J. Main and Belle Main, his wife. Under that judgment, the property was sold, the sale was confirmed, and a sheriff's deed was issued to the plaintiffs. Afterward, John J. Main filed an application, the prayer of which read:

"This defendant prays that the judgment hereinbefore set out may be vacated as void and rendered without jurisdiction; and that if such relief be denied, then the order of sale and order of confirmation heretofore entered in this cause be vacated; and for such other and further relief as to the court shall seem proper."

The plaintiffs answered that application trial was had, the application was denied, and John J. Main appeals.

Findings of fact and conclusions of law were made as follows:

"1. On July 31, 1917, plaintiffs filed the original petition in this case, praying for a foreclosure of a mortgage given by John J. Main and his wife, to secure a note of \$300, dated April 9, 1913, upon which the defendants were in default for payment of interest, and on the same day summons was personally served by the sheriff upon the defendant John J. Main and Belle Main, his wife. No answer was filed by either of said defendants, and judgment by default was rendered September 17, 1917, as set out in the petition to vacate the judgment.

"2. Thereafter and on November 8, 1917, the sheriff sold at public outcry to plaintiffs the real estate involved in this action for the sum of \$420.27, being the amount of the judgment of \$342, plus delinquent taxes, court costs and sheriff's fees.

"3. That on March 23, 1918, said sale was confirmed by order of the court, as set out in the petition to vacate the judgment.

"4. On October 2, 1918, the probate court of Shawnee county, Kan., found the defendant J. J. Main to be insane. A commission of examining physicians filed a report in said court wherein they stated 'that the disease is of two years' duration, dating from the first symptoms of this attack'; that he shows the effect of alcoholism and suffering from delirium tremens, with rational intervals; that on said date defendant was committed to the State Hospital at Topeka, Kansas.

"5. That on April 30, 1919, he was paroled from said institution by the order of the superintendent, and on March 9, 1920, was discharged as restored to sanity by order of the superintendent of said institution.

"6. No guardian was at any time appointed for said J. J. Main.

"7. That on May 29, 1919, the sheriff, in pursuance to the order of confirmation herein, deeded to plaintiffs the property foreclosed in this case, being lot 135 and the north 15 feet of lot 137 on Polk street in the city of Topeka.

"8. That at the time of said foreclosure sale and purchase by the plaintiff herein said property was also subject to a first mortgage held by the Security Benefit Association in the sum

of \$1,000 upon which the defendants were in arrears for the payment of interest and the entire principal, and that said purchase by the plaintiffs upon said foreclosure sale was subject to such first mortgage.

"9. That the value of said property at the time of the foreclosure sale was between the sum of \$1,750 and \$2,000. Subsequently to said sale the plaintiff repaired said property and made valuable improvements thereon, considerably increasing the value of said property.

"10. Suit is now pending in this court to foreclose the first mortgage held by the Security Benefit Association, and a personal judgment is sought against the defendant J. J. Main.

"Conclusions of Law.

"1. The judgment of foreclosure rendered herein was in all respects valid and legal and not subject to proceedings for vacating void judgments.

"2. That the property did not sell for so much less than its actual value at the time of the said sale that the said sale should be set aside for inadequacy of price."

Three propositions are presented: That the service of summons on John J. Main was void; that the judgment rendered thereon was likewise void; and that the sale, confirmation, expiration of time for redemption, and the making of the sheriff's deed were all during the period of his incapacity and therefore voidable on timely application. These propositions can be disposed of together.

The findings of the district court show that John J. Main was declared insane on October 2, 1918, and that the disease was of two years' duration, dating from the first symptoms of the attack. He argues that this finding establishes that he was insane two years previous to the adjudication by the probate court. That is not the effect of the finding of the district court. That finding shows that Main was insane on October 2, 1918, but it does not show that he was insane at any time prior thereto. Symptoms of an attack of insanity are not insanity. Main's petition alleged that he was in a state of alcoholic dementia. Symptoms of alcoholic dementia are not equivalent to insanity. If the foreclosure action was commenced, summons was served, judgment was rendered, order of sale was issued, sale was made, and the sale confirmed months before the probate court found that Main was insane. The period of redemption expired about seven months after the finding of the probate court. The summons, judgment, order of sale, sale, and confirmation were regular, and cannot be avoided by Main in a proceeding of this character. After the confirmation the only right he had was the right to redeem from the sale. During a part of the period of redemption, he was insane. On March 9, 1920, he was discharged from the State Hospital for the Insane at Topeka, as restored to sanity. This proceeding was commenced on July 6,

1920. If Main had any right after having recovered his sanity, it was the right to redeem from the sale. That right he did not claim and did not attempt to exercise. A foreclosure case somewhat closely parallel to the one under consideration is *Lundberg v. Davidson*, 72 Minn. 49, 74 N. W. 1018, 42 L. R. A. 103, the syllabus to which reads:

"The fact that the mortgagor or the occupant of the mortgaged premises has become insane does not suspend the power of sale in the mortgage, or render void a sale under it. If the power is exercised in bad faith, for the purpose of using such disability to gain an improper advantage of the mortgagor, the courts will set aside the sale. But if the mortgagee and the purchaser at the sale acted in entire good faith, and in ignorance of the disability of the mortgagor, the mere fact that the property was bid off for much less than its value, and that the mortgagor was insane at the date of the sale, and so continued until after the expiration of the time of redemption, will not of itself entitle the mortgagor to have the sale set aside, or to redeem from it, after the expiration of the period of redemption allowed by statute, especially where the purchaser at the sale has entered into lawful possession of the premises, and made valuable repairs and improvements."

Under the *Lundberg Case*, Main would be denied the right to redeem from the sale in this action. No error appears.

The judgment is affirmed.
All the Justices concurring.

(111 Kan. 396)

KRATZ v. PADFIELD. (No. 23771.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Reformation of Instruments — 45(1)—Evidence must prove beyond a reasonable doubt that instrument does not express agreement of parties.

Refusal of the district court to reform a written instrument because the evidence failed to prove beyond a reasonable doubt that the instrument did not express the intention of the parties approved.

Appeal from District Court, Sedgwick County.

Action by O. H. Kratz against R. E. Padfield. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Blood, of Wichita, for appellant.
Hasty, Siefkin & Hasty, of Wichita, for appellee.

BURCH, J. The action was one to recover money according to the provisions of a written contract. The defendant prayed for reformation of the instrument on the ground

it did not express the agreement of parties. The court denied reformation, and rendered judgment for the plaintiff. The defendant appeals.

In deciding the matter of reformation, the court said:

"Contracts are reduced to writing to avoid just such a muddle as we have gotten into. Mr. Padfield signed this contract after reading it, and he is held to have understood it and known all that was in it, whether he actually did or not. He contends that certain provisions ought to be inserted, and the contract reformed to contain those provisions. Now, the law requires that evidence establishing those facts should establish them beyond a reasonable doubt. * * * You have not proved by the evidence beyond a reasonable doubt that this contract should be reformed, and I shall so hold."

There was substantial evidence that no mistake was made in the preparation of the instrument, and substantial evidence that after the execution of the instrument the parties conducted themselves in accordance with its terms. The standard of cogency which the court applied to the proof is the standard recognized by this court in such cases. *Bodwell v. Heaton*, 40 Kan. 36, 18 Pac. 901; *Schaefer v. Mills*, 69 Kan. 25, 76 Pac. 436.

The judgment of the district court is affirmed.

All the Justices concurring.

(111 Kan. 375)

PARROTT v. ATCHISON, T. & S. F. RY. CO.
et al. (No. 23600.)

(Supreme Court of Kansas. June 10, 1922.)

(*Syllabus by the Court.*)

1. Release \S 58(5, 6)—Whether there was a mutual mistake as to the nature of the injuries, and whether release was procured by misrepresentations, held for jury.

The testimony relating to a release of a claim for damages by an injured railway passenger examined, and *held*, that it sufficiently tends to show mutual mistake of the parties as to the nature of the injuries of the passenger, and also that the release was procured by misrepresentations to take the case to the jury.

2. Release \S 21—Injured passenger's letter to railroad's claim agent held not a ratification of former settlement.

A certain letter written by plaintiff to the claim agent of the defendant is held not to be a ratification of the settlement.

Appeal from District Court, Atchison County.

Action by Jake M. Parrott against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for defendants,

and plaintiff appeals. Reversed and remanded.

Maurice P. O'Keefe and Hugo Orlopp, both of Atchison, and Wheeler, Brewster & Hunt, of Topeka, for appellant.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and Z. E. Jackson, of Atchison, for appellees.

JOHNSTON, C. J. This was an action by Jake M. Parrott against the Atchison, Topeka & Santa Fé Railway Company to recover damages for injuries alleged to have been sustained by him while he, a passenger, was alighting from a train of the defendant. A demurrer to his evidence was sustained, from which ruling he appeals.

His testimony tended to show that he was a passenger on a train going from Cummings to Atchison, and that when the train stopped at Tenth street, Atchison, a regular stopping place, he proceeded to alight, and before he had time to safely do so, the train was negligently started without notice or warning, throwing him to the ground, by reason of which his collar bone was broken and his arm injured so that he is permanently crippled.

The defense set up was that the injuries were not the result of the negligence of the defendant, but resulted from plaintiff's own negligence, and further that for a consideration the plaintiff had released the defendant from all liability for the damages sustained. There is no controversy here as to the extent of the injuries suffered by the plaintiff, nor as to the negligence by which they were occasioned.

[1] The contention is that the evidence disclosed that plaintiff had executed a release to the plaintiff upon the payment of \$20 and had discharged it from all liability; and further that if the release lacked validity in any respect, it had been cured and ratified by a letter subsequently written by the plaintiff to the claim agent of the defendant. As to the release the plaintiff testified that within a few days after the accident he called on Dr. Dingess, who had previously acted as his physician and who was also the employed physician of the defendant. The doctor made a cursory examination, prescribed liniment to be rubbed on the affected part, and procuring a paper he began writing plaintiff's answers to inquiries as to his name and age, etc., and in the next call the doctor asked him if a claim agent of the defendant had called on him, and when he replied in the negative, the doctor said that one would call on him within a few days. Shortly after the doctor asked him to go to the hospital for an X-ray examination of his shoulder, and after inspecting the pictures there taken he told the plaintiff that his injury was a small bruise, that some of the

ligaments had been loosened, but that he would be well in a few days, and could not come in for a large claim of damages. The claim agent approached the plaintiff for a settlement and asked him to go to Dr. Dingess' office for that purpose. The agent offered him \$5 on his claim, then \$10, and then said that the best offer that he could make him for such an injury was \$20, and the payment of the hospital bill. Having in mind the doctor's statement as to the nature of his injury, he accepted the offer and signed the release. About a week afterwards he called on the doctor again and reported that his arm was no better, when the doctor told him that it would be sore for some time, and when plaintiff asked him why he had not told him so before the settlement, the doctor replied that he guessed he was in too big a hurry. Later, when plaintiff asked the doctor for a statement of the facts, he refused to give one, saying that it would look bad for him. Shortly afterwards an examination of the shoulder was made, and it disclosed that the injury had fractured the collar bone, that there was a marked deformity of the shoulder joint, that it caused the spine to extend forward and upward anteriorly, and that it will never mend.

It is manifest that the release was executed by the plaintiff in the belief that the injury was slight and that its effect would pass within a few days. He was induced to think so by the statement of the doctor that the soreness would soon pass away. Plaintiff testified that he had "implicit faith in Dr. Dingess, and believed what he said, and believed he would be well in a few days." If the statements of the doctor were honestly made, he was likewise mistaken as to the nature of the injury, and it may be inferred that the claim agent who co-operated with the doctor did not understand that it was as serious as it turned out to be. The nominal amounts proposed in settlement of the claim and the amount finally agreed upon tends to show that the claim agent and the doctor both regarded the injury as slight and temporary. The trifling consideration given in payment of a serious and permanent injury argues strongly that there was either a mistake of facts on their part or that the release was fraudulently procured. Assuming that all were acting in good faith, it is manifest from the evidence that they were mistaken as to the character of the injury and that under the circumstances the release was not binding.

There is some evidence tending to show a lack of good faith and that the claim agent and doctor purposely kept from the plaintiff the serious nature of his injury until the settlement was effected, when some of the facts tending to establish that claim are that plaintiff called on the doctor, data as to his claim was taken by the doctor, and that he

informed the plaintiff that a claim agent would visit him within a day or two. The claim agent took the plaintiff to the doctor's office to make the settlement. After the X-ray picture was made revealing the nature of the injury, the doctor still declared that it was only a small bruise with some ligaments torn loose and that he could not come in for a big claim. Before the settlement and when it was proposed to go to the hospital to inspect the X-ray picture, the claim agent told the plaintiff that the picture was not there, but had been sent to Topeka. After the release was signed and plaintiff was complaining about his suffering, the doctor told him it would be sore for some time, and when asked why he did not tell him that before the release was given, the doctor said he was in too big a hurry and then refused to make a statement as to plaintiff's condition saying that it would look bad for him. We conclude that there was evidence to go to the jury, not only as to mutual mistake of fact, but also as tending to show misrepresentations of the doctor as to the nature of the injury and of his co-operation with the claim agent in effecting a settlement.

[2] There is a further contention that if the evidence should be regarded as sufficient to show that the release was procured through mistake or fraud, that it had been ratified and cured by the following letter written to the claim agent by the plaintiff:

"Mr. h. C. pribble. Well i thought i would write to you and let you know how i am. My arm hant any better and i haid to other doctors to look at it and the plates at the hospital and they say that the bones is broke and it will leave me a cripple the rest of my life and i think i ought to be in the hospital now but i hant got the money so i thought i would see if you would take this up with the santa fe Company and see what they will do for Me for i wot bee able for work this way i know we settled up wonce and i acked the man and will do so again for things looks bad to me aith an arm like mine is cant work and no money neither and the santa fe train is the blame for it all and i think the santa fe furm ought to look after this at wonce for i have done all the suffering and hant done yet and not my falt neether. well i would lie to hear from you at wonce for you know how things is now address all to

Mr. J. M. Parrott,

"1011 George street,
"atchison, Kansas."

The contention is that in this letter plaintiff in effect has stated, that he entered into a fair settlement and had no complaint to make about it, but that as he needed hospital treatment he desired the agent to take that matter up with the defendant. This inference of recognition and satisfaction with the settlement is derived from his statement:

"I know we settled up wonce and I acked the man and will do so again for things looks bad to me," etc.

Instead of a ratification, the letter carried an implication that plaintiff had acted the man in settling upon the understanding of the facts at the time the settlement was made, but that now it has developed that the parties were mistaken as to the nature and extent of the plaintiff's injuries, and that he is now willing to act the man and make a settlement on the basis of the actual injuries which had now become apparent. To show that a mistake had been made, he, in effect, says that two doctors who had examined him, and the X-ray plates that had been taken, had advised him that the bones of his shoulder were broken, that he would be a cripple for life, and that he should be in the hospital at this time, but was without money to pay for treatment. He therefore asked the claim agent to take the matter up again with the defendant, as it was to blame for his condition. Taking the letter in its entirety, it is more of a repudiation of the settlement than a ratification of it, and it is clear that the circumstances of the case do not bring it within the rule of the cited case of *Frazier v. Railway Co.*, 97 Kan. 285, 154 Pac. 1022.

The case is more nearly in line with *Ladd v. Railroad Co.*, 97 Kan. 543, 155 Pac. 943, and as the evidence is deemed sufficient to take the case to the jury, the decision sustaining the demurrer to plaintiff's evidence must be reversed, and the cause remanded for a new trial.

All the Justices concurring.

(111 Kan. 443)

JOHNSON & PROCTOR REALTY CO. v. ELLIOTT. (No. 23816.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

Brokers \S 86(4)—Evidence held to support findings that real estate agents were procuring cause of sale and entitled to commissions.

The evidence is held to support a finding that the plaintiffs as real estate agents were the procuring cause of the sales on which they asked commissions.

Appeal from District Court, Cherokee County.

Action by the Johnson & Proctor Realty Company, a copartnership composed of Samuel N. Johnson, F. E. Proctor, and others, against James H. Elliott. Judgment for plaintiffs, and defendant appeals. Affirmed.

Al F. Williams, of Topeka, and Skidmore & Skidmore, and Don H. Elleman, all of Columbus, for appellant.

Stephens & Dresia, of Columbus, for appellees.

MASON, J. The defendant appeals from a judgment in favor of the plaintiffs for commissions in negotiating sales of his lands. A reversal is asked upon the ground that the evidence did not support a finding that the sales were due to the efforts of the plaintiffs. The defendant relies upon the fact that the purchasers, as witnesses for the plaintiffs, testified that they knew of the defendant wishing to sell the property, and talked with him directly, before having any communication on the subject with the plaintiffs. That is not necessarily fatal to the judgment. The defendant admitted on the stand that he had listed the lands with the plaintiffs, but asserted that the prices named were net to him, there being no agreement that he was to pay a commission. There was evidence that one purchaser asked the defendant if he would take \$80 an acre for a tract, and was referred to the plaintiffs; that the deal was closed at \$100 an acre, the agreement for that amount being made by the buyer and one of the plaintiffs. The plaintiffs testified that they negotiated the sales. It was shown that they talked with the purchasers on the subject before the deals were agreed to. The question whether they were the procuring cause of the sales was one of fact for the determination of the jury and the trial court.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 551)

KIRCHER v. KIRCHER. (No. 23814.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Judgment \S 436—Default judgment not vacated for unavoidable casualty or misfortune, where failure to defend occurred through defendant's negligence.

A judgment taken by default, and obtained without fraud or fault of the plaintiff, cannot be vacated on the ground of unavoidable casualty or misfortune where the failure to defend occurred through the inattention and negligence of the defendant.

2. Appeal and error \S 1024(4)—Whether defendant, suing to set aside default judgment, was mentally competent during prior action, question for trier of facts.

Whether or not the defendant against whom the judgment was rendered was mentally competent, and had the capacity to understand the nature of the action or the necessity for making a defense, was a question for the trier of the facts, and, there being evidence to support the decision of the trial court, its judgment is conclusive.

Appeal from District Court, Pottawatomie County.

Action by Champion D. Kircher against Priscilla Kircher. Judgment for defendant, and plaintiff appeals. Affirmed.

R. P. Evans and George Clammer, both of Manhattan, for appellant.

W. F. Challis, of Wamego, for appellee.

JOHNSTON, C. J. This was an action to annul and set aside a judgment obtained against Champion D. Kircher by his mother, Priscilla Kircher, rendered on April 4, 1918. The judgment determined that a deed which had been executed by the mother to the son on December 12, 1904, was null and void, and it was decreed that it be discharged of record.

In that action Priscilla Kircher alleged that she had been induced to execute the deed through the importunity and misrepresentations of her son, who was living with her, and to whom she had intrusted the management of her business affairs. She alleged that she was then in feeble condition physically and mentally; that he took advantage of her enfeebled condition and her trust in him, and urged her to make the conveyance of the land to him, telling her that it was incumbered with a mortgage, when it was unincumbered, and that she would lose the same through the pretended mortgage unless she would convey the property to him. He also threatened to institute insanity proceedings against her unless the property was conveyed. She further alleged that he employed one P. C. Helder to prepare the deed, and represented to her that Helder was a minister of the Gospel, and a justice of the peace, and, taking advantage of her religious nature and confidence in ministers, told her that Helder would not permit her to sign a deed unless it was just and right that she should do so. Helder, she alleged, was not a minister nor a justice of the peace, and all of the representations made were untrue, were made to quiet her apprehensions, and by reason of these she was fraudulently induced to sign the instrument. She further alleged that she did not have knowledge or mental capacity to comprehend the nature of the instrument or to understand its terms. A part of the inducement to sign the deed was that he promised to make a home for her, and would pay her the income of the property, but he failed to provide her with a home except for the short period of 10 months, and that he has never paid her any part of the income except \$100. She asked to have the deed set aside, that she recover the reasonable annual rental of the property, which is \$480, and that the plaintiff and his wife be ejected from the premises.

That action was pending from August 23, 1915, until about April 1918. In the instant case the testimony offered to set aside the judgment is based largely on the ground that Champion D. Kircher was of unsound mind, and unable to make a defense in the former

action in which the deed was set aside. His wife, who was joined with him as a defendant, had been adjudged insane, and was confined in the State Hospital. His mother, who brought the original action in which the judgment sought to be set aside was obtained, became insane before the judgment was rendered and has since died. The judgment in favor of the guardian of the mother was rendered by default as against Champion D. Kircher, but his wife was represented by her guardian. The judgment recites that the plaintiff introduced her evidence in support of her allegations of misrepresentation and fraud, and that the defendants introduced no evidence, although the guardian ad litem of Mrs. Champion D. Kircher was in court, and the court found the allegations of plaintiff's petition to be true, entered a decree setting aside the deed and restoring the title to the plaintiff.

It appears that Champion D. Kircher employed attorneys to represent him when the action was brought, but they had withdrawn from the case a year prior to the entry of judgment. In the latter part of the year 1915 there were negotiations between the parties looking to a settlement of the original controversy, but it was never consummated. In behalf of Champion D. Kircher, it is said that, after the original action was begun, his wife sued him for divorce, and, upon a charge that the children were neglected, they were taken from both parents and committed to another. This was followed by a proceeding in which his wife was adjudged insane; and it was claimed that all these circumstances affected his mentality, and rendered him unfit to understand the action brought against him, or the necessity for a defense. The evidence as to his competency shows him to have been a preacher, a peculiar and eccentric man. The probate judge and sheriff stated that they hardly thought he was normal. One of his attorneys testified that they had great difficulty in making him understand the nature of the action, and that there was incoherence and inconsistency in the statements he made to them. Some of his witnesses said that he was abnormal only on the topics of religion and women, while others said they thought there was a real unsoundness of mind.

[1] The question presented to the trial court was whether the plaintiff against whom the judgment was rendered had shown that he was prevented from making his defense by unavoidable casualty or misfortune. It was mainly a question for the trier of the facts, and it has been determined against the plaintiff. There was much testimony produced tending to show the abnormality of plaintiff, and a lack of appreciation of the importance of the litigation with his mother. He did employ attorneys, who had difficulty in making him understand the nature of the case, and the possible result of it. They represent-

ed him for about two years, while the case was pending, and presented a number of motions in it, but finally withdrew from the case after giving him ample notice of the withdrawal, and advising him that it was essentially necessary that he should employ others. This he neglected to do, although the action was not tried nor judgment rendered until about a year after his counsel had severed their connection with the case. There was no haste, no fraud of the adverse party, nor anything which contributed to the failure of plaintiff to prepare and make his defense. His failure to appear and defend was his own careless inattention and gross negligence, which cannot be regarded as unavoidable casualty or misfortune or grounds for a vacation of a judgment. He was negligent not only before but after judgment, as he made no attack upon it until the present action was brought, and that was more than 15 months after the judgment was rendered.

In the recent case of *Gooden v. Lewis*, 101 Kan. 482, 167 Pac. 1133, it was said:

"The rule is settled that a litigant cannot invoke the Code provision for relief on the ground of 'unavoidable casualty or misfortune preventing a defense' where he has been manifestly negligent, guilty of laches, lacking in diligence, careless, hurried, or mistaken in the preparation of his defense, nor on account of the negligence of his attorney."

[2] The ground upon which counsel for plaintiff mainly relies for the vacation of the judgment is the incompetency of plaintiff and his lack of appreciation of the course of litigation. It was shown that he is peculiar and eccentric, and it is true that a number of distracting and distressing circumstances occurred in his life while the litigation was pending. Some witnesses regarded him to be of unsound mind, while others thought him to be sane but erratic. His mental condition was peculiarly a question for the trial court, which had much better opportunity than this court of determining his sense of responsibility and competency to make a defense. It has determined that these afforded no excuse for his negligence and no ground for the vacation of the judgment.

Within the rule which governs us in the review of a decision of a trial court on a question of fact, its judgment must be affirmed.

All the Justices concurring.

(111 Kan. 395)

HOVER et al. v. DECKER. (No. 23768.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

I. Brokers ¶53—Real estate agent employed to assist in finding purchaser must show that his efforts did so assist.

Before a real estate agent employed to assist in finding a purchaser for land can re-

cover a commission for its sale, the agent must show that his efforts did assist the owner to find a purchaser.

2. Brokers ¶48—Real estate agent must show that he sold land, or was procuring cause, before he can recover.

A real estate agent employed to sell land must show that he sold the land, or that he was the procuring cause of the sale, before he can recover a commission therefor.

Appeal from District Court, Greenwood County.

Action by H. D. Hover and others against J. W. Decker. Judgment for the defendant, and plaintiffs appeal. Affirmed.

Homer V. Gooling, of Eureka, and Fred S. Jackson, of Chicago, Ill., for appellants.

Wicker & Badger, of Eureka, and A. M. Keene, of Ft. Scott, for appellee.

MARSHALL, J. The plaintiffs sued to recover a real estate agent's commission for the sale of land. Judgment was rendered in favor of the defendant, and the plaintiffs appeal.

The plaintiffs alleged that the defendant requested them to assist him in finding a purchaser for a ranch in Greenwood county; that he agreed to pay the plaintiffs a commission for their services; and that as a result of their efforts, the land was sold to one F. H. Hull. The evidence tended to show that the defendant listed the land with the plaintiffs for sale; that one of the defendants had a conversation with Mr. Hull concerning the latter's purchase of the land; that Mr. Hull was not interested; and that afterward, through others, he became interested in the land and purchased it. On the trial, the plaintiffs requested the following instructions:

"(1) If at the time defendant listed the farm for sale with the plaintiffs he knew that F. H. Hull was a possible buyer, and with knowledge defendant requested plaintiffs to interview and later F. H. Hull did contract to buy the land, then I instruct you as a matter of law defendant would be liable to plaintiffs for the amount of the commission.

"(2) If you find from the evidence in this case that the defendant employed plaintiffs to aid and assist defendant in selling said land, and defendant received such services from plaintiffs and later sold said real estate to F. H. Hull, then plaintiffs are entitled to prevail in this action, and you should so find."

Neither of these instructions was given. The court in substance instructed the jury that to entitle the plaintiffs to recover they must have been the proximate and procuring cause of the sale of the property.

[1] 1. Plaintiffs contend that it was error to refuse to give the instructions requested. Under them, the plaintiffs would have been entitled to recover, although their efforts had

no effect whatever in inducing Hull to buy the land. In order to entitle the plaintiffs to recover, it was incumbent on them, under the allegations of their petition, to show that their efforts assisted in bringing about the sale of the property. The requested instructions omitted the element that was incumbent on the plaintiffs to establish. The evidence did not tend to prove the allegations of the petition. The evidence tended to show that the plaintiffs were employed by the defendant to sell the land. Under that evidence, it was not error for the court to refuse to give the requested instructions.

[2] 2. (The plaintiffs complain of the instructions that to entitle them to a commission they must have been the proximate procuring cause of the sale of the land. If they were employed to sell the land, those instructions were correct. *Beougher v. Clark*, 81 Kan. 250, 106 Pac. 39, 27 L. R. A. (N. S.) 198. Under the evidence, those instructions were properly given.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 545)

CITIZENS' INS. CO. OF MISSOURI v. ETCHEN. (No. 23803.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Parties \S 51 (2)—Action on redelivery bond may be brought against one or all of obligors; refusal to make another obligor a party defendant held not abuse of discretion.

The party for whose benefit a redelivery bond is given in a replevin action may sue either or all of the obligors on the bond; and, where only one of the obligors is sued, a motion to bring in as defendant another obligor on the bond is addressed to the trial court's discretion, and the denial of such motion is not prejudicial error.

2. Pleading \S 367 (5)—Sustaining of motion to have answer made more definite and certain held not error.

Where an answer to a petition is properly subject to a motion that it be made more definite, specific, and certain, there is no error in sustaining a motion to that effect.

3. Pleading \S 355—Carbon copy of original answer, with trivial interlineations, and not complying with order requiring answer to be made more specific in indicated particulars, was properly stricken.

Where a motion has been sustained requiring an answer to be made more specific, definite, and certain in duly indicated particulars, and time is asked and repeatedly granted to the defendant to comply therewith, and he fails to do so within the time allowed or extended, but afterwards he files a carbon copy of his origi-

nal answer, with some trivial interlineations, and certain matters stricken out by cancellation, but which in no respect complies with the order of the court in the matters required to be pleaded with greater definiteness and certainty, such belated answer may properly be stricken from the files.

4. Judgment \S 106 (9)—Default judgment properly entered against defendant whose amended answer was properly stricken.

When an amended answer which does not conform to the order of court as to definiteness and certainty is filed out of time, and is properly stricken from the files, defendant is in default, and no error is committed in entering judgment against him.

5. Motions \S 11—Any person interested may make a motion with reference to his interest, whether legally and technically a party or not.

Any person interested in a lawsuit may make a motion with reference to his interest, whether he is legally and technically a party thereto or not, following *Green, Adm'r, v. McMurtry*, 20 Kan. 189, 193.

6. Arguments in brief held not to warrant disturbance of judgment.

Other matters argued in defendant's brief, which do not fall within his formal assignment of errors, examined, and nothing discerned therein to warrant a disturbance of the judgment.

Appeal from District Court, Montgomery County.

Action by the Citizens' Insurance Company of Missouri against Fred R. Etchen. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanford & Seacat, of Independence, and W. E. Ziegler and A. M. Etchen, both of Coffeyville, for appellant.

S. H. Piper, of Independence, and Chas. D. Welch, of Coffeyville, for appellee.

DAWSON, J. This was an action on a bond for the redelivery of an automobile.

The car had been stolen from its owner. The defendant, Fred R. Etchen, obtained it from a man who professed to be a deputy marshal in Oklahoma. Defendant repaired the car at considerable expense, and traded it to Sam Weinberg. The plaintiff company had insured the original owner of the car against theft, and had acquired his interest, and brought an action in replevin against Sam Weinberg to recover it. The defendant, who had traded the car to Weinberg, joined with him in executing a redelivery bond. Plaintiff prevailed in that action, and then brought this action against Etchen to recover on the bond. It prevailed, and defendant appeals. He presents an assignment of errors, viz.:

"(1) Error in overruling defendant's motion to make additional party defendant.

"(2) Error in sustaining plaintiff's motion

to require defendant to make his answer more specific, definite, and certain and to strike certain parts thereof.

"(3) Error in sustaining plaintiff's motion to strike defendant's amended answer from the files, and for judgment.

"(4) Error in rendering judgment for plaintiff."

These errors are argued together by counsel for appellant, but it will make for simplicity and brevity to consider them separately.

[1] 1. Touching the first of these errors, the plaintiff had the right to sue either or both of the obligors on the redelivery bond. Civ. Code, § 38 (Gen. St. 1915, § 6928); 34 Cyc. 1598. It is superficially true that Weinberg was the principal on the redelivery bond and Etchen the surety, but the trial court was doubtless aware that as between Weinberg and Etchen the liability was bound to fall ultimately on Etchen, since he had sold or traded the automobile to Weinberg, and had expressly or impliedly warranted the title. So it would have served no material purpose to have brought in Weinberg, and the trial court did not abuse its discretion in refusing to grant defendant's motion to that effect.

[2] 2. In defendant's answer he had alleged:

That he had purchased the car from one William Mayfield, who was then and there, as defendant "was informed and believes, a deputy United States Marshal for the Eastern district of Oklahoma; * * * that * * * said Mayfield informed this defendant that said automobile had been used in the unlawful and illegal transportation of intoxicating liquors into the state of Oklahoma and in the Indian country, and that said automobile had been seized by the federal officials, and had been sold to the said Mayfield pursuant to libel proceedings theretofore pending in the United States court, and that he, the said Mayfield, because of said proceedings and sale, held good and sufficient merchantable title to said automobile, and could by said sale convey good title."

Defendant also alleged that for the defense of the replevin suit he gave Weinberg and his attorney a statement of the facts concerning the purchase and sale and history of the automobile in controversy, and gave them the names of witnesses who were available, and who would prove these facts, and requested Weinberg and his attorney to procure their attendance or take their depositions, but that Weinberg had neglected to use this information or to summon these witnesses, and failed to make a proper defense in the replevin action. Defendant also loosely charged duplicity and collusion on the part of Weinberg and plaintiff's counsel in the replevin case, and that Weinberg had taken the advice of plaintiff's counsel, and that Weinberg had refused to make a verified application to have Etchen made a de-

fendant in the replevin suit, and that by Weinberg's failure to assert the proper defenses judgment was entered against him for a much greater sum than if the case had been properly defended. Defendant also alleged neglect on Weinberg's part in failing to appeal.

On plaintiff's motion the defendant was ordered to make his answer more definite, specific, and certain in these particulars:

(a) To state whether the car was in fact seized, libeled, and sold by federal officials, and to state whether Mayfield held a good title pursuant thereto.

(b) To state the name and location of the court and title of the cause under which the car was ordered sold, and to give the date of sale, and set out a copy of the order in the libel proceeding or the book and page where it could be found.

(c) To state whether defendant had procured a bill of sale for the car from Mayfield, and, if so, to set out a copy of it.

(d) To state the names and addresses of the witnesses which defendant alleged that he had given Weinberg and his attorney for the proper defense of the replevin action.

Other matters which had also been loosely and uncertainly pleaded in defendant's answer, too long for repetition here, were also required by order of court to be more specifically and definitely pleaded. The order to that effect was entered on April 26, 1921, and defendant was given 20 days to conform thereto. On May 17 defendant filed an application for 20 days' further time, for the reason:

"That, though he has been diligent to discover the facts required by this court to be included in the amended answer, he has been unable in the time allowed to assemble all of the necessary information and data on which to base allegations, but has been able only partially to complete necessary investigations, and believes that, with the additional time herein requested, he will be able to ascertain exact and sufficient facts on which to predicate the required allegations."

It should be noted that this had reference to the facts which defendant alleged that he had supplied to Weinberg months before for the defense of the replevin suit; but, nevertheless, this request for further time was allowed. It should also be noted that this request for further time to comply was in effect an acquiescence in the court's order requiring him to make his answer more specific, definite, and certain, and the court's order to that effect was neither erroneous nor prejudicial. Civ. Code, § 122 (Gen. St. 1915, § 7014); L. L. & G. R. Co. v. Com'rs of Douglas Co., 18 Kan. 169; Water Power Co. v. McMurray, 24 Kan. 62; St. L. & S. F. Ry. Co. v. French, 56 Kan. 584, 44 Pac. 12; Phillips on Code Pleading, §§ 283, 284.

[3] 3. Touching the third error assigned,

the defendant did not within the time allowed conform to the order of court, so on June 13, the plaintiff served notice that it would move for judgment by default. Thereupon the defendant filed a carbon copy of his original answer, with two or three trivial interlineations, and with certain matters originally pleaded stricken out, but which made no effort or pretense to conform to the court's order of April 26. Whereupon plaintiff moved to strike this answer from the files, and for judgment. This motion was sustained.

What was wrong about this? The order of the court had been disobeyed. Exceptional leniency had been extended to defendant. After alleging at length that he had supplied Weinberg in the replevin suit with the necessary facts to make a good defense, and the names of witnesses to prove those facts, he could not set down definitely and certainly in an answer on his own behalf those facts which he says would have so effectually resisted the plaintiff's replevin case against Weinberg. After making uncertain but insinuating charges of collusion between plaintiff's attorney and Weinberg in the replevin suit, he could not, or at least did not, set those matters down with definiteness and certainty, so that the plaintiff could fairly meet them in this lawsuit. If defendant could not even plead with definiteness and certainty the matters he relied on to defeat the plaintiff, it was perfectly obvious that he could not prove them. Furthermore, this amended answer was filed out of time, and could be regarded as a nullity. *Luke v. Johnnycake*, 9 Kan. 511; *Jeffs v. Flickenger*, 14 Kan. 308. The court committed no error in striking this amended answer from the files.

[4] 4. The defendant's answer having been properly stricken from the files, he was in default, and plaintiff was entitled to judgment as entered in his behalf. *Race v. Malony*, 21 Kan. 31; *Herman v. Gardener*, 103 Kan. 659, 175 Pac. 971.

[5] The foregoing disposes of defendant's assignment of error. We have not failed to note other matters discussed in his brief which do not follow the assignment, but they are not of sufficient relevancy to disturb the judgment. We note that a firm of lawyers interested in defendant's possible liability if Weinberg were defeated in the replevin suit undertook Weinberg's defense, but it does not appear that Weinberg employed them. These lawyers prepared a motion and affidavit for Weinberg to sign to have Etchen substituted as defendant, but they retired from that case when Weinberg declined to verify the affidavit, which recited that "Fred R. Etchen had good right to sell and deliver" the automobile to Weinberg. Weinberg could not with safety swear to anything of the sort, but he did invite defendant and his

counsel to participate in the defense to the replevin suit. Furthermore, this defendant might have applied to the court in his own behalf for leave to be made a defendant in the replevin case, and he might have sworn to the alleged facts, which Weinberg prudently declined to do. In *Green, Adm'r. v. McMurtry*, 20 Kan. 189, 193, it was said:

"Any person interested in a suit may make a motion with reference to his interest, whether he is legally and technically a party thereto or not. Gen. Stat. 734, § 532; *White-Crow v. White-Wing*, 8 Kan. 276, 280; *Harrison v. Andrews*, 18 Kan. 537; *Branner v. Chapman*, 11 Kan. 118; *Foreman v. Carter*, 9 Kan. 674."

See, also, *Stevens v. Dimke*, 110 Kan. 686, 205 Pac. 596.

Nor have we failed to note the alleged collusion between Weinberg and plaintiff's attorney. There was no more impropriety in Weinberg calling at the office of plaintiff's attorney than there was for defendant's attorney to do so. They were well acquainted with each other, and Weinberg had not then employed counsel. We discern no breach of professional ethics in plaintiff's counsel telling Weinberg that he was not in a position to advise him and that he should consult another lawyer, but warning him that, if he should swear that Etchen had good title, and had good right to sell and deliver the car, he would have him subpoenaed as a witness to show the facts. Following this conversation with plaintiff's counsel, Weinberg employed a lawyer, and then wrote to the defendant:

"Your [attorney] * * * at no time represented me in this case. I only permitted my name to be used in this case for the benefit of yourself, who is the real party of interest.

"I refuse to sign this motion for the reason that if I had signed the same I would have been guilty of perjury for the reason that the motion as set out is not true. * * *

"Wish further to advise that I am perfectly willing to turn this case over to you or your company or your lawyer to be conducted as you see fit and I will sign any motion or pleading you desire so long as the same is true.

"Wish further to advise that I have retained Chas. D. Ise as my counsel in this matter and we are perfectly willing to co-operate with you in any legitimate defense you have in this case."

[6] There is no error in this record. The judgment in the replevin case may have been for a larger sum than it would have been if defendant had gotten into that case and made a straightforward defense thereto; but the size of that judgment was no fault of Weinberg, and, since defendant was bound to protect Weinberg, and was likewise bound on the redelivery bond, we discern no ground upon which this judgment can now be disturbed.

Affirmed.

All the Justices concurring.

(111 Kan. 542)

**GOODAILE v. BOARD OF COM'RS OF
COWLEY COUNTY et al. (No. 23799.)**

(Supreme Court of Kansas. June 26, 1922.)

(Syllabus by the Court.)

Highways —196—Permitting hedges to obstruct view of one road from other held not proximate cause of injuries to driver, when horse became frightened at automobile suddenly appearing.

The owners of land permitted high hedges to grow along public roads which crossed at the corner of their property. The hedges obstructed the view of one road from the other. A woman, driving a horse and buggy along the road, approached the crossing. The horse became frightened at an automobile, which suddenly appeared at the crossing of the roads. The woman was thrown out and injured. *Held*, that the owners of the land are not liable in damages for the injuries sustained by her.

Appeal from District Court, Cowley County.

Action by F. G. Goodaile against the Board of Commissioners of Cowley County, Lawrence L. Wilson, and others. From a judgment of dismissal as to the County Commissioners, and from a judgment sustaining a demurrer of the defendants Wilson and others, plaintiff appeals. Affirmed.

J. E. Torrance and O. W. Torrance, both of Winfield, for appellant.

Ross McCormick, of Wichita, for appellees.

MARSHALL, J. The plaintiff appeals from a judgment sustaining a demurrer of the defendants to the petition. The action was dismissed as to the board of county commissioners.

The petition alleged that Lawrence L. Wilson, Grace E. Wilson, Ira B. Mueller, Max G. Wilson, and Dona F. Wilson were the owners and in possession of certain real property in Cowley county; that on the south and east sides of the land were high, dense, hedge fences; that public highways ran along the south and on the east sides of the land, and crossed at the southeast corner; that the hedges obstructed the view of one road by those traveling on the other; that there was no orchard, vineyard, or feed lot at or near the southeast corner of the land; that the plaintiff was driving a horse and buggy east along the south side of the land; that, when she reached the corner, an automobile coming from the north turned the corner, and appeared directly in front of her horse; and that the horse became frightened, and overturned the buggy, threw her out, and injured her. She asked \$5,000 damages for the injuries sustained by her.

The plaintiff argues that section 4825 of

the General Statutes of 1915, chapter 288 of the Laws of 1915, and chapter 253 of the Laws of 1919, as amended by chapter 51 of the Laws of 1920, make these hedges a nuisance, and make it the duty of the defendants to cut them, and argues that, upon their failure so to do, they are liable for any damage caused thereby. Section 4825 of the General Statutes of 1915 reads:

"That owners of real estate in any county in the state of Kansas shall keep all hedge fences along the public highway cut and trimmed down to not over five feet high, except trees not less than sixteen feet apart and hedges necessary as a protection to orchards, vineyards, and feed lots; said feed lots not to extend more than forty rods. All brush out from said hedges shall be cleaned up and removed or burned."

Chapter 288 of the Laws of 1915 reads:

"Under rules and regulations to be prescribed by them the board of county commissioners of each county in the state are authorized to cut all hedge fences within fifty yards of a railroad grade crossing, or abrupt corner in the road; and thereafter keep the same trimmed to a height not to exceed four feet. Except when used as protection to an orchard, vineyard, or feed lot, and cut all weeds in the public roads within fifty yards of any such railroad grade crossing, or public road crossing, or abrupt turn in the road, and thereafter keep the same cut so same shall not at any time be allowed to grow to a height exceeding three feet. And remove all bill boards, sign boards, and board fences exceeding four feet in height within fifty yards of any such railroad grade crossing or public road crossing: Provided, that where any board fence is removed another shall be constructed not to exceed four feet in height, in the place of the one removed, at the expense of the county: Provided further, that nothing in this act shall apply to signs placed by any state or county association for the purpose of imparting historical information or traveling directions. All expenses of the trimming of the said hedge fences, the cutting of weeds, and removal of fences and bill boards shall be paid from the general fund of the county."

Chapter 253 of the Laws of 1919, as amended by chapter 51 of the Laws of 1920, reads:

"That in any county where the provisions of this act shall be adopted any owner or owners of real estate after having been given thirty days' notice in writing either in person or to his or her duly authorized agent, shall be required to cut or cause to be cut all hedge fences situated on the land belonging to said person or persons which is located along the public highway, and shall cut or cause to be cut, weeds growing upon the public highway running by said land, and upon failure of said owner or owners to comply with these provisions, said owner or owners shall be guilty of a misdemeanor and shall be subject to a fine of not less than \$25.00 nor more than

\$100.00: Provided further, that the road overseer of the district in which said land is located shall, upon the failure of said owner or owners to comply with the provisions of this act, cut or cause to be cut said hedge fences as provided herein; and cut or cause to be cut said weeds upon the highway as provided herein and the said road overseer shall in writing report to the county clerk of said county the cost of the cutting of said hedge or said weeds, and thereupon the county clerk shall enter these costs on the tax rolls against the said real estate and the same shall be collected as other taxes, and shall be paid over to the treasurer of the township in which said land is located."

This law took effect January 29, 1920. The plaintiff was injured July 9, 1920.

Section 4825 of the General Statutes of 1915 and chapter 253 of the Laws of 1919, as amended by chapter 51 of the Laws of 1920, make it the duty of the defendants to trim the hedges along their property, and provide a penalty for their failure so to do; but these statutes do not in terms declare the hedges nuisances, nor say that the defendants shall be liable in damages for their failure to trim the hedges. Buildings, woodland, or tall crops would have obstructed the vision from one road to the other the same as the hedges; but it cannot be contended that such obstructions would render the owners of the land liable for accidents occurring at the crossing of the highways.

In *Railroad Co. v. Justice*, 80 Kan. 10, 191 Pac. 469, this court said:

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

Even if it be admitted that the high hedges were in part the cause of the accident which resulted in the plaintiff's injury, it cannot be said that they were the efficient intervening cause of the accident. The horse was frightened by an automobile. That was what caused the accident. In *Eberhardt v. Tel. Co.*, 91 Kan. 763, 139 Pac. 416, it was held that a telephone guy wire extending into the public highway was not the cause of an injury to one who was riding in a wagon with her husband, who was driving a span of mules that ran away, and ran into the wire and thereby injured the plaintiff in that action. The latter case is closely parallel to the present one. The proximate cause of the injury to the plaintiff in this action was the frightening of her horse, and not the condition of the hedges. *Railway Co. v. Bailey*, 66 Kan. 115, 122. 71 Pac. 246; *Norris v. Ross Township*, 98 Kan. 394, 161 Pac. 582. The petition did not state a cause of action against the owners of the land.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 533)

ROSS v. ROSS et al. (No. 23787.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. *Wills* ¶792(1), 794—Election to take under will must be made clearly and understandingly; husband held by his conduct to have elected to take under deceased wife's will.

Under the settled rule that in order to constitute an election to take under a will the choice must be made clearly, unequivocally, and understandingly, it is held that the record showed on the part of the plaintiff an election by conduct to take under the will of his deceased wife.

2. *Findings held supported by evidence.*

The findings of fact held to be fairly supported by the evidence and to justify the result reached.

3. *Wills* ¶794—Husband's election to take under wife's will held an election by conduct rather than an election as a matter of estoppel.

Estoppel and inconsistency of conduct discussed and distinguished.

Appeal from District Court, Rice County.

Action by H. H. Ross against Edward E. Ross, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jones & Jones, of Lyons, and F. Dumont Smith, of Hutchinson, for appellant.

Ira E. Lloyd, of Ellsworth, W. W. Stahl, of Lyons, and N. F. Nourse, of Ellsworth, for appellees.

WEST, J. This appeal presents the one question whether or not the plaintiff must be held in law to have elected to take under the will of his wife, Allie V. Ross.

The testatrix died in 1913 at Philadelphia, leaving as her heirs the plaintiff and two children, Edward E. Ross and Violet E. Ross. At the time of her death Allie V. Ross owned a half section of land in Rice county, Kan. She left a will by which she bequeathed all her property to her executors, her two children, in trust, to collect the rents and income and apply: (1) To the payment of taxes and the costs of the repairs and maintenance of the farm; (2) to the payment of all her debts; and (3) to the plaintiff during his natural life, and the remainder over to the two children. No formal consent or election was ever given or filed by the plaintiff. Afterwards the daughter died, leaving all her property to her brother, Edward E. Ross.

In July, 1920, the plaintiff brought this action in partition, claiming an undivided half of the land. The defendant and his wife set up the will and claimed the remainder in

fee. In 1913 Edward E. Ross received from a lawyer in Philadelphia a letter advising him that the will should be probated in Philadelphia, and:

"If probate is delayed longer, it may put upon you the burden of explanation in the event of a contest. As soon as the will is probated, copies should be sent to Mr. Ross and other parties in interest, but we think that there is no reason why a copy of the will should be probated at the present time in Kansas. This would prevent the necessity for any definite action upon the part of your father, and at the same time would preserve the right of all the heirs under the will."

The son testified that he was present when the will was made, and that the lawyer who drew it told the father when he read it to him what his curtesy rights were under the laws of Kansas, and told him under the law of Kansas he was entitled to half the real estate, and asked him if he understood that and if the will was satisfactory to him. His father said it was.

"He explained to him, 'You are entitled to the income of all the property, in Kansas, for your lifetime.' Father said he was satisfied with that."

He testified that he found a note from his father to his wife for \$9,800, and it had never been paid to his knowledge, and that he had never presented it for payment; that he and his sister had never received any money except a certificate for \$300; that there were debts amounting to \$1,261.50 which his sister paid, and that his father repaid them and \$250 which his sister had advanced on a mortgage; that he had never paid or offered anything from the proceeds of the farm to the witness; that after his sister's death he talked to his father and asked him if he was satisfied with the conditions of the will.

"He said he was, only he felt hurt he had not been made one of the executors. He said, 'It is all right; go ahead; we don't want any lawsuit about it.' About a month after that in a conversation he said he did not think he was getting all he was entitled to, and said, 'I could take half of the farm if I wanted it, under the laws of Kansas.' I said, 'That way you would get only half of the income; this way you get it all.' He made no further statement at that time that I remember."

Witness said that his father came to Kansas to look after the land, and about January, 1920, he heard a conversation between him and witness' sister, and after she told him what she had in her will, she said to him:

"I have left this house in Philadelphia to Ned and my half of the Kansas farm to him. Isn't that right? You will get all the income all your life, and I think he ought to have the land. Isn't that right? Are you satisfied?"

And he said he was.

Joseph A. Zile testified that he knew the plaintiff four or five years, and once asked him if his farm was for sale, and he said it belonged to his children; that he got the proceeds as long as he lived. Afterwards, when the witness found that the plaintiff had brought a suit, he asked him what was the matter and said:

"I thought the land belonged to your children.' He said, 'Yes' but he explained about the Kansas law and said, 'I am depending on the Kansas law,' and that's about all he said. * * * He told me he was simply renting the farm and it belonged to his children. He said, 'I've just got a life interest and get the proceeds from the farm.'"

Charles Zile testified that the plaintiff told him the land belonged to the boy and girl, and that he could not sell it. He got all that came off the farm.

The plaintiff testified, among other things, that he was not present when the will was made, and that it was never read to him; that he never learned that his wife willed the property away until the previous month; he had rented this land before 1913, and had rented it for 42 years, and continued to do so after his wife died; after his wife's death he paid off the mortgage and kept an accurate account of the income; that he had come to Kansas nearly every year since 1907; but he denied the conversation referred to, and that he had ever admitted that the children owned the land.

The trial court, after hearing all the testimony, made findings of fact very thoroughly covering the entire controversy, and conclusions of law. Among the findings are the following in substance: That the will was withheld from record in Rice county intentionally by the son at the advice of counsel until August 7, 1920; that the plaintiff at no time since the making of the will has ever consented to its provisions, "but said H. H. Ross, the plaintiff, has at all times since the making of said will collected said rents and incomes, and from said sums so collected has paid the taxes, costs of repairs, and upkeep of the said premises and the insurance upon the property and crops thereon, and has paid the mortgage upon said land and the interest thereon"; that prior to her death the testatrix told the plaintiff that she was going to will the farm to the children, and that they were to be executors, and he was to receive the income; that shortly after her death he was informed what the Kansas law was touching his rights in the property; that his control and management of the farm and the collection of rents, the payment of taxes, insurance, and indebtedness, and the discharge of the mortgage, together with the expenses of the last sickness and burial of his wife, "has in no manner prejudiced the rights or interests

of Edward E. Ross or Violet E. Ross or caused them to alter their position in any manner to their prejudice, and such payments were in accordance with the terms of said will."

It was further found that the \$9,800 note has never been paid by the plaintiff; that the daughter paid \$1,600 expenses of funeral and sickness, which the plaintiff subsequently returned to her out of the rents and profits of the land. At the time of the trial he had received from the land \$6,693.33, out of which he had expended \$4,461.98, including a note executed to him by his daughter for \$457, leaving in his hands as proceeds from the farm \$2,688.35; that the plaintiff was in no wise prejudiced by the attitude of his children concerning his management of the estate, neither were they prejudiced or misled by his action in relation thereto.

As conclusions of law the court found that the plaintiff was estopped from claiming any greater interest in the land than that bequeathed to him by the terms of the will, and that under its terms the son succeeds to all rights of the daughter in and to the land. The plaintiff was decreed to have such rights as were given him by the will, the remainder to go to the son upon the death of the plaintiff.

It is contended that the plaintiff, not having made a statutory election, is entitled to one-half of the land, and decisions of this court are cited in support of the theory that an election must be clear and unequivocal.

[1] The defendants claim an election by conduct. Counsel suggest that before his marriage to his second wife in 1919 the plaintiff's statements indicated an intention to take under the law. They cite *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522, holding that one who deliberately proceeds as though an election had been made, accepts the benefits of the will, and actually takes under it will not be heard to say no election has been made.

The usual condition in a law suit is found here, a sharp conflict between the testimony of the plaintiff and that of the defendants, and direct assertions and denials of expressions and knowledge touching the provisions of the will. But the trial court resolved this conflict in favor of the defendants, and this is conclusive on us. There is left for our consideration the conduct of the plaintiff and its legal effect.

The case has been thoroughly and ably presented on both sides, and in one or both briefs are discussed not only the question of estoppel, whether estoppel was properly pleaded, whether any change in status was caused by any act of the plaintiff, whether he came into court with clean hands, whether he was a cotenant with the defendant and his sister, and at what place an election to take under the will should have been made.

Aside from the question of estoppel, which under the answer and reply and the way it was treated in the trial was sufficiently pleaded, the other matters referred to are not necessary to a determination of this case, and therefore will not be discussed or decided.

Taking up the matter of election, it may be said that section 11798, General Statutes of 1915, provides that, if the widow shall fail to make an election, she shall retain her share of the estate which she would have been entitled to had there been no will, and of course the same rule applies to a husband. In *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556, it was decided that, in order for the acts of the widow to be regarded as an equivalent to an election to take under the will, she must act with full knowledge of all circumstances and of her rights, and it must appear that she intended by her acts to take under the will, which acts must be plain and unequivocal, and be done with the full knowledge of her rights and the condition of the estate. There the widow sent a written election to the probate court by her stepson, but she had not had explained to her the provisions of the will or her rights, and there were other reasons why the circumstances were not sufficient to amount to an election. In *James v. Dunstan*, 38 Kan. 289, 16 Pac. 459, the widow did not make a formal election, but expressed her satisfaction with the will when it was made, and, after the death of the testator, declared her intention to take under it and to come in and elect to accept its provisions, but her rights were not explained to her, and she was held not to have elected. In *Cook v. Lawson*, 63 Kan. 854, 66 Pac. 1028, it appeared that the husband when drafting his will was requested by the wife to enlarge her temporary estate to a full life estate, which was done to her expressed satisfaction. She was made executrix with another. After her husband's death she took the will to the probate judge's office and made written proposition for its probate and renounced her right to serve as executrix and asked that her coexecutor be permitted to serve alone, and several times stated to her neighbors that she knew all of the provisions of the will and was satisfied with them and continued to reside on the land for nearly twenty years. The court said:

"All that was lacking satisfactorily to prove an election in pais was evidence of the widow's knowledge of her rights under the statute. We do not think, however, that it was necessary to make express proof of that fact. Knowledge on her part was inferable from her acts and from her declaration of satisfaction with the provisions made for her, and from her 20 years' failure to dissent from them. It was fair to infer that during that long period she learned what her rights were under the law." 63 Kan. 856, 66 Pac. 1029.

In another case the widow was found to have consented to the will, and after the husband's death appeared in probate court, and with it sent a petition asking for its probate and stated that it would not be necessary for her to elect to take under the will, for she had in writing consented to the will. She afterwards acted as executrix for more than a year and received from the estate \$2,000 from the distribution of personal property and had a thorough knowledge of the property of the deceased. It was held that under all these circumstances the discovery that the estate was larger than she supposed afforded no reason for setting aside the consent she had previously given. The trial court found an election by conduct to take under the will, and this was affirmed. *Pirtle v. Pirtle*, 84 Kan. 782, 115 Pac. 543. That when a widow fails to make an election the law makes one for her, and her failure amounts to an election to take the share she would have taken had her husband died intestate, was held in *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074. The court said:

"If appellant, with full knowledge of her rights under the will, accepted benefits and received property provided for her by that instrument, she will be estopped to deny that she made an election or to claim the share which a wife takes under the law where the husband dies intestate." 85 Kan. 635, 118 Pac. 1075.

"Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. The doctrine, which is purely equitable, and was originally derived from the civil law, finds its most frequent illustration in the case of wills; the principle being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will." 40 Cyc. 1959.

[2, 3] Under the findings made by the trial court, which the record shows were supported by the evidence, the conclusion of law that the plaintiff should be held to have elected to take under the will is entirely supportable under the rules announced in the foregoing decisions. It may be more proper to regard it as an election by conduct than purely as a matter of estoppel. The finding that neither party had changed its position or sustained any loss by reason of the action of the other eliminates some of the usual features of estoppel.

But, to use plain terms, with full knowledge, the plaintiff for many years acted as if he had chosen to take what the will gave him, and his actions in this respect were so significant and so continued that to hold he

had not elected would be to convict him of remarkable inconsistency.

Holding, therefore, that the trial court was justified in determining the conflict against the plaintiff, and proceeding from this starting point, we conclude that the findings of conduct on his part would, if construed otherwise than as by the trial court, work a remarkable case of inconsistency, and that such actions were sufficient proof of an intention to take under the will.

Hence the judgment must be, and is, affirmed.

All the Justices concurring.

(111 Kan. 555)

BAKER v. MAGNOLIA PETROLEUM CO.
(No. 23819.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Evidence \S 472(1)—Where defendant claimed truck was owned and operated by independent contractor, testimony that defendant's foreman was in charge admissible.

Certain evidence considered, and held competent.

2. Master and servant \S 332(1)—Responsibility for injury by truck held for jury.

In an action to recover damages against defendant, caused by a collision between an automobile in which the plaintiff was riding and a truck used in the business of the defendant, held, there was no error in overruling a demurrer to the evidence.

3. Master and servant \S 332(1)—Agency of truck driver held for jury.

The defense to the action was that the truck belonged to an independent contractor, who was engaged in the truck business, and under a contract furnished the truck and driver and the gasoline, for which the company paid him \$20 a day. The defendant's evidence showed that it was an oral contract, and that nothing more was said than that the company wanted the truck to go to its leases wherever the work was being done. Sometimes one driver was sent by the owner of the truck and sometimes another. The driver reported each morning, and gathered up the men in the employ of the defendant, and hauled them from town to the place in the country where the defendant was laying a pipe line. The driver stayed at the pipe line, and was sent occasionally for drinking water, and transported the tools from place to place. He was sometimes sent back to town on errands. The defendant's testimony tended to show that the boss of the gang of workmen gave the driver no directions as to the way he drove the truck. The driver himself testified that the boss who had charge of the gang directed the operation of the truck, and told him what to do and where to go and when. Held, that the question whether the driver of the truck was a servant

of the defendant (although he continued to be the general servant of the contractor, and paid by the latter for his work) was a question for the jury to determine from a consideration of all the circumstances under which the truck was hired and used.

4. Master and servant §332(1)—Contract for hiring truck and driver held for jury.

The contract by which the truck and the driver were hired being oral, *held* that, where the evidence is conflicting, or where different inferences might well be drawn from the testimony concerning the oral contract, the matter was properly left for the jury to determine.

5. Master and servant §301(4)—Instruction on liability for negligence of driver of hired truck held proper.

On the facts stated in the opinion, *held*, that an instruction was proper which charged that, if the jury should find from the evidence that the defendant employed or hired a truck with a driver from the owner of the truck, and under the terms of the hiring was to have general charge and control of the truck and driver, and to direct generally the work to be done, the time and manner of its doing, and to have full and complete control of the operation of the work it should direct to be done by the truck and driver, the defendant would be liable for damages sustained as a result of the driver's negligent acts when using the automobile in the service of the company.

Appeal from District Court, Butler County.

Action by Cora Baker against the Magnolia Petroleum Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Leydig, Geddes & Grant, of El Dorado, Hubert Ambrister, and Blakeney & Maxey, all of Oklahoma City, Okl., for appellant.

J. M. Pleasant and Geo. J. Benson, both of El Dorado, for appellee.

PORTER, J. Cora Baker was a passenger in an automobile owned and driven by her brother on the public road from Augusta to Douglass. She received serious injuries as a result of a collision between the automobile and a truck used in the business of the defendant. She brought suit, alleging that the truck belonged to the defendant; that the driver, Fred Howard, was in defendant's employ; and that the collision occurred by reason of the negligent operation of the truck and the negligence of the company in using a truck with a defective brake. The answer was a general denial, also a verified denial that the driver was in the employ of the defendant, and alleged that the truck was owned and operated by an independent contractor. As a further defense it was alleged that certain negligence of the driver of the automobile was imputed to the plaintiff. Issues were joined, and there was a trial with a verdict in plaintiff's favor for \$3,860.42. The court reduced the verdict to \$2,600, to which plaintiff consented. Judgment was rendered, and the defendant appeals.

The plaintiff's evidence was sufficient to sustain a finding that she was riding, as a guest of her brother, who owned the automobile, and that the collision occurred through the negligent manner in which the truck was driven, and because the brakes were out of repair; that the brakes had been in that condition for a considerable length of time. There was evidence also to show the nature and character of her injuries, and to support a finding that she was not guilty of contributory negligence.

The first assignment of error relates to the admission of testimony. Haney, a witness for plaintiff, testified that he was on the truck; the accident occurred about four miles north of Augusta. He was then asked:

"Q. Are you acquainted with Mr. Crowley, the boss? A. I worked for him for a while.

"Q. State whether or not he was the boss in charge of this car?"

The question was objected to as assuming a fact not proven, and calling for a conclusion and opinion of the witness, and misleading. The objection was overruled.

"A. He was in charge of the gang, but Porter Parrish was over him. He was in charge of the gang for the day. Parrish was not there."

Regardless of the form of the question, it may be said that the answer to the effect that Crowley was in charge of the gang could not have prejudiced the defendant. The same objections were made to the following questions:

"State whether or not he directed the operations of the truck?"

The answer was:

"He told the truck what to do that was on the works."

[1] It is insisted that the question was objectionable because the witness was not asked to state what Crowley did, but to state whether Crowley was in charge of the truck, which was one of the particular questions which the jury would be called upon to determine from the facts, not from the opinion of the witness. We think it was proper to show that Crowley was in charge of the gang riding on the truck, and directed generally the operations of the truck. Upon cross-examination this witness testified:

That there were about 35 men on the truck. It had a trailer on it. Fred Howard was driving the truck. Wheeler owned it. "I did not say that the Magnolia owned the truck. The Magnolia had the truck hired. I don't know who Howard was working for."

Another witness testified:

That a few days before the accident they were on a grade out of town two or three miles from Augusta, "and this truck driver, his engine went dead, and as soon as it went dead

he said to put rocks under the wheels to stop it running down hill, and another occasion I saw him put it across the road to keep it from running down hill."

There was testimony showing that the truck was used for "company work," hauling men and tools and stuff on the pipe line.

[2] It is true the petition alleged that the truck belonged to the defendant, and was driven by one of its employees; but the evidence shows that the truck was used in the company's business, the work of which was under the control and direction of a foreman of the company. For these reasons we think there was no error in overruling the demurrer to the evidence.

The evidence introduced by the defendant showed that the truck belonged to C. C. Wheeler, who was engaged in the truck business, and doing contract work. The company agreed to pay him \$20 a day for the truck and driver, and Wheeler was to furnish the gasoline. The contract was oral, and nothing more was said, except that the company wanted the truck to go to its leases wherever the work was being done. The driver was to report to the bunkhouse and get the men in the morning, a mile west of Augusta. Sometimes Wheeler himself drove the truck, sometimes one driver, and sometimes another. The driver stayed at the place where the pipe line was being laid, and was sent for drinking water, and to keep the tools gathered up. The tools were along the pipe line. Sometimes he was sent back to Augusta for something.

Porter Parrish, a witness for the defendant, testified:

That every morning when the weather was fit to work the truck appeared in charge of some driver; the truck would leave the bunkhouse about 7 o'clock in the morning. It would take from one to two hours to get out to the lease; the men started back generally about 4:30; the truck driver stayed out on the lease. All he did after he got there was to get drinking water and keep the tools gathered up. "I think a few times he went back to Augusta for something."

Another witness for the defendant testified:

That his "duties at the lease were to pick up the tools and take them where the gang was; the tools left along the line. * * * I loaded them on the truck; after they were loaded, the driver drove the truck; when he wanted water for the men I took the truck and went after it; I didn't drive it."

Crowley, who was boss of the gang on the morning of the accident, testified:

That Howard was not working for the defendant company; he was working for Wheeler. "I gave him no directions of any kind as to the way he pursued or the method to drive the car; the road was out there and he knows the way out and I didn't have nothing to do with it. I had no directions over him, no more

than to ask him to do something; he knew about the work he had to do. Whatever arrangements was made when he was hired. All I could ask him to do was to go and get a barrel of water or something like that. It was Wheeler's truck; Wheeler done the hiring, and if he broke down Wheeler went and got another truck without any bother at all."

Fred Howard, who was driving the truck, was asked this question:

"Mr. Howard, you may state to the jury in driving this truck, who directed the operations of the truck and told you where to go and what to do and when?"

An objection was overruled.

"A. Well, the boss that had charge of the gang I had taken out; either George Crowley or Porter Parrish."

Among the instructions given by the court was No. 4, which charged in substance that before plaintiff could recover she must establish by a preponderance of the evidence that her injuries were sustained as a result of the negligent or careless acts of the defendant or of some of its agents or employees, "and you must find in this case * * * that the driver of the truck * * * sustained the relationship of an employee to the defendant before you can find the defendant liable in damages to the plaintiff."

Instruction No. 5 reads:

"You are instructed that where a person hires or rents an automobile, or an automobile truck, with a driver in charge for the purpose of transportation or conveyance, and in consideration of the payment of a certain sum per day or per week for the time for which said automobile or automobile truck with the driver in charge is rented or hired, such person has a right to direct said driver as regards where to go, what route to take, when to start, when to return, and in so doing does not become charged in any responsibility or liability for the acts or negligence of the driver in charge of said car."

Instruction No. 6 reads:

"You are instructed that, where a person hires or rents from another an automobile and driver thereof for the purpose of conveyance or transportation, and gives directions to the driver as to the place or places where he desires to be conveyed or transported, and as to the time or times when such transportation or conveyance shall be done, but gives no special directions as to the mode or manner of driving, he is not responsible for the acts or negligence of the driver; and you are further instructed that under no circumstances can such person be responsible for the acts or negligence of the driver unless he interferes with and controls by his own commands and requirements the manner and method and mode of handling such automobile."

Instruction No. 7 reads:

"If you believe from the evidence in this case that the defendant entered into an agreement with one C. C. Wheeler by the terms of which

the said C. C. Wheeler, in consideration of a certain sum per day, to be paid to said Wheeler by the said defendant, was to furnish an automobile truck and driver to the defendant for the purpose of transporting defendant's men and material from the city of Augusta, Kan., to its leases, and from its leases to the city of Augusta, Kan., and that in pursuance of said agreement said C. C. Wheeler did furnish an automobile truck and driver, and that while said driver of said truck was engaged in said work of transporting the said defendant's men or materials from Augusta to the leases of defendant an injury was occasioned to the plaintiff as the result of a collision with said truck, then, in that event, plaintiff would not be entitled to recover as against the defendant, and your verdict should be for the defendant."

The defendant makes no complaint of the foregoing instructions, which indeed are most favorable to the defendant, but does complain of instruction No. 8, which reads as follows:

"You are instructed that, if you should find from the evidence that the defendant employed or hired a truck with driver from one C. C. Wheeler, and that under the terms of said hiring the defendant was to have general charge and control of the truck and driver, and to direct generally the character and kind of work to be done, the time and manner of its doing, and to have full and complete control of the operation of the work that it should direct to be done by the truck and driver, then the defendant would be liable for any damages sustained as a result of the negligent acts of the driver of said automobile when using it in the service of said company."

[5] It is insisted that the evidence furnished no basis sufficient to warrant the jury in drawing an inference that the facts stated in the instruction existed. On the contrary, we think the evidence justified an inference on the part of the jury that, notwithstanding the defendant employed a truck hired from Wheeler, the defendant was to have general charge of the truck and driver, was authorized to direct generally the character and kind of work to be done, and had full and complete control of the operations of the work it might direct to be done by the truck and driver. There was evidence sufficient to justify a finding that the driver took his general orders from the boss or foreman of the gang of workmen; that is to say, that the foreman had general charge and control as to when and where the truck should go, and complete control of the work the defendant directed to be done. This instruction, it will be noticed, places emphasis on the fact, if proven, that the defendant controlled all the time the operations of the work performed by the truck and driver. It is well settled that the servant of A. may for a particular purpose, or on a particular occasion, be the servant of B., though he continues to be the general servant of A., and

is paid by him for his work. 1 Labatt, Master and Servant [2d Ed.] §§ 52-57, citing the language of Mr. Chief Justice Cockburn in *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. Div. 205:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

In the opinion in *Standard Oil Co. v. Anderson*, 212 U. S. 220, 29 Sup. Ct. 253, 53 L. Ed. 480, it was said:

"One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service. The plaintiff rests his right to recover upon this rule of law which, though of comparatively modern origin, has come to be elementary. But, however clear the rule may be, its application to the infinitely varied affairs of life is not always easy, because the facts which place a given case within or without the rule cannot always be ascertained with precision. The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

In *Philadelphia & R. C. & I. Co. v. Barrie*, 179 Fed. 50, 102 C. C. A. 618, it was held:

"Where defendant, a coal dealer, in delivering coal from its yards to customers, hired from another dealer a team and a driver in the latter's general employ, paying a stipulated sum per hour for their services, and having full control and direction of the work and the method of its performance, the driver, while engaged in such work, was a servant of defendant, which was liable for an injury to a third person, caused by the driver's negligence in its performance."

See, also, *Scribner's Case*, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178; 20 Neg. & C. C. A. pp. 302-304.

[3, 4] It cannot be said as a matter of law that the negligence in this case was that of an independent contractor; that and the other questions submitted were for the jury to determine from a consideration of all the circumstances under which the truck was hired and used. If different inferences concerning the contract and use of the truck may be drawn from the testimony, the finding of the jury is controlling.

"In the case of an oral contract, if there is no material dispute in the testimony, whether the employee is an independent contractor may present a question for the court; but, where the evidence is conflicting, or where different inferences may well be drawn from the testimony concerning the oral contract, the matter is one for the jury to determine." 14 R. C. L. 79.

The mere fact that the foreman of defendant neglected to exercise control over the manner and method in which the truck was driven along the highway, or that he neglected to see that the truck was equipped with brakes sufficient to control it, does not determine the question of whether the owner of the truck was an independent contractor; nor would that fact prevent the defendant from being liable for an injury to the plaintiff caused by the negligent manner in which the truck was equipped and controlled. Previous to the accident the company, through its foreman, knew that the truck was not properly equipped with brakes, and for that reason could not always be controlled. The duty the company owed to other travelers on the highway required it to insist that a truck employed in its business should be properly equipped with brakes and handled by a reasonably careful driver.

There was no error in refusing to grant the motion for a new trial.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 573)

CRAWN v. FOWLER PACKING CO.
(No. 24068.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Master and servant §382—Compensation settlement may be avoided for mistake.

Where a settlement fixing compensation of an injured workman was made and a release given to the employer under a mutual mistake of the parties as to the nature and extent of the injuries of the workman, and the compensation agreed upon is grossly inadequate, the agreement and release may be treated as nullities.

2. Master and servant §405(1)—Mistake in compensation agreement shown.

The evidence examined, and it is held that it is sufficient to establish a mutual mistake of the parties in respect to the injuries of the plaintiff.

3. Master and servant §398½, New, vol. 8A Key-No. Series—Arbitrator authorized to determine issue of mistake in compensation settlement.

Where an arbitrator is appointed by consent, and upon the request of the defendant,

the issue of mutual mistake in the settlement and release is expressly referred to the arbitrator, and evidence upon the question is presented by the parties, he is vested with authority to determine the issue, and upon sufficient evidence to decide that the release is a nullity, and to award adequate compensation as if the invalid release had not been executed.

Appeal from District Court, Wyandotte County.

Proceeding under the Workmen's Compensation Act by Margaret Crawn for compensation for injuries, opposed by the Fowler Packing Company, employer. From an award for the claimant, the employer appeals. Affirmed.

Wm. G. Holt, of Kansas City, Mo., and P. W. Croker, of Kansas City, Kan., for appellant.

H. E. Dean, of Kansas City, Kan., for appellee.

JOHNSTON, C. J. This is an appeal from an award made under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216). While Margaret Crawn was in the employment of the Fowler Packing Company, she accidentally fell from one floor level to a lower one, which resulted in a fracture of the left femur in the region of the hip joint, an injury so serious in its nature as to cause total permanent disability. The accident occurred April 14, 1919, and on December 11, 1919, the defendant paid her \$50 as compensation, and she gave a receipt for the same. On January 28, 1920, another payment of \$50 was made, and a receipt for the same was given. On April 6, 1920, an additional payment of \$244.85 was made to her, which was the amount due as compensation up to that time at the rate of compensation payable in such a case, based on her average weekly wages for the year preceding the injury.

A controversy arose as to the compensation due, and the plaintiff asked for the appointment of an arbitrator. At the request of the defendant the following questions in substance were referred to the arbitrator for determination:

(1) Was the release given by the plaintiff a binding one?

(2) Was there any mutual mistake of fact between the parties when the release was taken?

(3) Was there any fraud or deceit on the part of the defendant in obtaining the release?

(4) Was the plaintiff suffering from any mental disability when the release was signed?

(5) Is the plaintiff entitled to any additional compensation on account of her injury?

Evidence on the questions was submitted.

After stating the nature of the injuries sustained, and that they had resulted in total permanent disability, the arbitrator found that plaintiff's average weekly wages for the year preceding the accident were \$16.57; that two payments of \$50 each had been made and receipted for, as has been stated, and that a third payment had been made of \$244.85. On the receipt of it plaintiff had executed a release of all claims on account of her injury. It was further found that the amount paid was grossly inadequate for the injury sustained, and that the release was made under a mutual mistake of fact of both parties as to the nature and extent of plaintiff's injuries, and was therefore not of binding force. There was a further finding that plaintiff had been taken to a hospital by the defendant and treated by a physician and surgeon employed by the defendant, and that all of the hospital, physician, and surgeon's bills, as well as for nursing and medicines, were paid by the defendant, and that the payments on that account exceeded the amount allowed by statute for these purposes. Plaintiff was awarded in a lump sum \$855.70, less the amount which had been previously paid as compensation up to the time of arbitration, which amount was 60 per cent. of her average weekly earnings, and she was also allowed for the eight-year period after the injury compensation at rate of \$9.95 per week. There was also a finding that there was no evidence of fraud or deceit practiced in the settlement, and no evidence as to the mental disability of the plaintiff when it was made. The court approved the award. The defendant contends that the release was valid and binding, and that the trial court erred in refusing to set aside the award.

[1, 2] The contention that there was no evidence of mutual mistake cannot be upheld. The evidence tends to show that both parties to the settlement proceeded on the theory that plaintiff had about recovered from her injury, and would be able to return to work within a few days, and this is confirmed to some extent by the fact that the compensation agreed upon was the amount due up to the time of settlement. The defendant's physician took plaintiff home from the hospital, told her that she had recovered from her injuries, and all that she had to do thereafter was to learn to walk. Plaintiff told the agent of defendant, who made the settlement, that she was ready to go to work, and thought she would be able to do so within a week or two. He stated to her that the doctor had said that she was all right and in good condition when he brought her home from the hospital, and he testified that the payment was made on the basis that she was then ready to go back to work. It is true he also testified that the release was taken as a full payment of her claim against the defendant. There is a controversy as to whether the terms of the release were read

and understood by the plaintiff and she stated that she supposed she was signing a receipt for the accrued compensation as she had done when former payments were made. However that may have been, it is manifest from the evidence that all concerned were mistaken as to the nature of her injuries, and that plaintiff entertained the opinion given to her by the doctor of defendant that she had recovered, and she rested in this opinion until an examination was made by three other doctors, which revealed the fact that her injury was permanent in character, and that she would be a cripple for life. There was not only mutual mistake of the parties, but the consideration for the release was grossly inadequate. It has been decided that:

"A mutual mistake as to the extent of existing injuries is such a mistake as will justify setting aside a release of liability on account of those injuries. * * * A release following an agreement as to compensation is no defense to an action under the Workmen's Compensation Law, where that agreement is based on a mutual mistake of fact and provides for a grossly inadequate compensation." *Weathers v. Bridge Co.*, 99 Kan. 632, 636, 162 Pac. 957, 959.

See, also, *Smith v. Kansas City*, 102 Kan. 518, 171 Pac. 9; *Wolf v. Cudahy Packing Co.*, 105 Kan. 817, 182 Pac. 895.

[3] It is further contended that the arbitrator was without authority to consider any question relating to the validity of the release. In providing for an arbitrator the person agreed upon by the parties was appointed by the court. The defendant, as we have seen, made a special request that certain questions other than the amount of compensation should be referred to and determined by the arbitrator. Several of these questions related to the validity of the release, including whether it had been obtained by mutual mistake. Without objection evidence was presented on this issue, and also as to the adequacy of the consideration that had been given for the release. After asking for a reference and a determination of the question, the defendant is hardly in a position to challenge the authority of the arbitrator to determine it. It is contended by the defendant that the Compensation Act does not expressly give an arbitrator power to pass on the validity of a release, even if the parties expressly request a submission and determination of the question. It is insisted that only a court having general equity jurisdiction can cancel a settlement and release on the ground of mutual mistake. The Compensation Act recognizes that questions relating to compensation other than the amount of the same may be referred to the arbitrator. After providing for the appointment of an arbitrator by consent or upon the order of the court, it is provided:

"The consent to arbitration shall be in writing and signed by the parties, and may limit

the fees of the arbitrator and the time within which the award must be made, and unless such consent or order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue," etc. Laws 1917, c. 226, § 11.

Any question touching the right of a workman to compensation which has been expressly referred may therefore be considered and determined by the arbitrator. The arbitrator is in a sense an arm of the district court, and is subject to the supervision of that court, and his decision may be reviewed by it upon certain grounds. Laws 1917, c. 226, § 16. He is vested with judicial authority, and his decision is binding upon the parties, unless it is modified or set aside upon review by the court. It is competent for the Legislature to confer judicial power upon any tribunal or court inferior to the Supreme Court, and, even if an arbitrator is regarded as an independent court, no reason is seen why he may not be vested with jurisdiction to hear and determine any question pertaining to the right of a workman to compensation which has been expressly referred to him in the order of appointment.

The decision and award of the arbitrator were brought before the trial court upon a motion to set them aside upon the grounds that the evidence did not establish that the settlement or release were made under a mutual mistake, and that there was no basis for holding them to be without binding force.

The decision of the arbitrator was approved by the court, and judgment for plaintiff was accordingly given.

Judgment affirmed.

All the Justices concurring.

(111 Kan. 397)

HUGHES v. HUDSON-BRACE MOTOR CO.
et al. (No. 23772.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Negligence §108(2) — Petition sufficient without using word "negligence."

Especially where a petition is not attacked by motion or demurrer the fact that it does not use the word negligence or a derivative thereof does not prevent its statement of a cause of action for negligent injury, where the acts complained of are alleged to have been illegal and in violation of the defendants' obligations.

2. Pleading §376—Admission of fact in answer held to dispense with evidence on such matter.

An admission in the answer that the driver of a car at the time of its collision with another was engaged in demonstrating cars for its owner is held to dispense with any evidence on the subject.

3. Municipal corporations §706(7)—In action for collision, whether plaintiff was contributorily negligent in exceeding the speed limit held a jury question.

The question whether the plaintiff in exceeding the statutory speed limit and in failing to see another car in time to prevent a collision was guilty of negligence contributing to his injury is held to have been one of fact, properly submitted to the jury.

4. Municipal corporations §705(2), 706(5, 7)—Ordinance giving vehicle approaching intersection from one direction the right of way over one from another construed; evidence held to warrant finding that defendant's car was coming so rapidly that plaintiff underestimated his speed while exercising due diligence; contributory negligence held a jury question.

Where by ordinance a vehicle approaching a street intersection from one direction is given the right of way over one approaching it from another, the driver of an automobile from the disfavored direction is not required under all circumstances before attempting to cross to await the passage of every car he can see coming from the other direction which by any possible burst of speed might reach the crossing of their paths ahead of him. It is not negligence as a matter of law for a driver from either direction to undertake to cross the intersection ahead of a car which is at such a distance that he has ample time to get across, provided the other car does not exceed the highest speed he should reasonably anticipate. And it is held that in the present case the evidence warranted a finding that the defendants' car was coming so rapidly that the plaintiff in the exercise of due diligence in that regard underestimated its speed and reasonably believed that he had abundant time to cross until it was too late for him to do anything to avoid a collision.

5. Appeal and error §1070(2)—In action involving automobile collision, question submitted to jury as to character of defendant's negligence held not to require reversal, although stating matter not pleaded or submitted.

Where in an automobile collision case a question is submitted to the jury calling for a statement of the character of the defendants' negligence, a reversal of a judgment in favor of the plaintiff is not required by the answer, "entering intersection on wrong side of street at excessive speed," although the defendants' being on the wrong side of the street was not pleaded nor submitted to the jury.

Appeal from District Court, Wyandotte County.

Action by Ewart S. Hughes against the Hudson-Brace Motor Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Carson & Miller, of Kansas City, Kan., and Busby, Sparrow & Patterson, of Kansas City, Mo., for appellants.

L. O. Carter, of Kansas City, Kan., for appellee.

MASON, J. Ewart S. Hughes was driving an automobile west on Washington avenue in Kansas City, Kan., while L. E. Tanner, who was in the employ of the Hudson-Brace Motor Company, was driving one belonging to that company north on Sixth street. The cars came together near the northwest corner of the intersection of these streets; the evidence being in conflict as to which struck the other. Hughes sued Tanner and the motor company for injuries received by him, the company asserting a counterclaim because of injury to its car. The plaintiff recovered a judgment, and the defendant appeals.

[1] 1. Complaint is made of the overruling of a demurrer to the plaintiff's evidence and of a motion for a peremptory instruction in favor of the defendants on the ground that the petition failed to state a cause of action, inasmuch as it did not allege that Tanner's handling of the car he was driving was negligent. The pleading did not in so many words characterize his conduct as negligence, but it alleged that he drove at a high, dangerous and excessive rate of speed, to wit, 45 or 50 miles an hour, disregarding his legal obligations and violating a city ordinance. The speed alleged would be unlawful because of the statute, which did not require to be pleaded. The omission of the term "negligence" or a derivative was immaterial. An allegation that a train was run at 60 miles an hour has been held not to charge negligence (*Railway Co. v. Wheeler*, 70 Kan. 755, 79 Pac. 673), but this is not true of a statement that an automobile was driven at a high, dangerous, and excessive rate of speed in violation of the statute and an ordinance.

[2] 2. The same rulings are attacked by the defendant company on the ground that there was no evidence that Tanner at the time of the collision was engaged in its business. The petition alleged that at all times therein referred to he was employed by the company and engaged in demonstrating its cars and was so working and employed at the time the accident occurred. The company's answer contained an admission that he was "at the times mentioned in plaintiff's petition engaged in the sale and disposition of" its cars "and was at said times * * * employed by it and engaged in demonstrating and selling" its cars. We consider this admission as having eliminated the issue referred to and rendered the introduction of evidence thereon unnecessary.

[3] 3. The same rulings are also challenged on the ground that the undisputed evidence showed that the plaintiff was guilty of contributory negligence. The jury found that the plaintiff's car was going 15 miles an hour. This was a violation of the statute restricting the speed of automobiles in city streets to twelve miles an hour and to 6 miles at intersections. Laws 1917, c. 74, § 5. Whether this conduct contributed to the accident,

however, was a question for the triers of the facts. The plaintiff testified that he saw the defendants' car while it was still a block away, but did not look for it again until he was halfway across Sixth street, when it was too late for him to prevent a collision. Whether this course amounted to contributory negligence was likewise a matter to be determined in the light of all the circumstances, including the speed of the defendants' car, which one witness estimated at 65 miles an hour.

[4] 4. The question as to which driver had the right of way is one to be considered in determining the matter of contributory negligence, whether or not it would be controlling. Tanner testified:

"I certainly thought I had time to cross the boulevard ahead of that car, because I knew I was entitled to the right of way. I knew that Sixth street was a boulevard, and knew traffic ordinances of this town, and that the north and south traffic has the right of way."

The provision of the ordinance to which he obviously referred reads:

"Whenever vehicles approaching each other on different streets shall reach the intersection of such streets at the same time, the vehicles proceeding on the street running north and south shall have the right of way unless such east and west street is a boulevard, or a street on which street car tracks are located, in which event the vehicle proceeding on the boulevard or street on which said street car tracks are located shall have the right of way, but every such vehicle shall be kept under control so as to prevent danger of collision."

The meaning of the ordinance appears to be that the north and south travel shall have the preference at an intersection, except where the east and west street is a boulevard (or a car line street) and the north and south street is not. Here the east and west street, as its name shows, was a boulevard. The defendants introduced an ordinance which they interpret as declaring the other street, Sixth, also to be a boulevard at this point. The plaintiff objected to the introduction of the ordinance on the ground that it had not been pleaded. The answer, however, alleged that Tanner had the right of way, and this allegation we consider sufficient to support the evidence. The ordinance making a part of Sixth street a boulevard contains a provision excepting that portion between the alley north of Washington street and the street two blocks south of it, which is declared to be "a trafficway for 20 feet in the center thereof." This exception leaves in some doubt the character of Sixth street at the place where the collision occurred. The ordinance regulating traffic contained this provision:

"Everything else being equal, the vehicle which has another vehicle on the right-hand side shall have the right of way."

Although contrary to the general practice and to ordinances of other cities, and in some states to the statutes (Huddy on Automobiles [6th Ed.] § 262; *Fox v. McCormick*, 110 Kan. 91, 93, 202 Pac. 614), this would control if no other test is applicable. The defendants asked an instruction that, if Tanner reached the intersection first, he had the right of way. The need of a rule determining which of two vehicles has the right of way arises when they approach an intersection from different directions at such time with reference to each other that unless one yields and slackens speed a collision will be likely to occur. The driver on the right enters into the actual area of the intersection at the very point of collision if one is to take place, while the one on the left enters it while still the width of the street away from that point. It is necessary that the question of precedence shall be determinable while the vehicles are approximately at equal distance from the point of possible collision. A rule giving priority to whichever vehicle first reaches the intersection is obviously not well adapted to automobile traffic. *Fox v. McCormick*, supra.

There appears to be some difference of opinion as to the circumstances under which one who sues for injuries sustained in a collision of automobiles at a street intersection may be precluded from recovery as a matter of law because he attempted to cross it in front of a driver from the direction having the preference. See *Anderson v. A. E. Jenney Motor Co.* (Minn.) 185 N. W. 378, and cases cited in connection therewith in a note in 20 Mich. Law Rev. 801. Assuming the correctness of the majority decision in the Minnesota case, we do not think it would follow that a driver who approached the crossing from the disfavored direction can never maintain an action against the other for running into his car. The occasion for applying the rule of the statute or ordinance or practice concerning the right of way arises only where the two vehicles approach the intersection at such distances and speed that a collision is probable unless one of them slows up. The giving of a preference to the driver on the right does not imply that the driver on the left is never justified in attempting to cross the intersection so long as there is in sight a car on his right which might by some unexpected burst of speed beat him to the point where their paths cross. The rule assumes the normal and reasonable operation of both cars. The fact of the legal speed limit being exceeded or that one car was going faster

than the other would not necessarily control; but it is not negligence as a matter of law for a driver from either direction to undertake to cross the intersection ahead of a car which is at such a distance that he has ample time to get across, provided the other car does not exceed the highest speed he has reason to anticipate. Assuming that in the present case the ordinance gave preference to the vehicle from the south over that from the east, we think a verdict for the plaintiff is sustainable upon the ground that the evidence justified a finding that the defendants' car was coming so rapidly that the plaintiff in the exercise of due diligence in that regard underestimated its speed and reasonably believed that he had abundant time to cross ahead of it until it was too late for him to do anything to avoid the collision. *Schultz v. Nicholson*, 116 Misc. Rep. 114, 189 N. Y. Supp. 722; *Weber v. Beeson*, 197 Mich. 607, 164 N. W. 255; *Barnes v. Barnett*, 184 Iowa, 936, 169 N. W. 365.

[5] 5. In answer to a special question asking them to state fully of what the defendants' negligence consisted the jury answered: "Defendant entering intersection on wrong side of street at excessive speed." It is urged that the finding requires the verdict to be set aside because it shows reliance on a ground of negligence not set out in the petition or submitted in the instructions. There was evidence that Tanner entered the intersection on the left side of Sixth street just after passing a Ford car for which he turned out. This was not pleaded, nor was any reference made to it in the charge to the jury. It does not affirmatively appear, however, that the jury regarded the fact that Tanner was on the wrong side of the street as an independent ground of negligence rather than one of the conditions that accompanied the negligent act of driving at excessive speed, which under the circumstances they regarded as negligence and as the proximate cause of the accident. At all events, inasmuch as a sufficient ground of negligence was specifically found, we do not think it necessary to order a reversal because of the inclusion of another ground which was unavailable because not pleaded. The defect in this regard is less serious than where an additional ground of negligence is included in the special findings without evidence to support it, and that has been held not to require a new trial. *M., K. & T. Ry. Co. v. Weaver*, 16 Kan. 456.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 391)

COOPER v. GEORGE A. FULLER CONST. CO. (No. 23766.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Master and servant \S 385(11 $\frac{1}{4}$), 405(2)—Verdict for compensation for injuries sustained.

The record examined, and the evidence deemed sufficient to support the findings that the plaintiff was in the employ of the defendant when injured, and that he made demand for compensation; also that the verdict was for the amount provided by statute under the circumstances shown.

2. No material error discovered.

No material error discovered in relation to the reception or rejection of evidence or in regard to the instructions.

Appeal from District Court, Wyandotte County.

Action by Israel Cooper against the George A. Fuller Construction Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Wood, of Kansas City, Kan., for appellant.

McFadden & Claffin, of Kansas City, Kan., and Russell Field, of Kansas City, Mo., for appellee.

WEST, J. The plaintiff, while working at a rock crusher, lost the sight of his right eye, and sued to recover compensation, alleging that the injury occurred while he was in the employ of the defendant. He recovered judgment for \$1,320, and the defendant appeals. The errors assigned relate to the reception and rejection of evidence, the instructions, and denial of a new trial.

The plaintiff's claim is that he was employed by the construction company in building a cantonment at Camp Funston, and put to work at a stone crusher some miles away.

[1] The defendant denies that the rock quarry and crusher were operated by it, and that the plaintiff was in its employ. Counsel says:

"There is a total absence of proof on the part of the plaintiff showing that plaintiff was in the employ of, or was paid by, or that plaintiff's injuries arose out of or in the course of his employment with the defendant."

Aside from these contentions it is alleged that the testimony touching the plaintiff's average earnings was insufficient; also that no demand was proven, and that in any event, if the plaintiff should be held entitled to recover, the amount should be \$660 instead of \$1,320.

It seems that the construction company

built the cantonment for the government, and was to be paid 10 per cent. above its cost. The records were not in possession of the defendant, but at Washington. The plaintiff testified that he was sent up to Funston by a man-catcher, and when he reached there he went to doing the work he was detailed to do and was furnished a place to sleep and his meals, and was paid in money in envelopes on Saturday at the construction company's pay office.

"This office was about two miles from where I was working. I went down to this office each Saturday for my pay. There were about 1,000 or more men getting their pay there when I went down there on Saturdays."

Certain pay envelopes were introduced in evidence. One of these read:

"Name, I. Cooper, National Army Cantonment, Ft. Riley, Kansas, George A. Fuller Construction Company."

The plaintiff testified that after his injury he was taken to the hospital, and stayed there seven days, and came back to the camp and stayed one night and went down to the office where he had always received his money, and talked with somebody. He got a paper and presented it to the cashier and got his pay envelope. The pay amounted to \$47.40, after taking out \$7 for board. It appears that the plaintiff received some sort of notification to call at some office for the purpose of discussing his claim against the company, and went to the Reserve Bank building.

"I talked with some person relative to my claim. I was up there half an hour. They didn't pay me anything for the injury which I had received. I never received any pay or compensation from anybody for the injuries I received. * * * I made demand for compensation at Camp Funston right after I got hurt. Right away I came home, the next day; that is, I mean when I got back to camp. It was made just before I came home, the next day. I made the demand the same day I got this pay envelope. * * * That was the same building I was in the habit of going to for my pay checks."

"When this man gave me my pay check, I asked him for compensation, and he didn't give me any answer at all. I told him I had lost my eye working, and it was right they should give me something for it; and he never gave me any kind of a settlement or said about whether they was going to settle it or not; didn't give me any kind of an answer at all."

While this evidence is not clear and definite as it might be, we think it sufficient to base the conclusion on that he was working for the defendant and was injured while so doing and demanded of the pay master a settlement for his injury.

The plaintiff testified that he was classi-

fed as a laborer; that he was in Camp Funston from September until November; that he lost his eye in October; that he saw the pay envelopes of other men who worked out there, and one man got \$75 for one week's work and another \$50, and that he himself received 60 cents an hour, working 10 hours a day and getting paid for 11, or \$6.60 a day; that before going to work there he had worked at Kansas City; and that prior to the 17th of October, 1917, when he was injured, for more than a year workmen like himself were getting 50 cents an hour. He also stated that during the month of October, 1917, and for a year before that time, the prevailing union rate paid to workmen in Kansas City was 57½ cents an hour.

The vice president of the defendant company testified, among other things, that a common laborer was on a flat rate of pay, and the prevailing union rate paid in Kansas City applied not only as to the rate of pay, but to overtime.

The envelopes received in evidence were under the circumstances competent for what they were worth, and we find no material error in the record touching the reception or rejection of evidence.

The defendant sought by requested instructions to have the compensation, if any, limited to \$6 a week for 110 weeks, and still contends that this is all the plaintiff is entitled to, if anything.

The jury found in answer to special questions that the plaintiff was working on the rock crusher operated by and under the direction of the defendant, that the average weekly earnings was \$30, and that he was employed by the defendant at the time of the accident.

Section 4, c. 226, of the Laws of 1917 provides that, when a workman has been employed less than a year, the average annual earnings shall be 52 times the average weekly amount which, during the 12 months immediately preceding the accident, was received by a person in the same grade of employment at the same work by the same employer, or, if there is no person in the same grade so employed, then 52 times the average weekly earnings of a person in the same grade employed by the same or other employer in the same district at the same or similar work or employment, and that the average weekly wages of a workman shall be 1/52 part of his average annual earnings.

While the plaintiff's testimony indicated that he received more than \$30 a week average, the jury found the amount to be \$30. By paragraph 15 of section 3 of the act referred to, for the loss of an eye, or the sight thereof, 50 per cent. of the average weekly wages during 110 weeks is the limit of recovery, which is again limited by the same section to \$12 a week. The amount returned

by the jury was for 110 weeks at \$12, and this is within the provisions of the statute.

[2] Finding no material error, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 616)

KESSLER v. DAVIS, Federal Agent.
(No. 23732.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Railroads \S 348(1, 4, 5)—Evidence held to sustain some charges of negligence at crossing.

In an action against the railroad management because of an automobile being run into at a street crossing, it is held that the evidence was sufficient to sustain findings of negligence in causing a train to approach a station and cross a street less than a block from it at too great speed, and in failing to give proper signals, but not to sustain findings that the collision was due to defects in the crossing, or to unnecessary obstructions to vision on the right of way.

2. Negligence \S 136(30)—Imputed negligence of occupant of automobile held for jury.

The evidence is held not to show conclusively that the plaintiff and the driver of the automobile were engaged in a common enterprise, in such sense as to render the former chargeable with the negligence of the latter; that question, in the circumstances shown, being one of fact to be submitted to the jury.

3. Railroads \S 327(12)—Automobile occupant, not negligent in failing to require driver to stop.

Where the driver of an automobile and a person accompanying him are not engaged in a common enterprise, and the situation is such that due diligence requires the driver to stop before attempting to cross a railroad track to assure himself that no train is approaching at a dangerous distance, the person accompanying him is not negligent as a matter of law in failing to see that such stop is made.

4. Railroads \S 350(21)—Contributory negligence of occupant of automobile held for jury.

The evidence is held not to show the plaintiff to have been personally guilty of contributory negligence as a matter of law.

5. Railroads \S 348(8)—Verdict based on estimate of distance, conflicting with actual measurements, set aside.

A verdict for the plaintiff is set aside because it is necessarily founded on a mere estimate of a distance at which an approaching train could be seen from a certain point, which is in conflict with evidence based on actual measurements that are not otherwise contradicted.

6. Appeal and error \S 843(1)—Unnecessary matters need not be decided.

Several assignments of error are held not to require a ruling.

Appeal from District Court, Labette County.

Action by C. A. Kessler against James Cox Davis, Federal Agent, etc. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

Waggener, Challiss & Brown, of Atchison, and E. L. Burton, of Parsons, for appellant.

C. E. Pile and L. E. Goodrich, of Parsons, for appellee.

MASON, J. While C. A. Kessler was riding in an automobile belonging to and driven by Howard Shearhart, the car was struck at a street crossing by the engine of a Missouri Pacific passenger train and Kessler was severely injured. He sued the federal agent, who was in charge of the road, and recovered a judgment, from which the defendant appeals.

[1] 1. The defendant asserts that there was no evidence that the railroad management was negligent in any respect. Four forms of negligence were alleged, and the jury specifically found that the defendant was guilty of all of them:

"Maintaining an improper crossing; maintaining obstructions on the right of way; approaching an obstructed crossing at excessive speed; failing to sound proper crossing signals."

There was evidence that the crossing was not maintained in conformity with the statute, but we find nothing to indicate that the collision was in any degree due to its defects. The petition charged that the view of the track from the street near the crossing was obstructed by unnecessary buildings, trees, and fences. The plaintiff testified that his view of the approaching train was cut off by a section house on the right of way and by a curve in the track; that otherwise he could have seen up the track for a mile. This testimony practically took the other obstacles out of consideration in this aspect of the matter. The section house was a necessary and useful building. Its position on the right of way was a matter to be taken into account in connection with the obligation on the part of the railroad management to give signals and with regard to the question of contributory negligence, but we do not think it could alone constitute actionable negligence. See *Corley v. Railway Co.*, 90 Kan. 70, 71, 133 Pac. 555, Ann. Cas. 1915B, 764. Therefore the judgment could not be sustained upon either of the two grounds already discussed. Their elimination, however, does not warrant a reversal, if either of the other two grounds of negligence is sustainable, and we think there was evidence to support both. Witnesses estimated the speed of the train at 20 to 40 miles an hour. While other evidence tended to weaken this, the matter was one to be submitted to the jury, together with the question whether the rate found was in ex-

cess of what was reasonably prudent, considering all the circumstances, including the distance of the crossing from the station—some 200 feet. Evidence of witnesses called by the plaintiff seemed to establish that the whistle was sounded as the train approached the station, but whether the conditions called for any further signal, and whether the bell was in fact rung, were questions properly submitted to the jury.

[2] 2. The defendant claims that the evidence conclusively established that the collision was due to the negligence of Shearhart, the driver of the automobile, which should be attributed to the plaintiff, because the two were engaged in a common enterprise. There was evidence to this effect: The plaintiff and Shearhart were neighbors, living near Edna. Each had a car. They frequently went to town together, sometimes in one car, and sometimes in the other. On the day of the accident Shearhart was going to town, and asked the plaintiff to go with him. The plaintiff had some produce he wanted to take in, and accepted the invitation on that account. They reached Edna in the morning, and stayed there until 4 or 5 o'clock in the afternoon, when they started home; the collision occurring while they were still in town. We do not think the evidence conclusively proved that the two were engaged in a common enterprise, in such sense as to make the plaintiff chargeable with the negligence of Shearhart. That question was one to be left (as it was) to the jury under proper instructions.

[3] 3. Under various assignments of error the defendant urges that judgment should be rendered against the plaintiff on the ground that his own personal negligence contributed to the injury. The rule is well settled that due diligence on the part of the driver of a vehicle requires him to assure himself that no train is approaching within a dangerous distance before attempting to cross a railroad, stopping for that purpose, if necessary. The defendant takes the position that in the present situation the same obligation rested upon the plaintiff. We do not think that it can be said as a matter of law that the plaintiff was negligent in failing to see to it that the automobile was stopped, assuming that to have been true of the driver.

[4] 4. The plaintiff, however, was under a positive duty to take reasonable precaution for his own safety. Whatever else this may have involved, it required him to keep an outlook for a train, particularly on his side of the car, and to give the driver notice as soon as he discovered one. *Knight v. Railway Co.* (Kan.) 206 Pac. 893, decided May 6, 1922; *Kirby v. Railway Co.*, 106 Kan. 163, 186 Pac. 744. As the two drove south on the principal street toward the railroad, which crossed it at right angles, their view to the west, from which direction the train was coming, was cut off to a considerable extent by various

obstructions, the last of which was the section house, situated at its nearest point approximately 125 feet west of the middle of the street and 19½ feet north of the middle of the railroad track. This distance refers to the main part of the building, the house itself; a small porch, consisting of a floor and a roof, supported by three posts, extending several feet to the south, but could not completely cut off the view up the track. The plaintiff was on the front seat, at the right of the driver. He testified that he was looking west all the while, but saw the train for the first time when he was 10 or 12 feet from the track, and at once called to the driver to look out; that the reason he did not see it when he was 25 feet from the railroad was on account of the section house and a curve in the track. In one instance he spoke as though the train when he first saw it was but 100 feet away, but the effect of his whole testimony is that the distance was about twice that.

If the plaintiff's account is correct, this must be what happened: While he was 25 feet from the track he could and did see along it to the west for 200 feet, the extent to which it was visible, but did not see the train, because it was not yet within that distance; he kept on looking, but the train did not come in sight—did not reach his field of vision along the track—until he was within 10 or 12 feet of the track, when, owing to the imminence of the peril, he could do nothing more than to warn the driver. This version attributes what seems a most improbable speed to the train, but we cannot say it is impossible, or that, if it is true, the plaintiff was guilty of contributory negligence as a matter of law. Therefore judgment upon the evidence cannot be rendered against the plaintiff.

[5] 5. However, we think the defendant's motion for a new trial should be sustained, for these reasons: The plaintiff's case rests upon the theory that at a distance of 25 feet from the track he could only see a train approaching from the west if it was within 200 feet. He testified that at that distance he could see no further up the track because of the section house and because of the curve in the track. By a plat drawn to a scale the section house is shown to be about 125 feet west of the middle of the street and 19½ feet north of the middle of the track. It is manifest that if these measurements are correct, and they are supported by the other evidence, a train coming from the west could be seen in spite of the section house at a distance of something like 500 feet, if the track is straight. There was no testimony as to just where the curve began, but the plat, which covers over 500 feet west of the street, does not show it. The plat, of course, is not to be regarded as infallible; but, in the absence of any other actual measurements in conflict with it, we do not think a judgment inconsistent with it should be allowed to stand,

the matter being one capable of exact determination. The jury, in answer to a special question, found that the occupant of an automobile, when he was 25 feet north of the track, had an unobstructed view along the track to the west for about 200 feet. In view of the issues involved, this must be interpreted as meaning that, when 25 feet from the track, he could not see an approaching train until it was within 200 feet of him. It cannot be said that the finding was wholly without support in the evidence, for it corresponded with the plaintiff's estimate, but it was in conflict with the plat, against which no actual measurements were offered.

Moreover, the plaintiff's statement was that at that distance the curve cut off the view, when there was no substantial evidence of a curve within that distance. A photograph was introduced, looking west from the crossing up the main track, showing a freight train approaching on the passing track to the south, the rear cars of which show a curve to the north. But the engine itself is standing about 200 feet west of the middle of the street, and while the length of the train, of course, cannot be closely estimated in such a picture, it is evident that the curve does not begin for a considerable distance beyond the 200 feet fixed by the jury as the limit of vision from a point 25 feet north of the track. The special finding shows expressly that the jury reached a conclusion (which would necessarily have been implied from the general verdict) that was in conflict with the only actual measurements submitted, upon vital matters that are capable of being ascertained beyond any doubt. In this situation we cannot feel that the judgment should be allowed to stand.

[6] 6. The defendant submitted 10 special questions. One of them called for the distance the occupant of an automobile could see west up the track when he was distant from it 25 feet, 50 feet, and 75 feet. The court treated this as 3 questions, and refused to submit more than 10 on that basis. The defendant then eliminated the question, so far as concerned the 50 and 75 feet, and complains of being required to do so. The jury having fixed 200 feet as the limit of vision from a distance of 25 feet, their estimate of the limit from the other distances, being necessarily less, became practically immaterial for the purposes of this trial.

Questions that have been raised with respect to instructions given and refused are practically disposed of by what has already been decided under other assignments.

The judgment was for \$20,000. The defendant urges that the amount is excessive, and it appears to be very large; but, inasmuch as a reversal is ordered upon other grounds, it is not necessary to rule upon this question.

The judgment is reversed, and the cause is remanded for a new trial.

All the Justices concurring.

(111 Kan. 475)

BRADSHAW et ux. v. PAYNE, Director General of Railroads. (No. 23381.)(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)*(Syllabus by the Court.)***1. Railroads —348(1)—Finding of negligence in kicking car uncontrolled sustained.**

In an action by parents against a railroad company to recover for the death of a minor son, who was riding as a guest of the driver of an automobile which was run into at a street crossing by a freight car, it is *held* that the evidence sustained a finding of negligence in kicking the freight car over a public street crossing uncontrolled and without a brakeman on top of the car, to stop it with the hand brake, if necessary.

2. Negligence —136(30)—Imputed negligence of occupant of automobile held for jury.

The evidence considered, and *held* sufficient to sustain a finding that the deceased, who was a minor about 17 years of age, and the driver of the automobile, were not engaged in a common enterprise, so as to render the former chargeable with the negligence of the latter; the question being one of fact to be submitted to the jury.

3. Railroads —327(12)—Guest of automobile driver not negligent in failing to require driver to stop.

Assuming that the driver of the automobile failed to exercise due diligence to stop before attempting to cross the railroad track in order to discover whether there was a car or train approaching, the deceased, being a mere guest of the driver, was not, as a matter of law, negligent in failing to observe the approach of the car, or failing to insist that the automobile be stopped, in order to ascertain whether the car was approaching.

4. Negligence —141(1)—Trial —244(4)—Instructions on contributory negligence of minor held to require jury to consider age, intelligence, and capacity.

In such a case it was not error for the court to instruct that in determining the question of contributory negligence the jury must take into consideration the age, intelligence, and capacity of the deceased, nor was it error to add this qualification to the statement in other instructions of the rule respecting contributory negligence.

5. Railroads —351(8)—Instruction on negligence in kicking car without brakeman on it held justified by evidence.

An instruction that, in breaking up freight trains, it is very common for switchmen to kick a car in upon a track without an engine attached, but that in doing so ordinary care and diligence require that at least one man ride the car and be in a position to and give timely warning at a crossing, and in position to control the car by the use of a brake or otherwise *held*, that the instruction was justified by the evidence and the circumstances concerning the surroundings of the crossing and the time of the collision.

6. Death —99(3)—\$6,500 damages for death of son 17 years old held not excessive.

In an action by parents to recover for the death of a son about 17 years of age, there was evidence showing that the young man was of more than ordinary development, mentally and physically, industrious, healthy, when not in school earned a man's wages on his father's farm, contributed his earnings to his parents when working for neighboring farmers, and had frequently said he intended to remain with his parents until the farm was paid for. *Held*, that an allowance of \$1,500 for his probable earnings from the time of his death until he was 21 years of age, and \$5,000 as compensation for the loss of earnings which he would probably have contributed to the parents after his majority, is not excessive.

Porter, J., dissenting in part.

Appeal from District Court, Labette County.

Action by James W. Bradshaw and wife against John Barton Payne (James C. Davis, Director General of Railroads, as Agent, etc., being substituted). Judgment for plaintiffs, and defendant appeals. *Affirmed*.

W. W. Brown, O. T. Atherton, and E. L. Burton, all of Parsons, for appellant.

W. D. Atkinson, of Parsons, for appellees.

PORTER, J. Claude B. Bradshaw, about 17 years of age, was one of a party of boys who had been on a coon-hunting trip to the Neosho river east of Parsons, and who were returning to the city between 2 and 3 o'clock in the morning, traveling in an automobile owned and operated by Frank Miller, when the car was struck at a street crossing by a shunted freight car of defendant, resulting in the death of young Bradshaw. In this action the parents recovered a judgment for damages, and the defendant appeals.

The switchyards of defendant in the city of Parsons extend north and south for a distance of more than a mile, and cross Crawford avenue, which runs east and west; 24 tracks cross the avenue, and are in use day and night in the operation of engines and switch cars. The petition alleged that the automobile approached the street crossing from the east at a speed of about 5 miles an hour; that a large building immediately on the south and adjacent to the track obstructed the view from the east; that a freight car, approaching from the south at 15 miles an hour, collided with the automobile. It alleged that it was the duty of defendant to have moved the car at a less rate of speed, coupled and controlled by a switch engine, and to have rung the bell of the engine, and to have had an employee on top of the car with a light to warn persons, and who could have controlled the car by the use of the hand brake. The negligence charged was kicking the car across the avenue uncontrolled by a switch engine or hand brake, and

without signal or warning, and failure to maintain a watchman. The answer, besides a general denial, alleged that Claude Bradshaw's own negligence in failing, on approaching the crossing, to look or listen, or to make any effort to have the automobile stopped, in order to make proper observations, was the proximate cause of his death; that the driver was likewise negligent, and that deceased and the driver were engaged in a common enterprise; and that the driver was the agent of the deceased in operating the automobile. The reply was a verified general denial, alleging further, that Claude Bradshaw was a passenger, with no control over the automobile, and denying that the driver was his agent.

The jury returned a verdict in the sum of \$8,500 in plaintiffs' favor, and special findings that the acts of negligence on which they based their verdict were: "A car uncontrolled; buildings obstructed view." The obstructions of the view by buildings was not alleged as one of the acts of negligence relied upon. The jury also found that the automobile approached the point of collision at 5, and the freight car at 12, miles per hour: that the automobile could have been stopped within 10 feet. They also returned the following answers to special questions asked by the defendant.

"(5) How far south of said crossing could the occupants of said automobile have seen a freight car approaching on the east house track, from the following point eastward along the traveled portion of Crawford avenue: From a point 20 feet eastward of the point of collision? Answer: 42 feet south of point of collision.

"(6) How far south of said crossing could the occupants of said automobile have seen a freight car approaching on the east house track, from the following point eastward along the traveled portion of Crawford avenue: From a point 30 feet eastward of the point of collision? Answer: 32 feet south of point of collision.

"(7) State what efforts, if any, deceased made to have the driver stop the automobile before going upon said crossing. Answer: None.

"(8) If you find for the plaintiffs, state what amount you allow for loss of earnings prior to his reaching the age of 21 years? Answer: \$1,500.

"(9) What prevented the driver and the deceased from seeing the approaching freight car in time to have stopped, had they looked to a point 25 feet east of the point of collision? Answer: Swift's building; darkness and glare of arc light.

"(10) Was the driver of said automobile, and said deceased, engaged in a mutual pleasure trip at the time of the collision? Answer: Yes."

To questions submitted by plaintiffs they answered that Claude Bradshaw was at the time of the accident a guest in the automobile, and also that he did nothing to direct its operation.

[1] The track on which the box car moved

was 17½ feet west from the northwest corner of Swift's poultry warehouse, which was located east of the tracks and was the last obstruction which prevented a view toward the south of the tracks upon which the freight car approached. The testimony of the other boys who were in the car shows that as they approached the crossing no one in the car saw or heard the freight car until the switchman shouted to them, when they all looked up and saw the approaching car and the switchman hanging on the side with a lantern in his hand. Their testimony was that they were looking to the north and south and listening for approaching cars. They were also looking ahead and expecting to see a flagman; none was there. Brakeman Crane, an employee of defendant, who was hanging on the lower step of the northeast corner of the approaching car with a lantern on his arm, called out to the occupants of the automobile, and this was the first warning they had of the approach of the car. Willie Bradshaw, a brother of the deceased, said that when he saw the box car it was 25 or 30 feet from the sidewalk and their automobile was 8 or 10 feet from the track; the automobile slowed down when the brakeman called; then the driver thought it was better to increase the speed and try to get across. The freight car hit the rear wheel of the automobile, shoved the car around, and Claude was found lying on the track on the north side of the automobile.

This witness testified that:

"Before the switchman halloed, I hadn't heard any engine, or hadn't seen any engine, nor had I seen any cars moving. I had not seen anybody in town. From the time we entered town there was no traffic on the streets; no traffic on the crossing."

Ernest Connelly, brother-in-law of the deceased, testified:

"As we approached the crossing, I looked north for engine or cars. I also looked for a flagman; Miller was looking south and said to me, 'One look each way as we come up to the crossing.' * * * As we approached, a switchman hanging on the northeast corner of the car that came out from behind Swift's building, with a lantern in his hand, hollered. We was under the street light, and it was like a man in a house looking out the window in the dark; the box car came up under the shade of the light; we didn't see the car till it was right on us, 'cause the light prevented."

Otto Koch testified:

"I saw no flagman. I looked north and south; didn't see or hear anything. When I discovered the box car, we were getting right on the track; we couldn't hardly see the car. It was a kind of a gloomy night, foggy and damp, misting, moonshine, and we couldn't hardly see the car at all. Frank started to stop the car when the brakeman hollered; he saw we were going to stop on the track, and he then done his best trying to get across. I stood up in the car and

yelled out, and Claude did, too. All three of us did. I don't know what else I did do; I was too scared."

Crane testified:

That he had thrown the switch and then crossed over to the east side and got on the car as it passed. "As we were going northward an automobile came from the east. There were no lights on it. I yelled when I was about half way up the ladder, and I went on up to the top of the car. The automobile came right up to within 12 or 15 feet from the track before it slowed down. Then the driver almost stopped; then he shot on across ahead of the freight car. When I halloed, I had my hand on the top stirrup on the north end of the freight car. * * * After I shouted to the people in the automobile, I went up the ladder and got on the platform of the brake. * * * Got to the brake when I saw a collision was imminent, and I got back on the car. At the time of the accident I had been to the brake and left it. I took hold of the brake and wound up the chain. This was the only way to stop the car. I commenced to wind as soon as I got around to the end. I had to get to the brake before I could wind it up."

On cross-examination he testified:

"The brake was on the north end of this car. The car was running fast enough to reach the place it was intended to go without any added power. I was to control the car by the brake. After the switch engine let go of it, it was wholly uncontrolled, unless I controlled it by the brake. If I had been at the brake, I could have controlled the car and stopped it in 25 feet. I saw the boys as soon as they came in sight. The car was then about 12 or 15 feet back from the end of the Swift Packing Company's house. I gave the signal as soon as I saw them. If I had been on top of the car then, I could have stopped it before it reached the center of the street. The car I was riding was a loaded car and made no noise. The automobile almost cleared the car. Just an instant more would have cleared it."

His testimony that he climbed to the top and reached the brake before the collision is contradicted by Willie Bradshaw, who said:

"He didn't go up the side of the car at all. He never started up."

Frank Miller, on rebuttal, testified:

"As we approached the crossing, the brakeman who hollered out to us was hanging on the lower step."

Otto Koch, on rebuttal, testified:

"The brakeman hanging on the side of the car as we approached Crawford avenue crossing was on the lower or bottom step. He made only one step after I saw him."

French, a witness for defendant, who was engine foreman in charge of the crew, testified on cross-examination:

"When the car was kicked northward, I intended for Mr. Crane, the field man, to take care of it. It was his duty to do so after it was cut off. The purpose of catching it and

riding it was to control it. He would not be able to control it until he was at the brake; then to control it he would have to have it tightened up where a turn of the wheel would apply the brakes. Crane was about 20 feet south of Crawford avenue when he caught the car. The car was then moving toward him. The purpose of Mr. Crane on that car was to stop it, if it need be stopped for any purpose. That was his duty. It was the duty of Mr. Crane, after he caught the car, to go up the side of the car to the brake, so that he might have the car under control. The car would not be under control until he was at the brake and had the brake in a position to apply it."

The evidence shows that the street light at the corner of Swift's building was lighted every night and that it hung about 25 feet above the street. Claude Bradshaw was familiar with the crossing; his sister lived near the railroad tracks on Crawford avenue for a time, and he had frequently visited her there.

The defendant, in support of the contention that the deceased was negligent, cites cases where it has been held that an automobile driver must stop and go to a point where he can see, if there is no other way to determine whether a train is approaching on a track which he is about to cross. It is insisted that the testimony of the boys who were in the automobile showed that, either because of the condition of the atmosphere or the existence of the street light and because of the buildings near the right of way, they were unable to observe for any distance on either side of the crossing, and therefore it was negligence as a matter of law for them to attempt to drive over the crossing without stopping and investigating whether a car was coming. The defendant also lays stress on the evidence showing that at this time in the night there was practically no traffic on this public street, and insists that, conceding it would have been negligence to have kicked the car across the street in the daytime in a thickly populated part of the city, it was not negligence to do so at the time and under the circumstances. We think it was negligent to have the car kicked over the public crossing at any hour of the night, because it was a public street, upon which travelers were liable to appear at any moment, although the probability that there would be travel over the crossing at that hour of the night was very slight. The evidence shows that the car might as well have been kicked over the crossing without any attempt to control it, or with no brakeman near it.

The only conflict in the testimony as to Crane's movements was over the question whether he went to the top of the car at all; the overwhelming testimony is that he did not, and that his neglect of this duty was one of the causes of the collision. The jury was warranted, upon the testimony of the foreman, French, and of Crane himself, in find-

ing that the car was kicked over this public crossing uncontrolled, and that this negligence was the proximate cause of the collision. On the facts stated, and under all the circumstances, it cannot be said as a matter of law that the deceased was guilty of contributory negligence in failing to observe the approach of the car, or failing to insist that the automobile be stopped in order to ascertain whether a car was approaching.

[2-4] The evidence shows that Claude Bradshaw was not present when the coon-hunting expedition was arranged, but was invited to go along. The findings of the jury are that he was a guest of the driver, and that he did not direct in any way the operations of the car, so that, even though the driver may have been negligent, the deceased was not. *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148; *Denton v. Railway Co.*, 90 Kan. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639; *Corley v. Railway Co.*, 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764; *Denton v. Railway Co.*, 97 Kan. 493, 155 Pac. 812; *Kessler v. Davis* (Kan.) 207 Pac. 799. The deceased was a minor slightly under 17 years of age. In *Angell v. Railway Co.*, 97 Kan. 688, 156 Pac. 763, it was held that it cannot be said as a matter of law that a 19 year old girl, riding in the rear seat of an automobile driven by her brother-in-law, is bound to advise him in reference to the management of the car at the approach to a railroad crossing.

There is a contention that instructions stressed too highly the fact that Claude Bradshaw was under age. In each instruction which referred to the general rule that a person must use ordinary care and diligence to avoid injury to himself, there was attached to the qualification, in substance, that if the jury believed from the evidence that the deceased "was a youth of immature judgment and understanding and inexperience in the perils of undertaking to cross the tracks under the circumstances surrounding him at the time, and that by reason of such immature judgment, lack of understanding, and inexperience, he was incapable of understanding the nature and extent of the hazard and peril to which he was being subjected," the rule would not apply; in substance that, in order to prevent a recovery because of contributory negligence of the deceased, "the jury must find and believe from the evidence that the deceased failed to exercise that degree of care and diligence that persons of his age, undeveloped judgment, and inexperience would ordinarily use under the same or similar circumstances." It is insisted that the court laid too much stress upon the minority of the deceased; especially in view of the testimony offered by plaintiffs to show that he was a young man of more than ordinary development, mentally and physically. The evidence showed he had attended the county high school; had taken

a year of an extended course in vocational agriculture; was very industrious, intelligent, healthy, and well-developed; that he weighed 150 to 160 pounds, and was able to do a man's work on the farm and to earn a man's wages at farm work; that he possessed the capacity of a man for earning money and doing work, and knew the location of the crossing and the obstructions thereto, and was familiar with the situation and conditions surrounding the place. It is argued that, if the jury followed the instructions, they could not escape the conclusion that the fact of the minority of the deceased was one of extreme importance for their consideration in determining the duty he owed to care for his own safety. It was not error for the court to instruct that, in determining the question of contributory negligence, the jury must take into consideration the age, intelligence, and capacity of the deceased. Was it error to add this qualification to each statement of the rule respecting contributory negligence? We think not. The instructions in this respect, taken as a whole, made incapacity and intelligence the test, and not necessarily the age of the deceased.

[5] Complaint is made of an instruction that, in breaking up freight trains, it is very common for switchmen to kick a car in on a track without an engine attached, but that in doing so ordinary care and diligence require that at least one man ride the car, and be in a position to give timely warning at the crossing, and in a position to control the kicked car at all times by the use of a brake or otherwise. This, it is insisted, amounted to an instruction that the failure to take such precautions was negligence per se. The instruction was justified in view of the evidence showing the surroundings of the crossing, the obstructions to the view of persons approaching from the east, and the uncontradicted testimony of the engine foreman, in charge of the car; in substance, that it was the duty of Crane, the field man, to ride the car in and to be in a position to control it by hand brake, if it needed to be stopped for any purpose. On the conceded facts, the jury could well say that it was negligence for the defendant to permit the car to be shunted across this public street in the nighttime at grade, without any warning, and with the car uncontrolled.

It is contended that the answers of the jury establish the contributory negligence of Claude Bradshaw, because of the distance the findings show an approaching freight car could have been seen. If this were a case in which Miller, the driver, were seeking recovery, the point might be well taken; but, since Bradshaw was merely an invited guest of the driver, the latter's negligence cannot be imputed to the deceased. The findings of fact do not establish as a matter of law contributory negligence, and the general verdict determines that issue in favor of the plaintiff.

We find no error in overruling the motion for a new trial.

[6] There is a contention that the verdict is excessive. The jury allowed \$1,500 as the probable earnings of the deceased from the time of his death until he was 21 years of age, a period of substantially 4 years, and \$5,000 as compensation for the loss of earnings which he would probably have contributed to the parents after his majority. The life expectancy of the father was shown to be 21 years; that of the mother about the same. The evidence upon the question of damages offered by the plaintiff showed that the young man, in addition to the capacity and intelligence already referred to, had contributed to plaintiffs his earnings when working for neighboring farmers; that he had frequently stated that he intended to be a farmer, and to remain with his parents until the farm was paid for; and that he intended always to stay with his parents. His conduct, declarations, and disposition toward his parents, his capacity, age, and intelligence, furnish some basis for a reasonable expectation that he would continue to confer benefits upon them. *Railway Co. v. Fajardo*, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681; *Brick Co. v. Fisher*, 79 Kan. 576, 100 Pac. 507. The jury could only speculate from this evidence what would be a reasonable sum to allow for damages. The majority of the court are of the opinion that the amount of the judgment cannot be regarded as excessive in this case.

It follows that the judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, WEST, MARSHALL, and DAWSON, JJ., concurring.

PORTER, J. (dissenting in part). In my opinion the \$1,500 allowed as the prospective earnings of the son, over and above the cost of his maintenance, education, and keeping for the four years until he would have arrived at majority, is an excessive amount according to general experience. I also think that the \$5,000 allowed in addition is an excessive amount and that the judgment should be reduced to \$3,500.

(111 Kan. 501)

**COURT OF INDUSTRIAL RELATIONS v.
CHARLES WOLFF PACKING
CO. (No. 23702.)**

(Supreme Court of Kansas. June 10, 1922,
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Master and servant §16, 69—Court of Industrial Relations authorized to fix wages and hours of labor in packing plant.

The Court of Industrial Relations has authority to make an order establishing wages to

be paid employees and fixing the hours of labor to be observed in a packing house plant employing approximately 300 men, where a controversy has arisen over wages and hours of labor and a meeting has been called to take a strike vote, and where, instead of voting to strike, the employees have voted to submit the controversy to the Court of Industrial Relations and have submitted that controversy to that court.

2. Master and servant §16—Court of Industrial Relations cannot make orders beyond notice.

The Court of Industrial Relations cannot make orders to be observed by the operators of a packing house plant beyond the matters embraced within the notice given, unless the operators consent that matters outside the notice may be investigated.

3. Constitutional law §275(2)—Master and servant §69—Court of Industrial Relations can make temporary order raising wages, although plant is operated at a loss.

Under proper circumstances, the Court of Industrial Relations can make an order, temporary in effect, slightly raising the wages of employees in a packing house plant and fixing the hours of labor, although the plant at the time the order is made is being operated at a loss.

Burch and Porter, JJ., dissenting.

Original proceeding in mandamus by the Court of Industrial Relations against the Charles Wolff Packing Company. Peremptory writ issued to compel the defendant to put into effect certain parts of the order of the Court of Industrial Relations.

Baxter D. McClain, of Iola, for appellant.
D. R. Hite, of Topeka, for appellee.

MARSHALL, J. This is a continuation of *Court of Industrial Relations v. Packing Co.*, 109 Kan. 629, 201 Pac. 418. There this court said:

"This is an original proceeding in mandamus to compel the Wolff Packing Company, hereinafter named the defendant, to put in effect a scale of wages to be paid by it to its employees and to establish hours of labor as ordered by the Court of Industrial Relations, hereinafter named the plaintiff."

The former opinion disposed of a number of legal questions. This is an opinion in the same action, and disposes of the questions that arise on the evidence.

[1] 1. The evidence, which was taken by A. L. Noble, of Wichita, who was by this court appointed commissioner to take the evidence and make findings of fact and conclusions of law, shows that the defendant was engaged in operating a packing plant in the city of Topeka for the purpose of slaughtering animals for food; that the defendant employed about 300 workmen in the operation of its plant; that a controversy arose between the

defendant and its employees concerning wages, hours of labor, and certain conditions under which the employees worked; that a meeting of the employees was called for the purpose of voting on a proposition to strike on account of the controversy; that at the meeting thus called the employees voted to present the controversy to the plaintiff rather than to strike; and that thereafter a complaint was filed with the plaintiff. It is now insisted that the evidence does not show such an emergency as gives to the plaintiff jurisdiction to make any order on the complaint that was filed.

On the former hearing it was contended by the defendant that the pleadings did not allege that such an emergency existed as gave to the plaintiff the extraordinary power of regulating the wages to be paid by the defendant to its employees. This court in the syllabus to the former opinion said:

"The petition filed in this action alleged that such an emergency existed as justified the Court of Industrial Relations in making an investigation."

What was said in the former opinion is approved. The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas; yet the plant manufactures food products and supplies meat to a part of the people of this state, and, if it should cease to operate, that source of supply would be cut off. The plant comes within the operation of the law, and the Court of Industrial Relations has power to make the orders provided by law under the circumstances named in the statute. The petition alleged facts which show that such an emergency as the law contemplates existed, and gave to the plaintiff authority to inquire concerning the matters alleged in the complaint. The evidence established facts sufficient to give to the Court of Industrial Relations authority to make proper orders thereunder.

Another matter that may be properly mentioned in connection with the discussion of this subject is that there is a presumption that the plaintiff made its order under proper circumstances. That presumption is not conclusive; it is rebuttable; yet the presumption exists, and whatever weight it has must of necessity be placed in support of the order made by the Court of Industrial Relations, although, in an action to compel compliance with an order of that court, the court trying the action must determine the matter for itself.

[2] 2. The plaintiff has filed a large number of exceptions to the report of the commissioner, both as to matters of fact and matters of law. The commissioner reported, as one of his conclusions of law, that the orders contained in paragraphs 1, 5, 6, 7,

8, 10, 12, 13, and 16 of the order of the plaintiff were made without jurisdiction and are unenforceable. This makes it necessary to set out those orders. The plaintiff ordered that—

"(1) In this industry the principles of the open shop, as now and heretofore existing by agreement of the parties, are approved by the court and shall continue.

"(2) Employees, whether organized or unorganized, shall receive wages as shown in schedules hereinafter set out.

"(3) A basic working day of eight hours shall be observed in this industry; but a 9-hour day may be observed not to exceed two days in any one week without penalty: Provided, however, that if the working hours of the week shall exceed 48 in number, all over 48 shall be paid for at the rate of time and one-half. Furthermore, in case a day in excess of the 8-hour day shall be observed more than two days in any one week, all over 8 hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be 48 hours or fewer.

"(4) No guaranty of time per week is specifically ordered; but sufficient work shall be offered to the regular employees in each and every month so that the monthly earnings of regular workers will be sufficient to constitute a fair wage under the Kansas industrial law, as heretofore defined by this court.

"(5) The management of the industry shall, whenever possible, notify the workers in case the plant is not to operate the following day, by bulletins posted at the time clock prior to the closing hour, and, if that be impossible, then by signal from the steam whistle the following morning, to make it unnecessary for workers to come to the plant when there will be no work.

"(6) Hours of beginning work shall be set by the management, and may be changed when necessary; but reasonable notice shall be given the employees of changes.

"(7) The seniority rule as heretofore observed in the industry may continue.

"(8) Reasonable rules and regulations in regard to conduct about the plant may be made from time to time as the same may be necessary, and reasonable notice of all such shall be given by posting at the time clock or personal notice to employees.

"(9) Women workers shall receive the same wages as men engaged in the same class and kind of work.

"(10) Toilets and dressing rooms used by the women workers shall be in charge of a woman.

"(11) Piece-work rates shall be paid in accordance with piece-work schedule herein set out.

"(12) Minor details in regard to work and wages cannot be set out in an order of this court; but whenever differences arise at any time they should be taken up by the grievance committee of the employees and the management, and reasonable time shall be allowed for consideration and adjustment of the differences.

"(13) The total working time for women employees, inclusive of overtime, shall not ex-

ceed 54 hours in any one week and not more than 9 hours in any one day.

"(14) Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employees under the terms of finding No. 3, hereof.

"(15) The temporary order heretofore made in this case shall stand and be complied with by the respondent company, beginning on the date of said temporary order and continuing until May 1, 1921, the date of this order.

"(16) The respondent company shall, within a reasonable time, furnish a suitable room for its employees in which to eat their midday lunch, well ventilated and apart from those portions of the packing house in which the work of slaughtering animals and dressing and preparing the packing products are carried on, and apart from toilets and dressing rooms.

"(17) The following schedule of minimum wages shall be paid by the respondent company to its respective employees, to wit: [The details of the schedule are immaterial.]

"(18) The establishing of the above minimum wage schedule shall not in any way be construed as restricting or preventing the respondent from paying a higher wage when the same is deemed advisable.

"(19) In departments operating 24 hours a day and seven days a week, each employee therein shall be entitled to one day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half.

"This order shall take effect and be in force on the 1st day of May, 1921, and shall continue until changed by the court, or changed by agreement of the parties with the approval of the court."

The conclusion of law reached by the commissioner was based on the fact that the complaint filed with the plaintiff did not allege anything to give the court jurisdiction to make orders concerning the subjects mentioned in paragraphs 1, 5, 6, 7, 8, 10, 12, 13, and 16 of the order. An examination of the complaint reveals that nothing was said concerning any of these matters.

The plaintiff urges that those matters were embraced within the complaint because they were embraced within the contract between the defendant and its employees, and that a copy of the contract was attached to the complaint. The plaintiff also contends that the defendant waived its right to object to those parts of the order being put into effect because the defendant insisted on the contract being introduced in evidence and because the defendant through its attorney stated to the Court of Industrial Relations that—

He was "authorized to make a proposal to the court that it is not prepared to accept the terms of the order of March 21, 1921, making the 8-hour day as the basic day, with time and one-quarter for the ninth hour and time and one-half thereafter, but as a counter proposal the Charles Wolff Packing Company proposed to adopt the 48-hour week, meaning thereby

that employees shall be paid the regular schedule for 48 hours' work, and all time employed over 48 hours' work shall be paid for at the rate of time and one-half; the employees if working less than 48 hours shall be paid at the regular schedule for the time actually engaged, but the company does not consent to the fixing of any guaranty of hours per week."

On the hearing before that court, the defendant unqualifiedly agreed to make the wages of women the same as those of the men for the same kind of work. That agreement was put into effect, and there is now no controversy about that portion of the order. Other than the agreement concerning the wages of women, it does not appear that the defendant submitted for the consideration of the plaintiff anything except what was contained in the complaint. An examination of the complaint reveals that the only questions named in it were wages and hours of labor.

Section 10 of chapter 29 of the Laws of 1920, Special Session, the Court of Industrial Relations Act, reads:

"Before any hearing, trial or investigation shall be held by said court, such notice as the court shall deem necessary shall be given to all parties interested by registered U. S. mail addressed to said parties to the post office of the usual place of residence or business of said interested parties when same is known, or by the publication of notice in some newspaper of general circulation in the county in which said industry or employment, or the principal office of such utility or common carrier is located, and said notice shall fix the time and place of said investigation or hearing. The costs of publication shall be paid by said court out of any funds available therefor. Such notice shall contain the substance of the matter to be investigated, and shall notify all persons interested in said matter to be present at the time and place named to give such testimony or to take such action as they may deem proper."

The notice served on the defendant was a copy of the complaint, with a copy of the contract between the defendant and its employees. Such a notice as is required by the statute was not given to the defendant concerning the subjects named in paragraphs 1, 5, 6, 7, 8, 10, 12, 13, and 16 of the order of the Court of Industrial Relations, and the defendant did not voluntarily submit to an inquiry into those matters. It follows that the court had no jurisdiction to make any order concerning any of them. However, it should be stated that if in the course of its investigation matters that ought to be considered should come to the knowledge of the court, it may investigate them and make orders concerning them after taking the necessary steps to acquire jurisdiction.

[3] 3. The commissioner found and the evidence shows that for some time prior to the making of the order by the plaintiff, the defendant had been operating its plant at a

loss, but the evidence does not show what was the cause of the loss. The order made by the Court of Industrial Relations slightly raised the wages of the employees over the wages that were in effect at the time the order was made.

The stock of the defendant's plant is largely held by the Allied Packers, a Delaware corporation with headquarters at Chicago, Ill., operating six other meat-packing plants situated in eastern cities and in Canada. A portion of the proceeds arising from the defendant's plant is paid over to the Allied Packers. How much does not appear.

Section 8 of chapter 29 of the Laws of 1920, the Court of Industrial Relations Act, provides that—

"If either party to such controversy shall in good faith comply with any order of said Court of Industrial Relations for a period of sixty days or more, and shall find said order unjust, unreasonable or impracticable, said party may apply to said Court of Industrial Relations for a modification thereof and said Court of Industrial Relations shall hear and determine said application and make findings and orders in like manner and with like effect as originally. In such case the evidence taken and submitted in the original hearing may be considered."

The Court of Industrial Relations, in its opinion on which the order was based, said:

"Any order made by this court, after having been put into force and effect for a period of 60 days, may be reviewed at the instance of either party and additional evidence introduced to show its practicability, its impracticability, its reasonableness or its unreasonableness. The order made in this case at this time will be made in view of that provision of the law. The business conditions of the day are unusual and unstable, and 60 days or 90 days may bring about such changes as would require a revision of any order made herein."

Laws and orders fixing rates for a period of time for public utilities have been sustained to determine their effect upon the revenue of such utility. *Wilcox v. Consolidated Gas Co.*, 212 U. S. 22, 55, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Northern Pacific Ry. v. North Dakota*, 216 U. S. 579, 30 Sup. Ct. 423, 54 L. Ed. 624; *Lincoln Gas Co. v. Lincoln*, 250 U. S. 256, 269, 39 Sup. Ct. 454, 63 L. Ed. 968.

The defendant's plant is being operated at a loss, and the order of the Court of Industrial Relations increases the wages of its employees. Is the order invalid for that reason? The general schedule of rates charged by public service corporations cannot be decreased by lawfully constituted regulating bodies when the business of that corporation, otherwise prudently and efficiently conducted, is being operated at a loss. This, so far as state regulation is concerned, is based on the Fourteenth Amendment to the Constitution of the United States, prohibiting any

state from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the law. Compelling a public service corporation to render service at a loss is a violation of the prohibitions contained in the Fourteenth Amendment; but rates and wages are not the same. Rates are compensation paid by those who desire the services of public service corporations for the services rendered by such corporations. Wages, for the purposes now under discussion, are that part of the cost of the finished product given to those who perform service in its production. Another way of distinguishing the two is that rates are the prices paid to public service corporations for their finished product; wages are that part of the cost of the finished product given to those who perform service in its production.

The operators of a packing plant cannot by law be compelled to sell the finished product of their plants at a price that will not allow them a fair return upon the investment, but that does not say that those operating the packing plant cannot be compelled by law to pay a living wage to their employees, notwithstanding the fact that the plant is being operated at a loss. An industry of any kind that cannot be operated except at the sacrifice of its employees ought to quit business. An industry ought not be permitted to recoup its losses out of the wages of its employees, where those employees are in such a condition that they cannot prevent it. It may be argued that a laboring man is not compelled to work for any particular employer, and that the laboring man can quit at any time and go elsewhere. So far as the law is concerned, this is true—he has an absolute right to go and seek work in some other place; but actually, and in fact, it is often impossible for a working man to quit the work in which he is engaged and readily find other work. Economic conditions are such that, most of the time, when a working man finds himself out of work, he must remain out of work for days, weeks, and months, during which time he and his family suffer. Many a working man cannot quit when he desires so to do. He must continue to work although his wages are not sufficient to properly feed and clothe himself and his family and educate his children. Public welfare demands that all industries that provide food, clothing, fuel, and transportation shall continue to operate because without their operation suffering must result; but public welfare likewise demands that the working man engaged in the production of the things that minister to the comfort of all, must be paid such compensation for his services as will enable him to live in the manner described in the Court of Industrial Relations Act.

The defendant is operating its plant at a loss. Why does not appear from the evidence. At least this court is unable to determine why, and for the purpose of this discussion it is unnecessary to ascertain why. The plant may be badly located on account of transportation facilities. There may have been managerial mismanagement. A part of the money arising out of the operation of this plant may have been taken by the Allied Packers and used in the operation of the other plants conducted by them. It may have been that the loss was due to unstable conditions in live stock and meat markets prevailing during the time covered by the investigation of the Court of Industrial Relations. The defendant contends that to prevent operating its plant at a loss, it must have its employees work for less than what the Court of Industrial Relations has determined are living wages. In other words, the defendant is trying to prevent loss in its business by putting the loss on its employees. That should not be done if its employees are thereby compelled to work for less than living wages. If the plant cannot operate without so doing, it is only a question of a short time until it must stop. If the plant is badly located on account of transportation to its market or from the source of supply of its raw material, it ought to be moved to where these handicaps will not exist. If the loss is caused by managerial faults, they ought to be corrected. Recoupment of losses caused by either of these matters ought not be brought about by compelling the working man to labor for less than a living wage.

The defendant should be compelled to pay the wages fixed in the order made by the Court of Industrial Relations, and should be compelled to establish the hours of labor there fixed, and should look elsewhere to recoup its losses and find the means of operating its plant at a profit.

A peremptory writ of mandamus will issue to compel the defendant to put into effect those parts of the order of the Court of Industrial Relations numbered 2, 3, 4, 9, 11, 14, 15, 17, 18, and 19.

JOHNSTON, C. J., and MASON, WEST, and DAWSON, JJ., concurring.

BURCH, J. (dissenting). I find myself halted at the very threshold of this litigation. So far as it is involved in this case, the act creating the Court of Industrial Relations belongs in the class of statutes beginning to be known in the field of constitutional law as emergency statutes. The Court of Industrial Relations is to do for this state, by means of orders respecting the conduct of essential industries, what Congress did for the United States when it passed the Adamson Law, and what the Legislature of New York did for the people

of that state when it passed the Emergency Housing Laws. The statute was interpreted in this manner in the case of *State ex rel. v. Howat*, 109 Kan. 376, 198 Pac. 686, and in the original opinion in this case. *Court of Industrial Relations v. Packing Co.*, 109 Kan. 629, 201 Pac. 418. The Legislature did not completely socialize the manufacture of food products, the manufacture of clothing, and the production of fuel, and the mere fact that the defendant conducts one of the essential industries is not enough to subject its business to state control. The Legislature had in mind the coal strike of 1919-1920, and merely authorized intervention by the Court of Industrial Relations to insure such efficiency and continuity in production of the necessities of life as will save the people from annoyance and distress. In the *Howat* Case it was said:

"Continuous production, and production according to the approval of an efficiency expert, are not required at all. Only that continuity and efficiency are required which will secure the people from privation and oppression. * * * A controversy between employer and workers, or between groups or crafts of workers, which endangers production, creates an emergency, with which the court may deal. * * *

"Section 9 does not authorize a general revision of labor contracts." 109 Kan. 414, 415, 198 Pac. 704.

To be cognizable by the Court of Industrial Relations, the nuisance of strife, disorder, and waste, and the menace to public peace, public health, and public welfare generally consequent on industrial controversy must be related to the ultimate object of the statute.

Applying the foregoing interpretation of the statute to the present case, until a controversy brings within reasonable contemplation a discomfiting shortage in the supply of food which the defendant produces, public interest does not attach to the conduct of its business, and the powers conferred by the statute are not called into action.

It seems quite clear the Court of Industrial Relations did not act on this interpretation of the statute. It evidently believed that on simple complaint it could regulate conduct of the defendant's business, and it even went far beyond the complaint presented to it, in its regulations.

The complaint to the Court of Industrial Relations alleged broadly that the controversy between the defendant and its employees was one which endangered continuous operation and efficiency of the service rendered by the defendant's plant, and that the controversy affected, and would affect, the manufacture and production of commodities necessary for human food within the state of Kansas. The petition to this court pleaded this complaint, and the court properly enough held that the petition suffi-

ciently alleged an emergency had arisen which justified the industrial court in taking cognizance of the complaint. Court of Industrial Relations v. Packing Co., 109 Kan. 629, 635, 201 Pac. 418. The court now says, in effect, that the evidence taken by Commissioner Noble established the fact that an emergency had arisen such as the statute contemplates. Presumably the court refers to the evidence bearing upon the meager facts stated in the opinion. If the court refers to other evidence establishing a statutory emergency, I have not been able to discover it by searching the record.

Mr. Charles Wolff, president and general manager of the defendant, testified as follows:

"Q. Where are your products sold, Mr. Wolff? A. Throughout the United States; also do some export business.

"Q. What proportion of your sales of your products is made in the state of Kansas, as compared with the whole amount of the business? A. Well, I don't know exactly what the percentage would be, but of course it would be a small per cent. * * *

"Q. Is there any competition in the business in which this company is engaged? A. Yes; we have plenty of competition."

It is a matter of common knowledge that the packing industry of Kansas is one of immense magnitude. It is not necessary to present the statistics. No one would attempt to deny that the quantity production of packing house products in Kansas is enormous. Only a small percentage of the product of the defendant's small plant is sold in Kansas, and, if the plant were to close permanently, the defendant's trade would be absorbed by competitors so quickly the people of the state who consume Wolff products would not be inconvenienced for a single meal, and the people of the state generally would not be affected at all.

Approximately 300 of the defendant's employees are members of a local union of the Amalgamated Meat Cutters and Butchers Workmen of North America. The stock of the defendant is owned by the Allied Packers, a corporation owning packing plants in Boston, Mass., Wheeling, W. Va., Macon, Ga., Richmond, Va., Buffalo, N. Y., and one plant in Canada. In the testimony are some allusions to a threatened strike of members of the meat cutters and butchers organization, on account of controversies with packing companies other than the Allied Packers, over violations of an agreement to which the Allied Packers was not a party. Possibility that this strike might occur no longer existed when the order of the Court of Industrial Relations was promulgated, and the opinion of the Court of Industrial Relations accompanying its order makes no reference whatever to any emergency respecting the food supply of the people of this state, except in summarizing the complaint which

initiated the investigation. The order was not based on any menace to the food supply of the state, and could not be, because it was not possible that suspension of operation of the defendant's plant could appreciably affect that supply.

Industries concerned with furnishing food, clothing, and fuel are segregated by the statute for regulation. A controversy cognizable by the Court of Industrial Relations, for purposes not merely of investigation but of regulation, must be definitely related to the subject of supplying the state with the necessities of life, and must create an emergency respecting that supply, or basis for the classification of industries fails, and the classification becomes arbitrary. In this instance, not only was the fundamental element of emergency lacking, but elements which, under other circumstances, might contribute to an emergency, were not present.

Employees of the defendant testified that what they wanted was an 8-hour day, regardless of pay for extra hours. While the defendant has yards for accommodating live stock, and has facilities for refrigerating its products, it is a small, local plant, depending on an irregular local live-stock market, which it must maintain, or lose altogether, and the following finding by Commissioner Noble is fully sustained by the evidence:

"By reason of the limited capacity of the plant, especially the refrigeration and storage, and the limited market for live stock at Topeka, it is impracticable to operate this plant with shifts of workmen, or to use more than one set or shift of workers in its general operation. The plant is the only quantity purchaser at Topeka of live stock for killing, and, except to a limited extent, the packing company does not have control or advance notice of the quantity of live stock which will be delivered, or when. It is also practically necessary that the plant purchase all of the live stock offered and delivered in order to hold the market, the purchases being made on the basis as to price of the competitive market at Kansas City. It is also practically necessary that all live stock purchased be killed within a limited time after it is received at the yards, and when killed it is necessary that the operations continue without cessation until the meat is placed in refrigeration. Therefore, on some days the operation of the greater part of the plant will necessarily occupy only a few hours, and on other days more than 8, or even 9 hours, depending largely upon the amount of live stock on hand for killing, and the condition is one that cannot practically be controlled by the respondent. The most arduous labor, that of the killing gang, working on what is spoken of in the evidence as the 'chain,' is not continued more than 8 hours a day, but the extra time is generally consumed in the cleaning-up work after the killing is over. The operation of the plant would not afford sufficient working hours per week to hold the men if those in the killing gang were not afforded other work in the plant besides the actual killing.

Since the abolishment of extra pay for time over 8 hours, the number of hours of work per day at the plant has not changed materially from those which obtained during the period covered by the expired contract."

It is regrettable that men and women should be tempted, in order to earn a living, to accept employments calling upon them to overtax their strength. In this instance, however, we are confronted by this dilemma: Continuity and efficiency of operation of the defendant's plant must be maintained, in order that the people of the state may be supplied with food; the defendant's plant is so located, is of such size, and must operate under such conditions, that its employees must sometimes work more than 8 hours per day; because overwork ultimately impairs ability to produce, this fact creates an emergency under the statute with which the Court of Industrial Relations should deal; to correct the evil which constitutes the emergency, working more than 8 hours a day must be prohibited; to prohibit working more than 8 hours a day will close the defendant's plant; and so a regulation nominally in the interest of continuity and efficiency of production puts an end to the defendant's contribution to production.

The Court of Industrial Relations recognized the fact that the defendant's employees must work extra hours when necessary. In the opinion accompanying the order it was said:

"The respondent's evidence shows that it is unable to control the supply of live stock. Farmers and stock raisers will ship in the live stock when it is ready to ship; and so, in spite of all the management can do to keep up a steady supply, there will be times when the yards fill up and it becomes necessary, in order to avoid great loss to the company, to run more than 8 hours a day."

The Court of Industrial Relations theorized on the subject of paying time and a half for overtime as follows:

"Overtime should not be considered in the light of extra pay; the wage should be fair on the 8-hour basic day. Overtime should be considered as a penalty upon the company to prevent the long hours and exhaustion of the workers."

Commissioner Noble, sticking to the facts, concluded his finding, quoted above, as follows:

"Therefore the commissioner finds that the hours of employment of the workers generally in the plant are governed by conditions over which the respondent has not practical control, and that the only effect of the establishment of a basic 8-hour day in the court's order would be upon the rate of wages required to be paid; that, however it might be regarded in other cases, the basic day in this order is a wage provision rather than a working condition."

This takes working more than 8 hours a day out of the case as something creating an emergency, and leads to consideration of the subject of wages in the defendant's plant, as creating an emergency in the food supply of the people of this state.

Commissioner Noble returned the following finding:

"The net change of wages put into effect by the packing company on January 17, 1921 [which brought on the controversy], was slight beyond the abolishment of the 5 cent per hour bonus and the extra pay for overtime. Some wages were raised, more were unchanged, and the remainder were lowered from 2½ per cent. to 14 per cent. making an average reduction in the hourly wage throughout the plant of less than a half cent per hour. * * *"

The Court of Industrial Relations contends the reduction was greater. In any event, the reduction was small, and the presiding judge of the Court of Industrial Relations testified before Commissioner Noble concerning the wage scale contained in the court's order as follows:

"In the final wage scale that we made we believed that we had not in any very serious, to any very serious, extent increased the wage as fixed by the company in its posted notice. * * * We realized that we possibly had increased some, but we felt not sufficiently to cripple the company financially in any serious way."

The actual increase is not material. Whatever it may have been, the Court of Industrial Relations did not regard the wage scale of the defendant's plant as so low that, by degrading labor, it limited production of one of the necessities of life to such an extent as to create an emergency, and it could not have been so regarded.

Strikes are infectious things. They may spread from plant to plant, and from industry to industry, and may invite exercise of all the power the Court of Industrial Relations possesses. But there was no strike. Many of the defendant's employees are old residents and responsible citizens of the city of Topeka, and the testimony shows they were not under domination of agitators. The leaders were earnest, sensible, law-abiding men and women, who believed they were unjustly treated. There was evidence that the supply of labor available to the defendant was abundant, and a previous strike, the only one in the history of the plant, was little more than 50 per cent. effective, and lasted but a short time. Sections 17 and 18 of the Court of Industrial Relations Act, prohibiting and punishing picketing, intimidation, and other trouble-making incidents of a strike, were available for preservation of the public peace, had a strike occurred.

Taking into account the relation of the defendant's product to the food supply of the

state, and the entire situation existing at the defendant's plant when the controversy arose, I am unable to discover anything approaching an emergency such as the statute contemplates, and regard the order of the Court of Industrial Relations as improvidently made. Since I do not reach consideration of the legal questions raised by assuming an emergency, it would appear officious for me to discuss them.

PORTER, J., concurs in this dissent.

(111 Kan. 580)

CITY OF WINFIELD v. COURT OF INDUSTRIAL RELATIONS et al.
(No. 24140.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Constitutional law §135—Gas §14(2)—Court of Industrial Relations or Public Utilities Commission could change gas rate for city, notwithstanding its contract, without violating the federal Constitution so far as the city was concerned.

During the time the Court of Industrial Relations was vested with the duties and functions of the Public Utilities Commission, that court, and the commission prior to and subsequent to that interval, had power to set aside and change the rate for natural gas furnished to the inhabitants of the city of Winfield, notwithstanding the city's objection thereto, and notwithstanding the existence of a contract between that city and the party which supplied the natural gas, which contract had been made and promulgated by a city ordinance prior to the enactment of the Public Utilities Law; and, whatever might be urged against the impairment of such contract by the other party thereto, the changes in the rates and service by order of the state tribunal did not, as against the city, violate the contract clause of the federal Constitution.

2. Public Service Commissions §7—Commission with assent of a public utility may alter contract and regulations notwithstanding the city has made agreements for lower rates.

In exercising the power of making contracts with public utilities and in enacting ordinances with reference thereto, a city acts as an agent of the state in its governmental character, and it is within the power of the state to withdraw that authority and confer it upon another governmental agency, such as the Court of Industrial Relations or the Public Utilities Commission, and such later governmental agency has the power, with the express or implied assent of the utility concerned, to alter the contract and other incidental regulations theretofore established by the city.

3. Gas §14(1)—Public Utilities Commission had original jurisdiction under regulatory and supervisory powers to regulate rate on gas transported from another state.

Where the gas supplied to a city in this state through a local distributing company is furnished by a gas transportation and sales company which has its chief sources of supply in Oklahoma and which similarly transports and delivers gas to many other cities in Kansas, the rates and service in such city are subject to the original jurisdiction of the Public Utilities Commission under its regulatory and supervisory powers conferred by statute.

4. Gas §9—Public Utilities Commission has power to order the installation of devices for regulating gas pressure.

The Public Utilities Commission has power to order the installation of devices for regulating gas pressure, and the fact that its order to that effect is experimental and the use of the pressure regulating devices only required for six months does not affect its validity.

5. Gas §14(2)—Power to regulate rates and gas pressure in city held within original jurisdiction of tribunal exercising powers under the Public Utilities Law.

Under authority of statute the city of Winfield contracted in 1906 for natural gas at prescribed rates and pressure, and enacted an ordinance to the same effect. Under the powers vested by the Public Utilities Act of 1911, and Acts of 1919, 1920, and 1921, the Court of Industrial Relations and the Public Utilities Commission made orders which changed the rates and pressure defined by the contract and city ordinances of 1906. The gas supply of Winfield is chiefly derived from a transportation company which similarly supplies other cities in that part of the state, and the rates and gas pressure in Winfield have a substantial and consequential effect on the rates and gas pressure in other cities. *Held*, that the matter of regulating gas rates and gas pressure in Winfield is within the original jurisdiction of the tribunal which exercises the powers conferred by the Public Utilities Act and supplemental legislation.

Appeal from District Court, Shawnee County.

Action by the City of Winfield against the Court of Industrial Relations and others. From a judgment of the District Court upholding an order of the Court of Industrial Relations increasing rates for natural gas, the plaintiff appeals. *Affirmed*.

A. M. Jackson, J. E. Torrance, and S. O. Bloss, all of Winfield, for appellant.

A. E. Helm, of Topeka, and H. O. Caster, of Bartlesville, Okl., for appellees.

DAWSON, J. The city of Winfield brings this appeal from a judgment of the district court of Shawnee county upholding an order of the Court of Industrial Relations which

increased the rates for natural gas which had been prescribed by ordinance in 1906, which rates were also prescribed by a contract of about the same date between the city and one Pattison, assignor of successive utility companies which have been supplying the city with that commodity pursuant to such ordinance and contract.

Another matter involved herein relates to the validity of an order issued by the Public Utilities Commission after it was re-established and reinvested with authority over public utilities by the act of 1921, Laws 1921, c. 260. This order directed that a certain device for regulating and limiting the gas pressure be supplied to the patrons of the gas company in Winfield. It also prescribed a certain gas pressure, substantially less than that provided by the city ordinance of 1906. The district court declined to interfere with that order, and its propriety is also within the scope of this appeal.

The city's main contention is that these official state boards, the Court of Industrial Relations and the Public Utilities Commission, had no power to make the orders appealed from, because such orders impaired the contract of 1906 between the city and Pattison and his assignees. Pattison had agreed to supply the city with gas at a rate not exceeding 30 cents per thousand cubic feet. The details of the contract and ordinance need not be stated. The order of the state tribunal created certain distributing zones of the cities supplied by the Wichita Natural Gas Company, the trunk line company which transports, sells, and distributes natural gas throughout that section of the state, Winfield, Arkansas City, and neighboring towns were put in zone 1; Wellington, Wichita, and others in zone 2, and Newton, Hutchinson, and others in zone 3, and a charge of 75 cents per month per customer, plus a rate of 56 cents per thousand cubic feet, was prescribed for customers in zone 1, and higher graduated rates in zones 2 and 3, which were further away from the gas transportation company's sources of supply.

[1] Did the state tribunal have power to make these orders? There can be no doubt that the Public Utilities Law conferred upon it that power, unless the city is correct in its contention that the order impaired the contract of 1906 within the inhibitions of the federal Constitution. In our own cases concerning orders of the state commission over rates and service of public utilities, it has not hitherto been necessary to decide this precise point, although we barely avoided it in *City of Cimarron v. Water, Light & Ice Co.*, 110 Kan. 812, 205 Pac. 603, because there the contract in question was made after the enactment of the Public Utilities Act. Here the question must be squarely met and decided, because this contract was made in 1906, and the public utilities statute, extending general state control over public util-

ities like gas companies and creating a state board to exercise that control, was not enacted until 1911.

It goes without saying that under the inhibitions of the federal Constitution the state may not enact a law which impairs the obligation of an ordinary contract between private individuals. Yet even this rule is not without its exceptions. *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 319, 9 A. L. R. 1423 and note. It has also been declared many times that when the state authorizes one of its municipal corporations to make a contract with private parties or public service corporations for a reasonable term of years, the state cannot by subsequent legislation impair that contract to the prejudice of the party with whom the contract was made nor without the assent of such party thereto. The many cases declaring this principle are the ones here pressed upon our attention by counsel for the city. But these cases do not reach the matter here concerned. Here the state authorized its own subordinate governmental agency, the city of Winfield, to make a contract with Pattison and his assignees. Now the state by further legislation says in effect:

"I resume this power and confer it upon another governmental agent, a public utilities commission or an industrial court, and I authorize it to act for me instead of my municipal corporation at Winfield."

When the city of Winfield made that contract with Pattison it was acting as the agent of the state for the benefit of the people of that municipality. Until the Public Utilities Law was enacted, the city and Pattison might have amicably changed that contract. In the act of 1911 (Laws 1911, c. 238) the state put forward another agent clothed with power to deal with Pattison; and that agent of the state, with the express or implied consent of Pattison's present assignee has abrogated and changed certain features of that contract; and neither the federal inhibition concerning the sanctity of contracts nor any other constitutional principle is violated thereby. This course of reasoning is pursued by most, if not all of the courts which have had occasion to consider it. In the *Cimarron Case*, supra, the leading cases with pertinent annotations which deal with this subject were cited. See, also, *Sandpoint Water & Light Co. v. Sandpoint*, 31 Idaho, 498, 173 Pac. 972, L. R. A. 1918F, 1106; *Arlington Board of Survey v. Bay State St. Ry.*, 224 Mass. 463, 113 N. E. 273, 5 A. L. R. 24; *North Wildwood v. Public Utility Comm'rs*, 88 N. J. Law, 81, 95 Atl. 749; *Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178; *City of Salem v. Salem Water, Light & Power Co.*, 255 Fed. 295, 166 C. C. A. 465.

[2] Strictly speaking, these cases announce

no new principle. The state creates governmental officers and agencies, clothes them with authority, alters that authority, resumes it, and imposes it on other functionaries as experience may suggest. A good example of this is found in the creation of the Board of Railroad Commissioners in 1883. That board was given regulatory authority over railroads, the only public utilities of importance in Kansas at that time. That board was abolished in 1898. It was recreated with the same or increased powers in 1901. The board and its functions were merged in the Public Utilities Commission created in 1911. This commission was abolished in 1920, and its duties and powers conferred on the Court of Industrial Relations created at that time. In 1921 the Public Utilities Commission was re-established and reinvested with all its functions which included most of the duties and powers vested in the Board of Railroad Commissioners by the act of 1901 (Laws 1901, c. 286).

On an analogous subject, in *La Harpe v. Gas Co.*, 69 Kan. 97, 103, 104, 76 Pac. 448, 450, it was said:

"The general statutes relating to the government of cities generally place the power to lay out and improve streets and public grounds, and to regulate their use, in municipal officers, but that is a power which the state may exercise directly or through one of its agencies. In placing the control of streets and public grounds in cities, the Legislature surrendered none of its own power, nor did it vest any rights to such cities as against the public. A city is a creation of the Legislature—a subordinate agency of the state, which exercises only such power as the Legislature confers, and for such period of time as the Legislature in its discretion determines. The state gives, and the state can take away; and the Legislature is at liberty to resume so much of the control of the streets and alleys and public grounds formerly exercised by the city as it deems best, and this without obtaining the consent of either the officers or the inhabitants of the city."

The Supreme Court of the United States in *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054 a case substantially similar to the one we are here considering, held that no question under the contract clause of the federal Constitution arises where the state first clothed one of its cities with power to grant a franchise to a gas company under terms prescribed by city ordinance, and afterwards transferred the city's authority over such matters to a state corporation commission, which abrogated the rates and rules prescribed in the franchise contract made by the city, and prescribed higher rates and other rules of its own making. The Supreme Court of Oklahoma sustained the orders of the state commission (64 Okl. 214, 166 Pac. 1058), and the city sued out a writ of error to the federal Supreme Court. Mr. Justice Van Devanter

stated the contention of the city of Pawhuska, which was practically identical with the present contention of the city of Winfield:

"The city contended in that court—and it so contends here—that at the time the franchise was granted it alone was authorized to regulate such charges and service within its municipal limits, that the Legislature could not transfer that authority to the Corporation Commission consistently with the Constitution of the state, and that, in consequence, the act under which the commission proceeded and the order made by it effected an impairment of the franchise contract between the city and the gas company in violation of the contract clause of the Constitution of the United States." *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 39 Sup. Ct. 526, 63 L. Ed. 1054.

In the opinion showing that no federal question was involved and that the case would necessarily have to be dismissed, a pertinent excerpt from an earlier case, *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, was quoted:

"But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the waterworks company, than it would have had if such contract had been made directly with the state. The state, having authorized such contract, might revoke or modify it at its pleasure."

Counsel for the city argue that the enactment of the Public Utilities Law of 1911 did not repeal the statute of 1903 (Gen. Stat. 1915, § 862), which conferred upon cities like Winfield the power to contract for and fix rates for natural gas similar utility services, under which the Winfield ordinance and contract with Pattison were adopted. This contention is only measurably correct. The powers conferred on cities by that statute have been superseded and withdrawn in so far as they are inconsistent with the powers later conferred on the Public Utilities Commission. In *Street Lighting Co. v. Utilities Commission*, 101 Kan. 774, 778, 169 Pac. 205, 206 (L. R. A. 1918D, 310), it was said:

"The cities of this state have always had the power to regulate and control their local public service corporations—assuming that the furnishing of lamp posts, etc., is a public service. Gen. Stat. 1868, cc. 18, 19; Gen. Stat. 1915, cc. 17-20. Cities still have that power except where they have been stripped of it by the Public Utilities Act. Laws 1911, c. 238,

§ 40; Gen. Stat. 1915, § 8368; *Humphrey v. City of Pratt*, 98 Kan. 413, 144 Pac. 197. And where the utility service is furnished wholly or principally within one city, the power of control is expressly reserved to the city. Sections 8 and 33, Public Utilities Act. If the local utility company and the city come to loggerheads, then the Public Utilities Commission may take jurisdiction by a proceeding somewhat in the nature of an appeal or right of review. Laws 1911, c. 238, § 33; Gen. Stat. 1915, § 8361."

Counsel quote from a note to *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. [N. S.] 713, in 14 Ann. Cas. 614, which holds that rates fixed by statute can only be abrogated by the Legislature, and cannot be altered by a subordinate body created by the Legislature. This court has had to consider this point in *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 308, 150 Pac. 544, where a telegraph company closed its station in the county seat of Hamilton county without the consent of the Public Utilities Commission and in disregard of a statute of 1893 (Laws 1893, c. 152), requiring all telegraph companies operating their lines through county seat towns to maintain telegraph stations therein. The effect of the Public Utilities Act upon that earlier statute was discussed, and reference was made to certain unreported federal cases which had dealt with the effect of the enactment of the Public Utilities Law upon the statutory rates on oil shipments, and it was said:

"The telegraph company was required to maintain its station at Syracuse, not on account of any remaining potency in the act of 1893, but because the Public Utilities Act of 1911 had entirely superseded it, and that act dealt with conditions as it found them at the time of its enactment, crystallizing those conditions, rates, service, regulations, and the like as they then prevailed, and made them subject to change, alteration and amendment by order of the Commission. The necessary inference is that important changes materially affecting or likely to affect the convenience of the public were not to be made without the approval of the Public Utilities Commission, except as its orders might be corrected by the courts. We hold, therefore, that the act of 1893 will be no obstacle to the abandonment of the telegraph company's office at Syracuse if the Public Utilities Commission shall see fit, in the exercise of its sound discretion and with due regard to the rights of the public and of the telegraph company, to sanction it. The powers of the commission are no less comprehensive in dealing with telegraph service at county seats than elsewhere."

[3] Another contention of the city is that the utility which served it was one which was "operated wholly or principally" within the city of Winfield, which made it subject in the first instance to city control, and not to the state commission except by appeal. Gen. Stat. 1915, §§ 8329, 8361. It is true that

in Winfield the gas is distributed by a local corporation whose corporate activities are largely confined to that municipality; but it produces no gas nor has it any considerable source of supply except what it receives from the Wichita Natural Gas Company, the trunk line gas, transportation, distribution, and sales company, operating in Oklahoma and into and through a score or more of towns in zones 1, 2, and 3, in Southern Kansas. The principal order complained of in this lawsuit is the one which prescribes and classifies the rates in cities (like Winfield) in zone 1, which receive their supply of gas from the Wichita Natural Gas Company. It is perfectly obvious that if there is to be any reasonable state control of gas rates and gas pressure, the state commission must exercise control in the situation here presented. The rates and pressure at Winfield have a direct influence on what rates must be exacted in the other cities served by the trunk line company. If the rates and pressure prescribed at Winfield unduly deplete the revenues of the utility, the other towns supplied by the Wichita Natural Gas Company would have to pay more than they should, or the company would have to go out of business, and all the towns, including Winfield, would be deprived of this public service commodity. In the case of the city of Scammon Street Lighting Co. v. Utilities Commission, 101 Kan. 438, 166 Pac. 514; *Id.*, 101 Kan. 774, 169 Pac. 205, L. R. A. 1918D, 310, there was no relation between the public service being rendered by the Welsbach Company in Scammon and any public service being rendered by that company elsewhere, and therefore the matter in controversy was vested within the governmental and corporate control of the city, except as it might come before the state commission by proceedings in the nature of appeal or review. But in this case the gas rates and gas pressure service in Winfield do have a very potent consequential effect on the rates and pressure which must prevail in other cities in zones 1, 2, and 3, and therefore these matters were properly subject to the original jurisdiction of the state commission. *State ex rel. v. Water Co.*, 92 Kan. 227, 140 Pac. 103.

[4, 5] Another contention of the city is that the state commission did not have power to order the installation of the pressure regulation devices. In view of the broad general powers conferred on the commission over public utility services, as well as by the enactment of chapter 239, Laws of 1919, this contention must be disapproved. Another objection is that the order was one of limited duration—for six months. With the expansion of governmental control over public utilities this form of regulation has become common, and is less objectionable than orders which perhaps upon insufficient information might be promulgated without such limitation. In the governmental control of

public utilities it can seldom be predetermined with certainty that a rate, a regulation, a service, will be compensatory, practical, satisfactory, and so experimental orders are proper. If time vindicates their wisdom and justice, their duration may be permanently established; if not, they may terminate without further action and without provoking needless litigation. In the Court of Industrial Relations v. Charles Wolff Packing Co., No. 23,702 (Kan.) 207 Pac. 806, just decided, it was said:

"Laws and orders fixing rates for a period of time * * * have been sustained to determine their effect upon the revenue of such utility. Wilcox v. Consolidated Gas Co., 212 U. S. 22, 55; Northern Pacific Ry. v. North Dakota, 216 U. S. 579; Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 269."

The other details covered by briefs of counsel have not been overlooked, but need no discussion. It is said that there was no evidence to support the court's finding:

"(13) That the amount of gas supplied each of the various towns by the Wichita Natural Gas Company affects the gas service of each of the other towns along said pipe line and drawing their gas from that common source of supply."

Mayhap there was no item of direct evidence on that specific point, but the whole plan and system of collecting and distributing natural gas to the cities of zones 1, 2, and 3 was explained to the trial court, and has been explained to us in the abstract and oriefs of the parties, so that by deduction it is seen that the finding is obviously true, and indeed it is not and cannot be denied that the finding of fact is itself correct.

The record contains no error, and the judgment is affirmed.

All the Justices concurring.

(111 Kan. 530)

LYMAN v. GOLL et ux. (No. 23770.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Gifts ¶9—Gift including chattel mortgage interest in automobile may be made where there is delivery and acceptance.

A gift of property including a chattel mortgage interest in an automobile may be made where there is a delivery of the same by the donor and an acceptance by the donee with the intention to make a transfer of ownership to take immediate effect.

2. Gifts ¶33(2)—Record of release of chattel mortgage is not essential to completed gift where there is a delivery of note and mortgage with donative intent.

The recording of a release of a chattel mortgage is not essential to a completed gift where there is a delivery of the note and mortgage with the donative intention to transfer immediately the interest or property to the donor and vest the control and dominion of it in the donee.

3. Witnesses ¶140(19)—Where one defendant in replevin disclaims interest, and trial proceeds against other defendant, disclaiming defendant may testify as to transactions with deceased person represented by plaintiff.

In a replevin action, where one who was named as a defendant disclaims interest in the property involved in the action, and the trial proceeds against the remaining defendant, the disclaiming defendant is not barred from testifying as to transactions or communications with a deceased person represented by the plaintiff.

4. Replevin ¶93—Special findings held not inconsistent with general verdict for defendant.

Special findings examined, and held not to be inconsistent with the general verdict or to require the entry of judgment for the plaintiff.

Appeal from District Court, Atchison County.

Action by Anne Lyman, executrix of the estate of Josephine Diebolt, deceased, against J. H. Goll and wife, in which the latter disclaimed any interest in the property, and the trial proceeded against J. H. Goll alone. Judgment for defendant, and plaintiff appeals. Affirmed.

A. E. Crane and R. F. Hayden, both of Topeka, and Maurice O'Keefe, of Atchison, for appellant.

Waggener, Challiss & Brown and Chas. Conlon, all of Atchison, for appellee.

JOHNSTON, C. J. The plaintiff, as executrix of the estate of Josephine Diebolt, deceased, brought an action against J. H. Goll, and his wife, Minnie Goll, to recover the possession of an automobile. After the action was brought Minnie Goll disclaimed any interest in the automobile, after which the trial proceeded against J. H. Goll alone. The defendant prevailed, and plaintiff appeals.

[1, 2] The plaintiff claimed the possession of the car under a chattel mortgage executed by the defendants for money advanced by Josephine Diebolt to pay for the car. The defendant claimed that the indebtedness and mortgage lien were forgiven, that a gift of the interest was actually made by her, and

that in recognition of special attention and nursing given to her by the Golls she released her interest and made a complete gift to the defendant. Mrs. Diebolt was an elderly widow living apart from her children, and in June, 1917, came to live in the hotel kept by the defendant. She was in poor health, had many attacks of illness, and during the 11 months that she was with the defendant she was cared for and nursed by Mrs. Goll. Shortly after she came to the hotel she assisted the defendant in the purchase of an automobile by joining him in the execution of a note for \$1,100, being the greater part of the purchase price, and the defendant gave her a chattel mortgage to secure the obligation which she had assumed. According to the testimony in behalf of the plaintiff, she was frequently taken by defendant in the car to five farms owned by her and on numerous trips about the city of Atchison, and, as one witness said, rode in the automobile whenever she wanted to do so. She paid the note when it became due and held it and the mortgage for a time. The testimony for plaintiff is that in recognition of the care given her she made a will devising property to the Golls, and that later she made a completed gift of the note and mortgage to the defendant. Before her death and while she was in a hospital in Kansas City she made another will leaving no property to the Golls, and at the same time gave instructions to reclaim the automobile under the chattel mortgage. It appears that she had executed a release of the mortgage, but withheld it from record. She admitted that she owed the Golls for the special attention they had given her and indicated a willingness to pay the bill.

The controlling question in the case is the matter of the gift of the note and mortgage interest to the defendant. The matter of gift was discussed by the parties, and the note and mortgage came into the possession of the defendant, but the plaintiff contends that the gift was not complete, and that this was shown by her direction that the release which Mrs. Diebolt executed was not to be recorded before her death, and was recalled before that event. The testimony relating to the recording of the release was competent as throwing light on her intention as to the nature of the gift made and whether or not the property was delivered to the defendant with the intention of releasing the defendant from all obligation to her. A record of the release,

however, was not essential to a valid and effective gift if it was made with the intention that it should take immediate effect. On this question the evidence was conflicting, and we conclude that that produced by the defendant is sufficient to uphold the verdict of the jury.

The court instructed the jury as to what must be shown to establish an executed gift and also with respect to a conditional gift that was not to take effect until the death of the donor. They were told that, if Mrs. Diebolt did not in her lifetime make a completed gift of her interest in the automobile, but made it upon the condition that it was to take effect on her death, she was at liberty to revoke and cancel it before that time, and if she did so the defendant would have no right to claim the property. The issue as to whether a completed gift had been made was fairly submitted to the jury.

[3] Objection was made to the testimony of Mrs. Goll, the wife of the defendant, upon the ground that she was not a competent witness to testify as to transactions and communications with the deceased mortgagee. She had been named as a defendant when the action was instituted, but before the trial she disclaimed all interest in the property in question, and the trial proceeded as if she was out of the case. Thereafter she was a competent witness and could testify as to transactions and communications with the deceased mortgagee to the same extent as if she had not originally been named as a defendant.

[4] There is a further contention that certain special findings as to the recording of the release required a judgment for plaintiff. The jury found that Mrs. Diebolt had given a release to one L. M. Baker and had told him that he was to file it if she died, but that if she lived she might want to recall it. That she afterwards did direct its return, and it was returned by Baker before her death and was never recorded. As has already been said, the testimony as to recording the release and its recall went to the contention that the gift was incomplete, but the recording was not essential to an executed gift if the property was delivered to the defendant by the donee and accepted by him with the intention of transferring title when it was given. The findings in this regard did not entitle the plaintiff to a judgment.

Judgment affirmed.

All the Justices concurring.

(111 Kan. 380)

CORBETT et al. v. SKAGGS et al.
(No. 23700.)

(Supreme Court of Kansas. June 10, 1922.)

*(Syllabus by the Court.)***1. Wills** ⇨523—Legacies held made to beneficiaries as individuals and not as classes.

Although each of three subdivisions of a will began with the statement that the testator gave to the children of a deceased brother or sister the sum of \$25,000, to be divided as specified, and this fact would indicate a purpose to treat the children of each group as a class rather than as individuals, it is held that, by reason of other provisions of the will, and especially because of the name of each beneficiary and the amount allotted to him being stated, such amounts not being uniform among the members of any of the groups, the legacies are to be regarded as made to the beneficiaries as individuals and not as classes, and the death of one of them without issue before that of the testator did not cause his share to go to the other members of group to which he belonged.

2. Wills ⇨534, 863—Share of residuary legatee, who dies without issue before testator's death, goes to surviving residuary legatees; where under will certain legatees have no share in residue, the rule that the share of a residuary legatee, who dies without issue before testator, passes as in case of intestacy does not apply.

The share of a residuary legatee, who dies (without issue) before the death of the testator, goes to the surviving residuaries, in the absence of some special provision of the will showing a different purpose. The rule that such share shall be disposed of as in the case of intestacy is rejected, as being in conflict with the established policy of the court to ascertain and give effect to the actual intention of the maker of the will. Even if that rule were adopted, it would not be held applicable where, as in the present instance, the will expressly provides that a number of specific legatees (who would also be heirs) shall have no share in the residue of the estate.

3. Wills ⇨863—Lapsed specific legacies to legatees, who are also residuary legatees, go to other residuary legatees.

The extension of the rule referred to so that it shall require lapsed specific legacies to persons, who are also residuary legatees, to be treated as property undisposed of by the will, is likewise rejected and held not to be applicable in any event in the present case, upon the same grounds.

Appeal from District Court, Barber County.

Action by Rachel L. Corbett and others against John H. Skaggs, as executor, and others. From the judgment rendered, defendants appeal. Remanded, with directions.

McClintock, Quant & Logan, of Topeka, D. M. Anderson, of Donora, Pa., and John

Bradley and E. J. Taggart, both of Wellington, for appellants.

Field & Orr, of Medicine Lodge, and W. W. Schwinn, of Wellington, for appellees.

MASON, J. This is an action to obtain a construction of the will of Samuel S. Kincaid. Two nieces to whom specific legacies were bequeathed, and who were also named among the seven residuary legatees, died without issue before the testator, and the questions involved are as to the proper disposition of the shares of the estate which would have gone to them if they had survived him. The trial court decided (1) that the amount of their specific legacies should be paid in equal parts to their sister and two brothers (who are the plaintiffs herein), on the theory that what they were to receive from this source was intended as a part of a gift to a class composed of the two brothers and the three sisters; and (2) that what they would have received as residuary legatees should be distributed among the other residuary legatees named in the will, in the same proportion as the general residue. One other legatee died before the testator, but he was survived by four children who take his share by representation (Gen. Stat. 1915, § 11811), and for simplicity of statement the matter will be discussed as though he were still alive.

The plaintiffs, as already indicated, are the two brothers and the sister of the legatees who died. They appeal from the second part of the decision and contend that the shares these two would have received as residuary legatees (including their specific legacies, if the trial court shall be held to have erred in awarding this part of the estate to the plaintiffs) should be distributed as though Samuel S. Kincaid had died intestate. The defendants are the residuary legatees other than the two who died. They appeal from the first part of the decision and contend that they are entitled to all the property that would have gone to the two legatees who died, if they had lived.

The testator left neither wife nor children. Aside from a number of minor specific legacies, which do not affect the matter in controversy, he left his whole estate to the three living children of a dead brother, James O. Kincaid, one of whose children also had died before the execution of the will, leaving a number of children for whom no provision was made; to the two children of his dead sister, Sarah Bell; and to the five children of his dead sister, Rachel Rinehart. The provisions with reference to these nephews and nieces were contained in three subdivisions, designated as the fifth, sixth, and seventh, each relating to one of the three groups and introduced by the words:

"I give and bequeath to the [now living, in one instance] children of my [brother in one

instance, sister in the others, the name being given in each case] twenty-five thousand dollars, to be divided among them as follows.
• • •

The names of the individual beneficiaries were given and in none of the three groups were the shares into which the \$25,000 was divided equal. The two subdivisions of the will, which require interpretation, read:

"Sixth. I give and bequeath to the children of my sister Rachel Rinehart twenty-five thousand dollars to be divided as follows: "Benjamin K. Rinehart, of Castle Rock, Montana, is to have twenty-five hundred dollars (\$2,500) absolutely. But he is to have no share in the residue and remainder of my estate.

"Winfield Rinehart, of —, Colorado, is to have twenty-five hundred (\$2,500) dollars absolutely, but he is to have no share in the residue and remainder of my estate.

"Mattie Rinehart, of Tucson, Arizona, is to have sixty-five hundred dollars (\$6,500) absolutely.

"Frances Rinehart of Tucson, Arizona, is to have sixty-five hundred dollars (\$6,500) absolutely. It is further my will that if this legatee (who is now far gone with consumption) should die before my estate is distributed, that the sixty-five hundred dollars (\$6,500) be added to the share of her sister Mattie Rinehart to compensate her for the years of nursing and care she has bestowed on her sister during her sickness.

"Rachel L. (commonly called Dolly) Corbett of —, Kentucky, is to have seven thousand dollars (\$7,000) absolutely, but is to have no share in the residue and remainder of my estate."

"Ninth. I give and bequeath all the rest, residue and remainder of my estate wheresoever the same may be situated to William R. Kincaid, Minnie O. Freemyer, Thomas F. Kincaid, Thomas K. Bell, Mrs. M. E. Morse, Mattie Rinehart and Frances Rinehart, the same to be divided among them in the same proportion as their former bequests bear to the whole sum bequeathed them. Sixty-three thousand dollars (\$63,000)."

[1] The ordinary situation in which a legacy or devise is regarded as made to a class rather than to the individuals composing it (a consequence being that, on the death of one member before the testator, his share goes to the other members and not to the residuary legatees or heirs) arises where a gift is made to a group of an uncertain number the amount each is to receive not being determined. But, even if the beneficiaries are named, they may be treated as a class, if an intention to that effect is otherwise shown. 40 Cyc. 1473-1475; 28 R. O. L. 260-267. The tests are discussed and illustrative cases collected in a note in L. R. A. 1918B, 234. The effort of the court is, of course, to arrive at the probable intention of the testator from a consideration of all parts of the will. Here the beneficiaries are definitely ascertained and named, so that they are to be treated as

individuals, unless a different purpose is affirmatively shown elsewhere in the instrument. The fact that the testator begins the subdivision relating to each group by stating that he gives \$25,000 to the children of his dead brother or sister tends to show a collective treatment. But in our judgment this is overcome by the circumstances that the legatees are not only individually named, the amount each is to receive being stated, but are apportioned different sums, indicating a plan not to treat them equally or merely as members of a group, but, in accordance with what was regarded as appropriate in the case of each one considered individually. This view we think finds further support in these additional provisions, indicating a different treatment of the members of each group: In the case of the three children of James O. Kincaid, two were to receive only the income of the \$10,000 allotted to them, the principal at his death to go to their children, while the third was given \$5,000 outright. In the case of the two children of Sarah Bell, the share of the daughter (\$10,000) was to be invested by trustees for her benefit and, if she died without issue, the principal was to go to the son, to whom \$15,000 was given outright. In the case of the five children of Rachel Rinehart, three were explicitly cut off from any share in the residue and remainder of the estate, while the other two were named as residuary legatees, and provision was made that, if one of them died before the estate was distributed, her share should go to the other, although the fact that both died before the testator, deprived this provision of practical effect.

[2] 2. A lapsed legacy ordinarily falls into the residue and inures to the benefit of the residuary legatees. It is a rule of the English common law, however, which has met with considerable acceptance in this country, that, on the death before the testator, of one of several residuary legatees (who do not take jointly or as members of a class) his share goes, not to the others, but to whoever would have inherited the property in case no will had been made. 40 Cyc. 1452, note 59; 28 R. O. L. 338, 339, notes 1 and 2; note 44 L. R. A. (N. S.) 811-813. In one state the court has held to the contrary, but without discussing the cases by which the rule is supported. *Gray v. Bailey*, 42 Ind. 349; *Holbrook v. McClearey*, 79 Ind. 167; *West v. West*, 89 Ind. 529. See, also, *Mann v. Hyde*, 71 Mich. 278, 39 N. W. 78. In two states the rule has been abrogated by statute. *Woodward v. Congdon*, 34 R. I. 316, 323, 83 Atl. 266, Ann. Cas. 1914C, 809; *In re Jackson*, 28 Pa. Dist. R. 943. Some cases cited in support of the rule are affected by distinctions between lapsed legacies and lapsed devises and some by a failure to make a distinction between a legacy which lapses because of death, which the testator may be

regarded as having anticipated, and one which cannot be given effect because void in itself, a condition he can hardly be deemed to have taken into account. The rule has been severely criticised even by judges and text-writers, who have felt constrained to follow it. See note in 31 Yale Law Journal, 782; also *In re Wain's Estate*, 156 Pa. 194, 27 Atl. 59; *Prison Ass'n v. Russell's Adm'r*, 103 Va. 563, 49 S. E. 966; 2 Jarman on Wills (6th Ed.) 1056-1058. The grounds of such criticism are indicated in these excerpts:

"* * * It was held, in *Skrymsner v. Northcote*, 1 Swanst. 566 (1818), that a lapsed portion of a residuary bequest went to the next of kin, and not to the other residuary legatees, on the ground that the latter were given specific portions of the residuum, and could not take more by the intent of the will, and receiving the bequest in common and not jointly, there could be no increase by survivorship. The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all. The rule is in fact a concession to the set policy of English law, nowhere more severely asserted than in chancery, to keep the devolution of property in the regular channels, to the heir and the next of kin, whenever it can be done. If the question were new in this state, speaking for myself I should not hesitate to reject the English rule as wrong in principle and subversive of the great canon of construction, the carrying out of the intent of the testator." *Gray's Estate*, 147 Pa. 67, 74, 75, 23 Atl. 205, 206.

"The English rule, as we said in *Gray's Estate*, 147 Pa. 67, does not commend itself to sound reasoning, or to the preservation of the testator's actual intent, but we found it recognized and accepted in our own cases before these particulars in its application arose, and we felt ourselves bound by it." *Wain's Estate*, 156 Pa. 194, 197, 27 Atl. 59, 60.

"There is a well-known rule that where residue is given to tenants in common, and one of the tenants in common dies in the testator's lifetime, the lapsed share does not go as an accretion to the gift to the other tenants in common, but it is held that there is an intestacy and the share goes amongst the next of kin. That is, there can be no residue of a residue. The arguments by which this rule was arrived at are perfectly intelligible and, one may say, plausible. Nevertheless I think that the effect of it is to defeat the testator's intention in almost every case in which it is applied; but it is a rule by which I am undoubtedly bound." *In re Dunster*, [1909] 1 Ch. 103, 105, 106.

In *Aitkin v. Sharp* (N. J. Ch.) 115 Atl. 912, the rule was recognized as binding upon the court by reason of prior decisions, but was held not to be applicable in the case there under consideration, because, in describing

the property disposed of by the residuary clause, the phrase was inserted: "Including lapsed legacies." Such a phrase has been said to be superfluous, inasmuch as lapsed legacies ordinarily fall into the residue. *Nickerson v. Bragg*, 21 R. I. 296, 43 Atl. 539. It might readily be interpreted as amounting merely to an express declaration by the testator that his meaning is just what the law would presume him to mean were the phrase omitted. In the opinion in the New Jersey case, however, it was said:

"Neither the industry of counsel nor my own examination have discovered any case in this state which decides that, where a testator, either by express words or plain implication, provides that gifts of the residue shall not lapse, but shall sink into or continue therein, the testator shall be regarded as dying intestate as to such gifts. I feel, therefore, at liberty to give effect to the intent of the testator, regardless of the earlier English decisions above referred to. Taking the entire will into consideration, it is quite plain that the testatrix did not intend to die intestate as to any portion of her property. She anticipated that some of her beneficiaries might die in her lifetime, and made provision for such event, and therefore, in the third paragraph, she not only gave to her residuary devisees and legatees all the rest, residue, and remainder of her estate, both real and personal, in certain proportions, but she expressly provided that such residue should include lapsed legacies." 115 Atl. 915.

This court has not heretofore had occasion to decide whether to follow the rule requiring the lapsed share of one of several residuary legatees to be treated as property undisposed of by the will. We might now avoid deciding that question by holding—as we think the facts justify—that, in any event, there are special features of the will under consideration which would require a decision in favor of the surviving residuary legatees. One of them is the circumstance that the residue of the estate is larger than the part disposed of by specific legacies, which gives added force to the presumption that the testator refrained from giving all his property to the residuaries only for the sake of the particular legatees. More important however is this consideration: Of the ten nieces and nephews to whom specific legacies were given, seven were also made residuary legatees. In the case of each of the other three, the language relating to the specific legacy was followed by the express statement that the legatee "is to have no share in the residue and remainder of my estate." Although this provision might be open to interpretation as a mere express statement of what would be implied without it, we regard it as showing affirmatively that the testator did not wish the three legatees referred to to receive more than the specific amount allotted to them. And from his expressly indicating that these

three were to receive nothing from the residue, it may be inferred that it was not his purpose that any unnamed heirs should be more favored in this regard. But while, in our view, these specific provisions of the will plainly show the testator intended that the three legatees, who were not included among the residuaries, should receive no more of his estate than the sums specifically set apart to them, we think if these provisions had been omitted the same purpose would have been sufficiently clear. We prefer to rest our decision upon the general principal rather than upon exceptional features of the particular case.

[3] We regard the rule that lapsed shares of deceased residuary legatees shall be treated as intestate property as in direct conflict with the one to which this court is definitely committed, that the actual purpose of the testator, so far as it can be ascertained, must be given effect. The presumption against intestacy of any part of the estate is a means of carrying out this policy which is disregarded by taking lapsed legacies out of the residue for the benefit of those who would inherit from the decedent in the absence of a will. The reasons for allowing lapsed specific legacies to fall into the residue apply with equal force in favor of allowing all the residue to go to the surviving residuary legatees in the case of the death of one of them, instead of turning over a part of it to persons for whom other provision had been made, or who had not been referred to in the will at all. The statement sometimes made in support of the latter practice—that the share of a deceased residuary legatee cannot fall into the residue, because it is itself a part of the residue—appears rather to play upon words than to point out any real difficulty. The result of these views is the approval of the ruling of the court, distributing the residue of the estate among the residuary legatees who survived the testator.

3. It remains to determine the disposal of the amounts of the specific legacies to the nieces who died before the testator. The plaintiffs contend that, if this money is not to be paid to them as being a part of a gift to a class of which they are members, then it should be treated as undisposed of property, and descend according to the statute in case of intestacy. In support of this contention, they invoke a rule which has been adopted by some state courts under which, where one

to whom a specific legacy is given, and who is also a residuary legatee, dies before the testator without issue, the specific legacy as well as the share of the residue goes to the heirs. 40 Cyc. 1948, note 42, second paragraph from end; 28 R. O. L. 339, note 3; note 44 L. R. A. (N. S.) 814; Schouler on Wills, § 519, note 7. This rule is but an extension or special application of that already discussed and must fall with it. It appears to have originated in *Craighead v. Given*, 10 Serg. & R. (Pa.) 351. Of the only two cases there cited (which were said to be directly in point) one arose upon the death of two of the four persons to whom the entire personal estate was given and the other upon the death of a residuary legatee to whom no specific bequest had been made. In the opinion it was said:

"That the disposition of the residue contemplated a residue arising from the death of any one, is inconsistent with the division of it among all the legatees. To bequeath to *Eliza Semple* [to whom a specific sum was left and who was also one of several residuary legatees] a portion of a residue happening in consequence of her own death, is a construction which can never be supported; yet such would be the fact, if this be the just construction." 10 Serg. & R. 354.

We regard the reasoning as artificial—the making of verbal difficulties. The reduction of the number of those who are to share the residue does not affect the force of the grounds upon which a lapsed legacy is held to fall into it, instead of becoming intestate property. However, if the rule that lapsed portions of the residuary legacy go to the heirs should not only be accepted but also extended so as to apply as well to lapsed specific legacies to persons who are also residuary legatees, we think the special provisions of the will under consideration already referred to are sufficient to take the case out of the extension to the rule as well as the rule itself. The lapsed legacies, both specific and residuary, should therefore be distributed among the surviving residuary legatees in the proportion indicated in the will.

The cause is remanded, with directions to modify the judgment in accordance herewith. The costs of the appeal as well as of the case in the district court may properly be regarded as a part of the expense of administration, and will be taxed against the executor, to be paid from the assets of the estate.

All the Justices concurring.

(111 Kan. 488)

MARLER v. STEWART FARM MORTGAGE CO. et al. FECHTER v. SAME. CRUMRINE v. SAME. (Nos. 23636-23638.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Appearance ⇐26—Petition to set aside a judgment against nonresident on ground that affidavit was false held properly denied.

A petition to set aside a judgment obtained in attachment proceedings against a nonresident on the grounds that the affidavit for the attachment was false and the judgment therefor void held to have been properly denied.

2. Appearance ⇐8(8)—Defendant, by alleging that material allegations of petition were false, and denying averment of ownership of property attached, submitted himself to the jurisdiction of the court.

A defendant who moves to set aside a judgment for want of jurisdiction over him, and as one of the grounds of his motion alleges that some of the material allegations of the petition were false, and denies the averment of ownership of the property attached as set forth in the petition, is held thereby to submit himself to the jurisdiction of the court.

3. Judgment ⇐17(9)—On service by publication not void because affidavit for publication is false.

The settled rule is followed that a judgment obtained on publication service is not void because the affidavit for publication is false.

Appeal from District Court, Shawnee County; James A. McClure, Judge.

Suits by S. C. Marler, A. H. Fechter, and Sam Crumrine against the Stewart Farm Mortgage Company and another. From judgment denying defendant's petition to set aside the service by publication and the judgment rendered thereon in action by first-named plaintiff, and from the judgments rendered in the other two actions, the defendants appeal. Affirmed.

D. R. Hite, John S. Dean, and Harry W. Colmery, all of Topeka, for appellants.

A. E. Crane and Guy Bradford, both of Topeka, for appellee.

WEST, J. The plaintiff sued the defendant land company, the W. E. Stewart Farm Mortgage Company, and W. E. Stewart, alleging that the land company was a nonresident with no office or place of business in Kansas; that the farm mortgage company was a Missouri corporation having its offices and principal place of business at Kansas City, Missouri, and was a nonresident; that the defendant W. E. Stewart was a nonresident of Kansas; that the land company was engaged in the sale of Texas lands; that the

mortgage company was organized by its stockholders and Stewart for the purpose of holding title to their lands; and that Stewart was an officer and director of both corporations. The petition stated that just prior to October, 1917, the defendants, for the purpose of inducing the plaintiff to purchase some of their Texas lands through its officers and agents and Stewart, personally, fraudulently represented to him that, if he would purchase a certain tract of land containing 40 acres, he could raise three crops of broom corn thereon each year; that, under the water rights and rights thereto to be conveyed to this plaintiff by them, the plaintiff could get water to raise such crops from the irrigation company whenever needed, and that he would not have to pay for the water rights until he had produced \$10,000 worth of products on the land; that there was a rural route by his place, and that the land was worth \$250 an acre, and the plaintiff could raise 75 bushels of corn an acre, and in addition thereto could raise a winter crop; that, relying on the truth of these representations, he made a written contract for the purchase of the land; that each and all of such representations were false, and not intended to be carried out by the defendants, and made for the purpose of inducing him to sign the contract, and the defendants knew, or ought to have known, that such representations were false and fraudulently made, and that he relied on them without knowing of their falsity, and entered into the contract, giving in cash and notes \$10,000 for the land, and that he had been damaged in that sum, for which he asked judgment. He alleged that the defendants owned certain real estate in Kansas, title being held either in Stewart or the mortgage company, describing certain lands in Shawnee county.

The attorney for the plaintiff made an affidavit for publication, setting forth therein that the cause of action was based upon the deceitful and false representations by which the defendants secured from the plaintiff \$10,000 in cash and notes for little or no consideration, and that he believed the claim was just, and the plaintiff ought to recover substantially that amount; that the defendants and each of them were nonresidents of Kansas, and that the defendant corporations were foreign corporations, organized under the laws of Missouri, but had been doing business in Kansas. Pursuant to this affidavit an attachment order was issued and an affidavit for service by publication was filed by the same attorney, setting forth that this was an action brought under section 78 of the Civil Code (Gen. St. 1915, § 6969) against a nonresident of the state and foreign corporations; that certain lands had been attached, describing them; that the plaintiff sought to sell them to satisfy his claim, and

averred that summons could not be had upon them within this state.

On June 19, 1920, proof of service by publication was filed showing that constructive service by publication had been had. On August 23 judgment by default was taken against W. E. Stewart Land Company, a corporation, the Stewart Farm Mortgage Company, a corporation, and W. E. Stewart. The journal entry recited that all the defendants, except W. E. Stewart, made default; that the plaintiff offered his evidence in support of his petition and rested his case. The court found that due service had been had upon the Stewart Mortgage Company, the land company, and W. E. Stewart, foreign corporations, and nonresidents, by publication as provided by law, the proof of which was examined and approved. The court further found that the allegations of the petition were true, and the plaintiff was entitled to recover as prayed for therein; that the defendants were indebted to the plaintiff in the sum of \$11,950, with interest, and that the property should be sold to satisfy such claim; and it was therefore adjudged that the W. E. Stewart Land Company, the Stewart Farm Mortgage Company, and W. E. Stewart were each indebted to the plaintiff in the sum of \$11,950; that the real estate of the defendants was duly and legally attached in this action, and the same should be sold to satisfy the action. The cause of action was ordered to be continued as to the W. E. Stewart Investment Company for further proceedings and trial.

On January 8, 1921, W. E. Stewart and the Stewart Farm Mortgage Company filed a petition to set aside the service by publication and the judgment rendered thereon. Among the allegations were the following:

"(3) That in his petition and affidavit for attachment filed in this cause the plaintiff fraudulently, wrongfully, and falsely alleged the joinder of your petitioners with the W. E. Stewart Land Company in respect to the facts and representations therein alleged to have been made to plaintiff.

"(4) That neither W. E. Stewart nor any officer, agent, or representative of the Stewart Farm Mortgage Company were present at the making of any of the alleged representations stated in the petition, and that neither your petitioner, W. E. Stewart, nor any officer, agent, or representative of the Stewart Farm Mortgage Company made any statements whatever in connection with the facts and representations therein alleged, and neither of your petitioners have now or ever have had any real or substantial interest in the pretended cause of action set out in said petition adverse to the plaintiff.

"(6) That the plaintiff made all of said fraudulent, wrongful, and false allegations for the purpose of causing to be issued out of this court an attachment of real estate of said W. E. Stewart in Shawnee county, as a mere pretense for constructive service by publication on all the defendants in this cause, and by

such abuse of its process wrongfully attempted to confer jurisdiction upon this court which otherwise it would not have."

After certain other allegations came the prayer as follows:

"Whereupon your petitioners, appearing specially for the purpose of this petition only, ask this court to set aside the publication notice for service and the constructive service thereby secured, and that this court set aside the said judgment entered against your petitioners for want of jurisdiction in this court to render said judgment."

This petition was properly verified, and on January 14, 1921, W. E. Stewart and the Farm Mortgage Company filed an amendment thereto as follows:

"And now comes W. E. Stewart, and the Stewart Farm Mortgage Company, and by way of amendment to their motion and special appearance filed herein on January 8, 1921, say that inadvertently the allegation is made in said motion that the real estate described and mentioned therein was owned by W. E. Stewart; that in truth and in fact the legal title of said real estate is in the said W. E. Stewart, but he holds the same in trust for the Stewart Farm Mortgage Company mentioned in said affidavit; and these moving defendants so appearing specially and for the purpose only of this motion and amendment ask that said motion be considered as amended as herein stated."

This amendment was supported by affidavit.

On January 22, 1921, the petition of W. E. Stewart and the Stewart Farm Mortgage Company came on for hearing. The attorney for the plaintiff objected to any evidence in support of the motion, and moved the court to overrule the same, for the reason that by these motions they had entered a general appearance in the cases, and the questions raised by the petition with reference to the facts alleged therein had been settled, and the judgment rendered was *res adjudicata* of those facts.

On February 19, 1921, the court rendered judgment sustaining the objection to any evidence in support of the petition, and overruled it. From this ruling the defendants the Stewart Farm Mortgage Company and W. E. Stewart appeal. They assign as error the sustaining of the objection to the introduction of evidence and the overruling of the petition to set aside service by publication, and the judgment rendered thereon. The three cases, Nos. 23636, 23637, and 23638, involve the same questions, and will be considered and determined together.

The defendants argue that, as the statute provides for service by publication on non-resident owners and attachment only when they have property or debts owing them in this state, if they had no property or debts in fact they are not subject to the jurisdiction of our courts. While they concede the

existence of the statutory ground against the Stewart Farm Mortgage Company, they contend the joinder of the other parties was baseless, and therefore void.

The plaintiff refers to the grounds of the motion to set aside the judgment, and says that the defendants, by incorporating non-jurisdictional matters, subjected themselves to the jurisdiction of the court. Further, that the attachment affidavit and affidavit for publication must now be taken as true, and their verity cannot be inquired into, since the court considered them as true, and entered judgment on the strength thereof; that, even if, as a matter of fact, the complaining defendants had no property here, this would not render the judgment void, or, in other words, the untruthfulness of the affidavit could not have that effect. In *Cohen v. Brownbridge*, 6 Kan. 385, the motion to set aside the judgment was based on the grounds, among others, that the affidavit was defective, the publication notice was defective, and that the defendant had no interest in the property taken by the judgment. The court, speaking by Klingman, C. J., said:

"The fifth, sixth, seventh, and eighth grounds of his motion go to the merits of the case, and to questions of irregularity in the proceedings, other than jurisdictional ones; therefore it must be held to be such an appearance as waived the defective notice of publication." 6 Kan. 304.

Life Association v. Lemke, 40 Kan. 142, 19 Pac. 337, is to the same effect. In *National Bank v. Peters*, 51 Kan. 62, 32 Pac. 637, holding that, after the seizure of property and judgment and due service by publication, the judgment and proceedings are conclusive upon the parties to the action and their privies, it was said:

"If it were competent for Peters, in the proceedings to determine the priority of the attachment liens, to show by ex parte affidavits that he had no interest in the property attached by the bank which was seized and sold as his property, then Schaeffer had also the right to make proof in the same way, and show that he had no interest in the property seized and sold. The result would be that upon ex parte affidavits in collateral proceedings, after seizure, judgment, and sale, such judgment and all proceedings thereunder might be set aside and vacated. If such were the law, attachment proceedings against nonresidents might be wholly abortive." 51 Kan. 69, 32 Pac. 638.

In *Frazier v. Douglass*, 57 Kan. 809, 48 Pac. 36, the defendant undertook to make a special appearance to set aside the service of summons, but in his affidavit he said he was the owner in fee of the land described, and in possession, and that the plaintiff had no right or title thereto. The court said:

"Where a defendant alleges and submits to the court matters that are nonjurisdictional, he recognizes the general jurisdiction of the

court, and waives all irregularities which may have intervened in bringing him into court." 57 Kan. 811, 48 Pac. 37.

That a decree quieting title to real estate upon publication service is not void because the affidavit for publication is untrue was decided in *Davis v. Land Co.*, 76 Kan. 27, 90 Pac. 766. The argument was made that statute contemplated publication service on those only who are in fact nonresidents and cannot apply to residents, and the filing of false affidavits cannot confer jurisdiction, but it was held:

"Whether a defendant is a nonresident or not is a question of fact, which must be determined by testimony before constructive service can be completed; and the only evidence required by the statute to establish this fact is the affidavit prescribed by section 73 of the Code. * * * When such an affidavit has been filed, and notice given as provided by section 74 of the Code, * * * and the proceeding has been examined and approved by the court as required by section 75 of the Code, * * * then jurisdiction exists. * * * The question whether the facts stated in the affidavit are true or not is immaterial until challenged in some recognized legal proceeding for the vacation of valid judgments." 76 Kan. 30-31, 90 Pac. 768.

In *Barnett v. Insurance Co.*, 78 Kan. 630, 97 Pac. 962, 10 years after a foreclosure had been taken against certain minors upon default, one of them who had come of age moved to vacate the judgment, one ground being that the petition did not state facts sufficient to constitute a cause of action. The motion was denied because the second ground constituted a general appearance, and cured the defective service. That fraud practiced by a successful party must be collateral to the issues involved in the action on which judgment is founded was decided in *Garrett v. Minard*, 82 Kan. 338, 108 Pac. 80, and it was held that the defendant in such a judgment taken by default could not have it set aside because the allegations in the plaintiff's petition were untrue. The Chief Justice said in the opinion:

"There would be no finality in a judgment and no end of litigation if the contrary view were taken." 82 Kan. 341, 108 Pac. 81.

In *Schultz v. Stiner*, 97 Kan. 555, 155 Pac. 1073, in his motion to set aside the judgment, the defendant undertook to appear specially to ask relief on the ground that he was not liable on the note sued on, and it was held that he thereby placed himself in the same position as if he had appeared at the trial. See, also, *Gooden v. Lewis*, 101 Kan. 482, 167 Pac. 1133.

[1, 2] Here, in the petition to set aside the service and judgment, Stewart and the farm mortgage company allege that neither was present at the making of the alleged false representations set up in the petition, and that neither of them had ever had any real

or substantial interest in the cause of action, and that the property in truth belongs to Stewart personally. In the amendment to the motion they say the former allegation that the property belonged to Stewart was a mistake, and that it in fact belongs to him in trust for the Stewart Farm Mortgage Company. The affidavit for publication was based on alleged false representations and the consequent procurement of \$10,000 from the plaintiff, the nonresidence of the defendants, and the ownership of the property attached; and the court not only approved the service, but found that the allegations of the petition were true. So the petition to set aside the service and judgment presented the issue as to the truthfulness of the petition and the affidavit for publication, and also the question as to who owned the property attached.

[3] It is settled law in this state that a judgment is not void because obtained by false testimony, and that the judgment rendered on publication service is not void because the affidavit for publication was false. It is equally well settled that, when a defendant moves to set aside the judgment on non-jurisdictional as well as jurisdictional grounds, he can no longer successfully claim that the court has no jurisdiction over him.

While, therefore, it is true, as argued by the defendants, that attachment can be had only when the debtor has property in this state, it is equally true when an affidavit in proper form is presented and favorably passed on by the court a petition alleging fraud, nonresidence, and ownership of the property here is presented to and passed upon by the court, and found to be true, and judgment thereupon rendered, the actual non-ownership of such property or actual falsity of the affidavit do not render the judgment void. It is conceded the court had jurisdiction of one of the defendants, but the complaint is that, by virtue of false affidavits and allegations, the complaining defendants were wrongfully joined as parties. But the real effect of such allegations and affidavits, together with the averments of the defendants' motion, was as already indicated.

The ruling of the trial court was in accordance with these settled principles, and is therefore affirmed.

All the Justices concurring.

(111 Kan. 444)

MILLER et al. v. PARVIN. (No. 23820.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Animals — **55** — Evidence held to sustain judgment for trespass.

Testimony examined, and held sufficient to sustain the finding as to the sufficiency of the

fence, the value of the cane destroyed, and the judgment rendered.

2. Animals — **53** — Owner bound to prevent trespass.

In herd law counties the liability of the owner of live stock for trespass committed by his cattle upon the crops of an adjoining landowner is the same as at common law, such owner being bound at his peril to keep his cattle from committing such trespass.

Appeal from District Court, Ness County.

Action by William H. Miller and another against Ed Parvin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Madison & Van Riper, of Dodge City, for appellant.

Lorin T. Peters, of Ness City, for appellee.

WEST, J. The defendant appeals from a judgment for damages alleged to have been caused by his cattle destroying the plaintiff's cane.

The petition alleged that in December, 1918, he allowed his cattle to escape unlawfully and trespass on the plaintiffs' land and destroy 20 tons of cane, to the plaintiffs' damage of \$600. The answer was a general denial.

Claude Miller testified that on December 3d he found 5 or 6 steers in the plaintiffs' field. There were 135 shocks of cane; he saw the field the next month, and there was nothing left except 2 or 3 little piles that stuck up through the snow; the fence separating the plaintiffs' field from the defendant's pasture was made of two wires on stone posts; about the 17th of December he drove out 45 head of cattle the first time he saw them in the field, and there were close to a hundred the next time.

The case was tried by the court and taken under advisement, and findings of fact were made to the effect that the defendant's cattle destroyed a large part of the plaintiffs' crop of cane of 20 acres, which produced about 14 tons, worth \$30 a ton, the total value of the cane destroyed being \$330; that the defendant's fences were not sufficient to restrain the cattle, and that the herd law was in effect; that they were running at large within the meaning thereof.

The court found that there were 20 acres producing about 14 tons, worth \$30 a ton, and gave the plaintiffs judgment for \$330.

[1] The defendant complains of the finding that the fence was insufficient. He asserts that the feed was not worth the amount named, and for which judgment was entered.

Claude Miller testified:

That the 40-acre field was inclosed with three sides of fence, but one side was poor. "That fence did belong to me, it belongs to the range Mr. Parvin was using. I presume they had not fenced that yet. It was two wires on stone

posts. That was on the north side of our field, separating the field from Parvin's pasture."

The defendant testified, among other things:

"Immediately south of my pasture and north of Miller's field there was hay land and the east side was field. That was not used as pasture land. Between that and Miller's field I think there were two wires on stone posts. It was 40 or 50 feet between most of them. * * * I saw his field the day he came over to see me. We tried to keep my cattle in the pasture. The cattle were kept in the pasture with four and three wire fences all the month of December, and were not turned out of the pasture. A three-wire fence is a reasonably good fence to (re)strain cattle. I have three wires every place in the pasture, except where there are four wires. The cattle broke the fence down and got out."

Howard Norman testified that the fence was not sufficient to restrain that kind of cattle "because it was not kept up. There was not sufficient wire on the posts." He said these cattle gave considerable trouble on the ranch the whole season. "They were real breachy."

The case seems to have been tried on the fence and herd law theory, as indicated by the evidence, and also by the findings of the court. *Railway Co. v. Olden*, 72 Kan. 110, 83 Pac. 25, involved damages for the loss of live stock which had gone from a pasture field upon the right of way where they were killed by a passing train. The pasture was not inclosed with a statutory legal fence. It was contended that, in a herd law county, if the stock escape from an inclosure without the owner's fault he cannot recover against the company for killing them unless the inclosure was protected by a legal fence. The court said the effect of the fence law was to modify the common law so the owner was not liable for injuries committed by trespassing stock except to those whose lands were inclosed with a legal fence.

"The adoption of the herd law is the readoption of the common law in this respect, and the owner of cattle is liable for injuries committed by them in a herd law county, regardless of the fence law. * * * If the stock killed be the ordinary farm stock, and the owner have the pasture inclosed with an ordinary fence, such as is generally required to restrain that kind of stock, and they escape without his fault, he is not guilty of negligence and is not guilty of permitting the stock to run at large, and he may recover regardless of the fence law." 72 Kan. 112, 113, 83 Pac. 26.

That is, he could recover against the railroad company. In *McAfee v. Walker*, 82 Kan. 182, 107 Pac. 637, 27 L. R. A. (N. S.) 226, the controversy was between the occupants of adjoining land regarding a partition fence which had been maintained between them. It was said:

"The common law places the responsibility wholly upon the owner of animals to keep them from his neighbor's premises, and makes him liable for any injury resulting from his failure to do so. The fencing act * * * changes the rule and requires the neighbor to protect himself from such injury up to a certain point by erecting a fence of a fixed power of resistance. The adoption of the herd law in turn eliminates the intervening statute and restores the common law, by canceling that requirement." 82 Kan. 185, 107 Pac. 638, 27 L. R. A. (N. S.) 226.

"The liability of the owner to prevent his animals from straying upon his neighbor's premises was the same at common law as under the herd law. He was under a positive duty to keep them up." 82 Kan. 186, 107 Pac. 638, 27 L. R. A. (N. S.) 226.

The case of *Hazelwood v. Mendenhall*, 97 Kan. 635, 156 Pac. 696, involved the question of damages committed by animals permitted to run at large and injure crops upon uninclosed land that without the fault of the owner had escaped from a pasture surrounded by a fence strong enough to show the exercise of reasonable diligence for their restraint. It was held that the herd law did not apply. An instruction had been asked, the action being brought under the herd law, that no recovery could be had for injuries done on uninclosed land by animals escaping without the fault of their owner from a pasture inclosed by a legal fence. This was refused, and the court charged that the plaintiff might recover even if the cattle had escaped from inclosure surrounded by a legal fence, and injured crops upon the plaintiff's uninclosed land before they could be apprehended. It was held that the requested instruction should have been given, citing the *Olden* and *Walker* Cases. It was said:

"The requirement that the crops shall be protected by a legal fence is canceled by the herd law only so far as relates to animals that are 'running at large.' Any that without fault of their owner have escaped from an inclosure surrounded by a barrier reasonably adapted to their restraint are not regarded as within that term, and the definition of a legal fence has reference to that which protects crops, and not to that which restrains cattle within an inclosure." 97 Kan. 637, 156 Pac. 698.

The expression in the *Olden* Case was reiterated that the fence law does not furnish a rule by which to determine whether the owner of the stock in herd law counties is guilty of negligence in inclosing them.

Ruling Case Law states:

"At common law a landowner was not bound to maintain fences between himself and his neighbor except by prescription or agreement, nor could he, without such agreement or prescription, be held to contribute to the expense of fences erected by his neighbors. As has been already stated, however, each owner at his peril was bound to keep his cattle on his own

lands, whether the lands of his neighbor were fenced or unfenced." 11 R. C. L. 880, § 11.

"At common law the proprietor or tenant of land is not obliged to fence it, but every man is bound at his peril to keep his cattle on his own premises. This he may do in any manner he chooses, but, in the event of their escape, he is held liable for their trespasses on the land of others, whether fenced or unfenced, no man being required to fence against the cattle of others, in the absence of an agreement, prescription, or statute to the contrary." Page 873, § 4.

[2] The law seems to be settled that in a herd law county one who pastures cattle upon his own land must at his peril keep them from trespassing upon the crops of adjoining landowners, regardless of the character of the fence separating the two tracts.

The same result having been reached by the trial court, and the evidence fairly showing the trespass and damage found by the court, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 425)

BAKER v. CONTINENTAL AUTO INS. ASS'N. (No. 23794.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Insurance \S 629(1), 668(1)—Petition alleging plaintiff's ownership when fire policy was issued and its destruction five days later held sufficient; evidence held sufficient to carry questions of ownership and value to jury.

In an action upon a policy insuring a touring car against loss by fire, the petition alleged that at the time the policy was issued plaintiff was the owner of the car, and that five days later while it was in his garage at his home it was destroyed by fire. The answer denied that plaintiff owned the property at the time the policy was issued or when the loss occurred. The reply was a general denial. There was no demurrer to the petition. No objection to the introduction of testimony. Defendant offered no evidence, waived argument, and contended that the petition was fatally defective because it failed to allege that when the loss occurred plaintiff was the owner of the property and to allege the value of the car at the time the loss occurred. *Held*, that the objections are without merit, and that the allegations of the petition and the supporting evidence were sufficient to carry the case to the jury on the question of ownership and value.

2. Insurance \S 612(3)—In action on fire insurance policy, arbitration held not a condition precedent.

The policy contained an arbitration clause which reads: "4. In the event of loss or damage to the property insured herein, and the assured and the association fail to agree as to

the amount of such loss or damage, then such loss or damage shall be determined by appraisers, each party to select one (1), and, in case of their disagreement, the two so chosen shall select a third, and the award in writing of two of them shall be binding as to the amount of such loss or damage only. The association and the assured shall pay the appraisers respectively selected by them and share equally all other expenses in connection with such appraisalment." *Held*, on the facts stated in the opinion, and because there was no showing that any difference of opinion ever arose between the parties as to the amount of the loss or damage, arbitration was not a condition precedent.

Appeal from District Court, Cherokee County.

Action by J. J. Baker against the Continental Auto Insurance Association. Verdict and judgment for plaintiff, motion for new trial overruled, and defendant appeals. Affirmed.

Al F. Williams, of Topeka, and Wilkinson, Wilkinson & Dabbs, of Kansas City, Mo., for appellant.

C. A. McNeill, of Columbus, and E. V. McNeill, of Baxter Springs, for appellee.

PORTER, J. On December 8, 1920, the defendant issued a policy insuring plaintiff's touring car against loss by fire to the extent of \$1,500. Five days later the car was destroyed by fire. The defendant refused payment, and this action was brought. The answer denied that the plaintiff owned the property at the time the policy was issued and at the time the loss occurred. As a further defense it was alleged that there was a change of ownership in the car and a misrepresentation and concealment of facts in reference to the ownership. The reply was a general denial. The plaintiff introduced his evidence tending to prove the facts alleged in the petition. The defendant introduced no evidence and waived argument. The court instructed the jury fully upon the issues, and a verdict was returned finding that the plaintiff was the owner of the automobile at the time the policy was issued and when it was destroyed. The verdict was for \$1,288, upon which judgment was rendered, and the court upon the testimony found that \$300 was a reasonable attorney's fee, and that plaintiff was entitled to recover that amount. A motion for a new trial was overruled.

[1] The main contention is that the petition was so defective that the plaintiff was not entitled to recover. The defects alleged are the failure to state that the insurance was in force when the car was destroyed; the failure to state that the plaintiff was the owner at the time the loss occurred; the

failure to allege the value of the car at the time of the loss as required by the terms of the policy attached to the petition. There was no demurrer to the petition, no objection to the introduction of testimony, and no objection to anything that occurred on the trial except to the judgment rendered. A number of decisions are cited from Missouri courts to the effect that a petition in such a case fails to state a cause of action unless it alleges that the property was covered at the time of the fire, and other decisions from the same courts holding that a statement in the petition that the property was plaintiff's property would not be sufficient. We have not examined the cases to discover the particular facts upon which the decisions turned, but it is enough to say that the rule of pleading stated therein does not appeal to us as persuasive, and that, applied to the facts here, the rule seems quite technical. In this case the petition alleged that at the time the policy was issued the plaintiff was the owner of the car, and that five days later, while it was in his garage at his home, it was destroyed by fire. Without a demurrer or any objection to the petition, we think this was sufficient to carry the case to the jury on the question of ownership. To uphold the judgment courts would be justified in indulging the presumption that the title having been shown to be in the plaintiff on the 5th day of February, and the car still in his possession and control five days later, the title had not changed. The same thing may be said as to the failure to allege the value of the car five days after the policy was issued.

[2] One other question relates to the arbitration clause which reads:

"4. In the event of loss or damage to the property insured herein, and the assured and the association fail to agree as to the amount of such loss or damage, then such loss or damage shall be determined by appraisers, each party to select one (1), and, in case of their disagreement, the two so chosen shall select a third, and the award in writing of two of them shall be binding as to the amount of such loss or damage only. The association and the assured shall pay the appraisers respectively selected by them and share equally all other expenses in connection with such appraisalment."

It is insisted that arbitration was a condition precedent to the right to maintain the action. The defendant cites *Insurance Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755. The policy in that case provided for arbitration in case differences arose as to the amount of the loss or damage before or after proof, and upon the written request of either party, etc. It was held that, because there was no showing that any difference of opinion ever arose as to the amount of the loss or damage, arbitration was not a condition

precedent. The evidence in the present case shows that the plaintiff gave notice of the loss to the local agent and sent a number of communications to the defendant which, so far as the evidence shows, were never answered. At all events, there is no showing that any differences arose between the parties calling for an arbitration. Besides, no defense was made to the action upon that ground.

Judgment was rendered for the amount of the verdict plus \$300 attorney fees, fixed by the court upon evidence submitted on that question. The fees should be taxed as costs instead of being included in the judgment.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 415)

FLYNN v. BROTHERHOOD OF RAILROAD TRAINMEN. (No. 23782.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Beneficial associations \S 10(2)—By-law of railroad employees' association held sufficient authority for expulsion, for refusal to abide by action of its general grievance committee.

A by-law of a mutual benefit association of railroad employees, which provides that, if a member refuses to abide by the action of its general grievance committee, he shall be expelled, is sufficient to authorize the expulsion of a member for petitioning a railroad official to modify a rule relating to seniority among employees, which had been formulated by such grievance committee and adopted by the company after negotiations with it.

2. Beneficial associations \S 5(1)—Constitutional law \S 91—Agreement of employees to conduct their negotiations collectively and not individually held not void as against public policy nor as against constitutional guaranty of right of petition.

The action of a group of employees in agreeing with one another that whatever negotiations they have with their employer with reference to privileges to be accorded them shall be conducted through their organization—collectively and not individually—is not void as against public policy or in conflict with the constitutional guaranty of the right of petition.

3. Beneficial associations \S 10(4, 6), 20(7)—Whether plaintiff's husband violated rules of association held a question for order's tribunal; beneficial order's right to expel members held clearly granted where after fair trial; where member was expelled with others who were afterwards reinstated, bad faith not shown in absence of showing that such member applied for restoration.

Various objections to the validity of an order of expulsion are held not to be well founded.

4. Beneficial associations §10(5)—Where assessment paid was returned on ground member had been expelled, retention of other payment made at same time held not waiver of defense.

Where an amount paid as an assessment or dues upon a beneficiary certificate is returned for the stated reason that the holder had been expelled, the retention of a payment made at the same time for an additional charge of \$1 for another purpose does not effect a waiver of a defense to the collection of the certificate on the ground of such expulsion, especially when there is no showing that the additional charge was not due prior to the expulsion.

Appeal from District Court, Wyandotte County.

Action by Mary Flynn against the Brotherhood of Railroad Trainmen. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to render judgment for the defendant.

A. L. Berger, of Kansas City, Kan., L. C. Boyle, of Washington, D. C., and A. E. Watson, of Kansas City, Mo., for appellant.

E. A. Enright, of Kansas City, Kan., for appellee.

MASON, J. The widow of Patrick J. Flynn, who was a yardman in the employ of the Missouri Pacific Railway Company, brought this action against the Brotherhood of Railroad Trainmen, upon a beneficiary certificate issued by it to her husband. Payment was resisted, the defense being that he had been expelled from that organization several years before his death. Judgment was rendered in favor of the plaintiff on the ground that the expulsion proceedings were invalid. The defendant appeals.

[1] 1. An order was made by the lodge of which the plaintiff's husband was a member (No. 281) expelling him from the brotherhood upon written charges and after a hearing, of the regularity of which no complaint is made except as hereinafter indicated. Under the laws of the order he might have appealed from the decision against him first to the president and later, if he desired, to the Grand Lodge, but he took no appeal. The defendant urges that he was bound to exhaust his remedies within the organization before invoking the aid of the courts. This is the accepted rule with respect even to associations, membership in which carries property rights (*Modern Woodmen v. Taylor*, 67 Kan. 368, 71 Pac. 807) subject to this exception—if an order of expulsion is made by a tribunal of the society acting without jurisdiction, or in disregard of the accused member's fundamental rights, as for instance where no opportunity for a hearing has been given him, relief at the hands of a court may be sought in the first instance. *Rueb v. Rehder*, 24 N. M. 534, 174 Pac. 992, and

cases there cited. See, also, 19 R. C. L. 1226-1230, 1253-1256; 5 C. J. 1359; 7 C. J. 1123; *Supreme Lodge Knights of Pythias v. Wilson*, 66 Fed. 785, 14 C. C. A. 264; *Tucker v. Kirkpatrick*, 106 Kan. 881, 189 Pac. 946; *Id.*, 107 Kan. 541, 192 Pac. 834.

The charge made against the plaintiff's husband was that he co-operated with others "in interfering with the working of the local grievance committee" of his lodge; that he affixed his signature with others (including members of other organizations) to a petition embodying a request "that the seniority rights of foreman, as established by local grievance committee of B. of R. T. of Missing Link Lodge, No. 281, be changed to suit the demands of following committee"—a committee being named composed of three members of the defendant association and three of the Switchmen's Union of North America. The charge included a recital that the petition had been presented to the superintendent about July 5, 1913.

The petition referred to in the charge, which was signed by the plaintiff's husband, and was addressed to the Missouri Pacific superintendent, read as follows:

"We, the undersigned, employees of the Kansas Terminal [a phrase which was explained as referring to the Kansas City terminals of the Missouri Pacific] hereby petition you to restore to us our seniority, or grant us a hearing at which time we can present our side of the question to you, inasmuch as we do not think the prevailing seniority list is just and fair."

The petition had reference to a rule of the company which had been put in force by an agreement between the brotherhood and the executive officers of the railroad, having been formulated by the general grievance committee of the former. It read:

"Any yardman refusing to accept promotion when tendered will relinquish his rights in favor of the next senior man and shall not be eligible to subsequent promotion until another vacancy occurs."

There was evidence that of some 7,000 employees who were affected by the rule only the signers of the petition, some 75 in number, were dissatisfied with it.

The laws of the order contained the following provisions:

"Whatever action may be taken by the general grievance committee or board of adjustment of any system within the meaning of the above general rules, shall be law to the lodges on that road until the next meeting of the Grand Lodge, and if any member refuses to abide by the action of said general grievance committee, or board of adjustment, he shall be expelled from the brotherhood for violation of obligation."

"Any member considering that he has been unjustly dealt with by his employer, or that he

is otherwise aggrieved, shall make a statement of the grievance in writing and present the same at a meeting of the lodge. The lodge shall then determine by a majority vote of the members present, employees of the division, whether to sustain or reject the grievance. Should the grievance be sustained, the local grievance committee shall lay the matter before the trainmaster, superintendent, or other proper officer and use every means to effect a satisfactory settlement and report their action and all things pertaining to the case to the lodge. If the result is not satisfactory, it may be referred to the general grievance committee for further action. A member of a lodge may withdraw a grievance placed in the hands of a general grievance committee, provided such action is taken before said grievance has been presented by the general grievance committee to the officers of the company, but not thereafter."

The district court made this finding:

"That the expulsion proceedings against Patrick J. Flynn in August, 1913, were invalid, being based on alleged acts of Patrick J. Flynn, against the doing of which the constitution and by-laws of the defendant provided no penalty of expulsion."

In the course of a discussion concerning the issues, preliminary to the introduction of evidence, the attorney for the plaintiff made this statement:

"This thing simmers right down, I am frank to say, from my standpoint it is wholly a question of law. If those charges are covered by the constitution, I think the suit was defeated. I do not think the charges were provided by the constitution. I think the whole act was void; that is my contention."

We think it was competent for the lodge, of which the plaintiff's husband was a member, to decide that, in petitioning an official of the railroad company for a change in the practice in regard to seniority rights of employees, he was guilty of refusing to abide by the action of the general grievance committee—conduct which made him subject to expulsion. The written rule on the subject, a modification of which was sought, was shown to have been the result of the action of the general grievance committee in consultation with the representatives of the railroad company. It has been argued that he had not refused to abide by the order of the grievance committee; that one "may wish to have a law changed and yet he may not be in open rebellion against the law." The signers of the petition did not indeed by that act declare that they would not be bound by the rule as it existed, but there was no way in which they could resist its enforcement, which did not rest with them. Those of them, however, who were members of the brotherhood had a means provided within their organization for endeavoring to obtain such a change in the rule as might be desired. And when they declined to avail

themselves of this method and undertook to go over the heads of their associates, it required no forced or unnatural construction of language to say that they refused to abide by the action of the general grievance committee of the order, which had decided that the existing rule was the one for which the organization should stand. A member of the brotherhood can hardly be regarded as abiding by the action of the grievance committee while he was endeavoring through outside channels to procure the undoing of the results it had accomplished in obtaining the acceptance by the railroad company of the priority rule it had formulated.

[2] 2. In behalf of the plaintiff it is argued that, if the provision quoted is interpreted as justifying the expulsion of a member of the order for attempting by outside means to bring about a change on the part of the railroad company, in a method of treating its employees which had been adopted at the instance of the order, such interpretation renders it void and unenforceable, because in conflict with the constitutional guaranty of the right of petition. *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 Atl. 70, with the note thereto in 14 A. L. R. 1446, is cited in support of the argument. In that case a by-law of a mutual benefit society authorizing the expulsion of a member for petitioning the Legislature to repeal a statute was held to be void. Our state Constitution provides that "The people have the right . . . to petition the government, or any department thereof, for the redress of grievances." Bill of Rights, § 3. The petition here involved was dated June 10, 1913. At that time the railroads were not in the hands of the government and a railroad superintendent was not a public official. We see no sufficient reason for considering it against public policy for a group of employees to agree with one another that whatever negotiations they have with their employer with reference to privileges to be accorded them shall be conducted through their organization collectively and not individually.

[3] 3. The plaintiff contends that it was neither charged nor proved that the petition in question was ever presented to the official addressed. As already stated, the charge recited such presentation to have been made, and there was sufficient evidence that it reached the superintendent's hands. The question of fact, moreover, was one for the determination of the tribunal provided by the order. *Burton v. Dickson*, 104 Kan. 594, 600, 180 Pac. 216, 775. The suggestion is made that the by-laws give no authority for a committee to prefer charges or act upon them. The right to expel members is clearly granted, and, in the absence of express provisions, any procedure resulting in a fair trial is unobjectionable. It was admitted that "charges were preferred and a trial was

had before a committee provided by the by-laws and that they pronounced judgment against Mr. Flynn." In the plaintiff's brief it is said: "It is unnecessary herein to complain against the good faith of the Flynn expulsion episode, although there was a wholesale slaughter of about 80 benefit certificates in a moment of passion, all to be restored except Flynn's." The reference doubtless is to other members of the brotherhood who signed the petition to the superintendent. The fact, if it be a fact, that all excepting the plaintiff's husband were restored does not suggest bad faith, for there is no showing that he applied for restoration.

[4] 4. After the expulsion of Flynn, the plaintiff made a payment to the secretary of the lodge of \$3.75, \$2.75 being for the assessment or dues, and \$1 (as she testified) for the grievance committee. The \$2.75 was returned to her. It is contended that the retention of the \$1 amounted to a waiver of the defense made. The amount paid on the certificate was returned with the express statement that it could not be received because of Flynn's having been expelled during the month. This negatives any inference of an intention to treat him as still a member of the order. There is nothing to indicate that the \$1 that was withheld was not for a charge that had already accrued, and it obviously was retained upon that theory.

The judgment is reversed, and the cause is remanded, with directions to render judgment for the defendant.

All the Justices concurring.

(111 Kan. 355)

STATE v. OSWEILER. (No. 23516.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Criminal law §625—Where defendant is incapable of making proper defense, because of mental disability, court should investigate before proceeding.

Rule applied that, when it is brought to the attention of the court that a defendant, about to be proceeded against for crime, is incapable, because of mental disability, to make proper defense, the court should investigate the defendant's mental condition before going forward with the proceeding.

2. Criminal law §625—The court should find out if defendant is in fit mental condition to be tried upon showing of mental disability.

It is not material that the showing of present mental disability be in affidavits made in support of an application for continuance only, and it is not necessary that counsel, either for the state or for the defendant, make formal application for an investigation of the defendant's sanity. In effect, the law makes the application for the defendant, and it is the court's

duty to find out, by one of the statutory methods, whether he is in fit mental condition to be tried.

3. Insane persons §86—Defendant suffering from insanity should be committed to hospital for dangerous insane, but if feeble-minded should be remanded to probate court.

Should the court find the defendant to be suffering from mental defect other than feeble-mindedness, he should be committed to the hospital for dangerous insane, under the provisions of section 4 of chapter 299 of the Laws of 1911. Should he be suffering from feeble-mindedness, he should be remanded to the probate court, under the provisions of section 2 of chapter 299 of the Laws of 1919.

4. Criminal law §625—Affidavits for continuance held sufficient to challenge court's attention to defendant's mental inability to make his defense.

Affidavits of responsible persons, filed in support of an application for continuance, considered, and held to contain expressions of opinion and statements of fact sufficient to challenge the attention of the court to the subject of the defendant's inability to comprehend his position and to make his defense.

Appeal from District Court, Sedgwick County; J. D. Wall, Judge.

Theodore Osweller was convicted of murder in the second degree, and he appeals. Reversed and remanded for further proceedings.

Amidon, Buckland, Hart & Porter, of Wichita, for appellant.

Richard J. Hopkins, Atty. Gen., and J. A. Conly, Co. Atty., I. N. Williams, and Sidney L. Foulston, all of Wichita, for the State.

BURCH, J. The defendant, whose education had been for the priesthood, and who, from religious zeal, had taken the novitiate for the most austere monastic order, the Passionists, shot and killed Caroline Cunningham, the only girl he ever cared for, on the steps of St. Mary's Cathedral in Wichita, immediately after he had attended early mass on Sunday morning August 1, 1920. He was convicted of murder in the second degree, and appeals.

As a child, the defendant lacked the play instinct, indispensable to normal development of the human mind. As a youth, he was slow in his studies, morose in disposition, did not participate in sports and games, and formed no youthful companionships. As a young man, he was morbid, subject to fits of depression, and unstable in purpose. He displayed great religious fervor, and studied to be a priest. He changed his mind, concluded he would become a lawyer and went to law school for four weeks. Then for a year and a half he studied philosophy, preparatory to entering the priesthood. Within three months of the time he would

have completed his course in philosophy, he decided he would become a monk, and sought refuge with the Passionists, in order to save his immortal soul. He was affiliated with the Passionists for less than two years, and when he left their retreat he was a nervous wreck. On successive mornings he would go a mile to church in inclement weather, scantily clad, so that he might contract pneumonia and die. He was easily excited to rage, and his father testified that only from a sense of humiliation did he refrain from placing his son in an asylum. Later the young man seemed to improve, and was employed in a bank in Wichita. Officers of the bank testified he was intrusted with no work involving initiative or discretion, could not grasp instructions, was forgetful, and displayed the mentality of a boy of 12 or 14, although he was 26 years old. He enlisted in the army, and in August, 1918, was sent to France, where he remained until June, 1919. He did not enlist from patriotic motives; he hoped he might be killed. In France, he was orderly for a Roman Catholic priest, who was chaplain of his regiment. In an affidavit for continuance, it was stated the priest, if present at the trial, would testify that the defendant, although very religious, was not merely queer and melancholy, but was mentally deranged. In the fall of 1919, the defendant was placed in his father's bank in the little town of Schulte, near Wichita. His conduct at Schulte was strange, and witnesses for the state who knew him there testified he was of unsound mind. Before going into the army, the defendant became engaged to marry Caroline Cunningham, but soon after he returned from France she broke the engagement. Sometimes, in fits of passion, he displayed a tendency to do personal violence, and on one occasion, for a fancied grievance, he threatened his father with an axe. In May, 1920, he purchased a pistol, which he carried about with him continuously. In May and June he told different persons he was worried and troubled, and said he intended to kill Miss Cunningham. He said he might just as well be lying in the penitentiary as to be in the bank at Schulte. The latter part of June he wrote Miss Cunningham a letter in which he said:

"My love has turned to hate, and I hate you and I curse you and hope all the bad luck possible will fall upon you if you ever marry any one."

On July 12 he wrote her the following letter:

"My dear Caroline: It's a year since you broke my heart, and I feel the disappointment as keenly as ever. Life has been a vale of tears and sorrows for me. I would have put an end to my life long ago, but for the thought of an after life. Dear Caroline, I have been mean to you, and wished you every evil possible, but all the while I have loved you just the

same. It was grief and sorrow that made me so cruel. But to-day I am writing you to ask your forgiveness. I take back the curse I pronounced on you, and the evils I wished you. Yes, Caroline, I'll try once more to forgive you, and ask your forgiveness. I hope and pray that God will bless you once more, and make you the happiest girl in this world. I ask you to pray that God may give me the grace to come back to the church and lead a good life again. I intend to go to confession next Saturday. Henceforth I'll try to bear my sorrows patiently and with resignation. You can marry Jimmie, if you like him, and I'll ask God's blessing upon your union. Oh how I would have liked to realize my fond hopes. There is but one thing I would like to ask you. It has been and still is a mystery to me, why you jilted me. Don't be afraid of hurting my feelings. My heart is broken already, and your telling me the truth will not make me unhappier. Let me hear from you soon. With love and good wishes, I am

"Your Heartbroken

Teddy."

On Friday before Sunday, August 1, the defendant told his sister his nerves were giving out, and he would be obliged to leave the bank.

After he fired the fatal shot, the defendant uttered a prayer, and leaned against a pillar of the cathedral, trembling violently. The pistol was in his coat pocket, and he had fired through his coat. He offered no resistance when the pistol was taken from him, and, in answer to horrified inquiries, said he did not know why he shot the girl. He was taken into custody without protest, and in the afternoon was questioned by the chief of police and the county attorney. He said he arrived in Wichita about 7 in the morning, and went to 8 o'clock mass. After the service he stood on the steps of the cathedral, simply looking about for any one he might know. He was not waiting for Miss Cunningham. When he saw her coming up the steps of the cathedral to the 9:15 service, he wanted to talk to her, but shot without speaking. A portion of his statement to the officers followed:

"Q. What led up to this shooting? A. Why, there was various things led up to it.

"Q. Well, what were they? A. Well, I don't know—

"Q. Don't you want to tell them? A. No, they are more or less personal matters.

"Q. You don't want to tell them? A. I am willing to confess that I shot her, and of course the law can take its course that way. Of course it is all over—it is personal matters that have led me to it.

"Q. Personal matters between you and her? A. Well, then other things—different other things that—not only her, but different other things that came up in my life that— * * *

"Q. Didn't you realize what you were doing this morning when you shot her? A. Well, I didn't intend to do it—I didn't know—because I was going to talk to her—and just all at once I took a notion and done it so fast, I didn't—I went up to her with the intention—I went up

to her with the intention—walked up to her with the intention of talking to her, and I just—

“Q. Instead of talking to her, you shot her—is that the idea? A. Yes. * * *

“Q. Well, now, Theodore, you said something—that it was a personal matter between her and you—this trouble came up—you don’t mean that there was anything wrong with her do you? A. No, not at all. * * * I thought she was an ideal girl all the time, but I didn’t think very much of her breaking her promise without a reason, and I found out she gave it to me in bad faith. That is what grieved me so much, to think that for two long years she gave me her promise in bad faith.

“Q. Well, that really was what was back of the biggest part of this affair, this trouble wasn’t it? A. Well, I don’t know, I had so many troubles. I don’t know just what caused me to do it. It wasn’t this matter alone, but I have worried all my life, but I don’t know what it is—it’s just foolishness sometimes—I don’t know whether I inherited it or not. But I have never been satisfied anywhere, never been happy anywhere. And the responsibility of the bank made it so much worse, and I never had anybody at home or had anybody myself. I brooded alone about all my troubles, and I was always inclined to get in the blues quite often. Sometimes it would stick with me for a couple of days. If it hadn’t been for her, I wouldn’t probably have been here now; for I went into the army in the expectation of getting killed. I was glad to go over there just to get out of my troubles. Of course she cheered me up, and all that, but—I don’t think I—if I didn’t—if everything else had been all right, I am very sure I wouldn’t have shot her I guess—I thought too much of her to harm her in that way.

“Q. Theodore, if you thought so much of her what was the idea of shooting her? A. I don’t know; I don’t just know why I did it either.”

At the trial, eminent alienists who had examined the defendant, and the only specialists in nervous and mental diseases who were called as witnesses, testified the defendant is a constitutional psychopath, which is the euphonious equivalent of Lombroso’s “moral idiot.” The alienists discovered in the defendant’s mind a delusion that he might properly be the instrument of God to kill the girl for her sin in breaking her engagement.

The information was filed on September 30, 1920. On December 6, the defendant was arraigned, and stood mute. On December 9 a motion to quash the information was denied, and the case was set for trial on December 14. The defendant’s father employed counsel to represent him. On December 14 and 15 the following affidavits were filed in the case:

“S. B. Amidon, of lawful age, being first duly sworn, upon oath deposes and says:

“That he is now and for more than 33 years last past has been actually engaged in the practice of law in the city of Wichita, Kan., and for the 30 years last past he has been acquainted with the father of Theodore Osweiler, and has been his attorney during such time;

that he has known Theodore Osweiler, Jr., practically all of the time since his birth; that he has been employed by Theodore Osweiler to defend his son, the defendant in the above entitled cause; and that he has been intimately acquainted with the said defendant during the times herein mentioned.

“Affiant states that he is vice president, and was vice president during the times mentioned, of the Southwest State Bank of Wichita, Kan., and that both prior to the time the defendant engaged in the World War and after his return from France, said defendant worked for a time in said bank, and affiant states that he noticed at said time that the said defendant was queer, odd, morose, forgetful, and incapable of attending to business, and that in the judgment of this affiant during said time said defendant was a person of unsound mind; that this affiant saw the said defendant frequently, observed him carefully; that he knew of the said defendant studying for a time for the priesthood and following various other kinds of study, but that, by reason of the condition of his mind, he was unable to accomplish in his studies that which he set out to accomplish.

“Affiant states that, since the 1st day of August, 1920, he has had frequent audiences with the defendant, and has talked with him frequently, and affiant states that, in his opinion, said defendant is not at this time capable of making this affidavit, and is not mentally competent to make this affidavit, and that, in the judgment of this affiant, said defendant is insane and was insane on the 1st day of August, and is now insane, and at this time is feeble-minded and incompetent mentally to make a rational defense, and that the defendant is unable to give this affiant a rational account of the occurrences on the 1st day of August, 1920, and of how the occurrence happened and why it happened, and of the various facts leading up thereto and concluding therewith, and that, in the judgment of this affiant, said defendant does not understand the difference between right and wrong, and does not at this time understand the moral effect or turpitude of the crime which he is charged to have committed in this cause or the nature and consequence of said act; that, if said defendant committed said crime, he did it while in a state of insanity, and while he was unable to understand the difference between right and wrong; that affiant makes this affidavit for and on behalf of the defendant, and that in the opinion of this affiant and in the judgment of this affiant, said defendant is incompetent to make this affidavit or to make any defense in said cause, by reason of the fact that said defendant is feeble-minded and insane and does not understand what is being done in this cause, and does not understand the difference between right and wrong, and does not know the nature and effect of the trial now about to be proceeded with. Affiant states that he has had full charge of the defense in this case, and that he has consulted with the father of the defendant very frequently in order to secure the presence of witnesses for the defense, and affiant states that said defendant cannot safely proceed to the trial of this cause at this time on account of the absence of material witnesses to the said defendant. [The remainder of this affida-

vit was in due form as an affidavit for a continuance on account of the absence of material witnesses.]”

“Theodore Osweller, of lawful age, being first duly sworn, upon oath deposes and says:

“That he is a resident of Sedgwick county, Kan., and has been a resident of said county and state for 42 years; that he is the father of the defendant in this the above-entitled cause, and affiant states that the defendant is now and has been, in the judgment of this affiant, and was on the 1st day of August, 1920, and ever since has been and is now, insane and unable to make a rational defense in this the above-entitled cause, is feeble-minded and mentally incompetent to make a rational defense; and that he is now and has been since the said 1st day of August, and was on said 1st day of August, 1920, insane; that he employed the firm of Dale, Amidon, Buckland & Hart to defend the defendant in the above-entitled cause; that he has given them such information as is within his knowledge; and affiant further states that in his judgment defendant does not possess the necessary knowledge to determine the nature of the proceedings now being had in this the above-entitled cause, and his mental condition is such that he cannot understand and does not understand the nature of the proceedings now taking place in this cause, and the nature of the proceedings in this cause, and that he is not mentally capable of making his defense in this cause, and for that reason his attorneys have been unable to properly prepare a defense in this cause, and are unable to go to trial at this time; that said defendant is now unable to recall the facts of the transactions involved in the charges against him so as to assist his counsel in the preparation of his defense or to testify as a witness or even to remember events from day to day.”

Following filing of these affidavits, a colloquy ensued between the court and counsel for the state concerning what should be done. The court and counsel for the state sought to have counsel representing the defendant admit he was applying for an inquiry respecting the defendant's present sanity, or else admit he was applying for a continuance only. He stood on the affidavits. The record shows the following:

“By the Court: Do you care to say anything further on the matter?

“Defendant's Counsel: No, your honor.

“By the Court: You asked for a few moments for conference; are you ready to proceed?

“Defendant's Counsel: We are ready.

“By the Court: Has the state anything further to state?

“Plaintiff's Counsel: Nothing.

“Defendant's Counsel: Except, if the state attorney wants the court to make a finding—judgment, that the defendant is insane, and send him to the asylum for the insane, we have no objection to it.

“Plaintiff's Counsel: But we are not asking for that.

“Defendant's Counsel: Then we reoffer our affidavits.

“By the Court: What has the state to say? “Plaintiff's Counsel: We have nothing further to say.

“Defendant's Counsel: Our affidavits are considered as filed and admitted, are they?

“Plaintiff's Counsel: We understood as an application for continuance. I believe that was counsel's statement.

“Defendant's Counsel: Under the statement of Mr. Elcock, assistant county attorney, as to what he thought the court's duty was—to make a finding—we will reoffer the affidavits for that purpose, on the question of the defendant's present sanity or insanity.”

Another colloquy ensued, in which counsel representing the defendant refused to be placed in the attitude of making application for an investigation of the defendant's present sanity. The colloquy was brought to a conclusion as follows:

“By the Court: I imagine, under this statute, the application is made for the purpose of continuance, on the ground that the defendant is insane at this time and unable to proceed to trial for that reason, that the court has the power to appoint a commission to examine into his sanity, or to empanel the jury to try the issue.

“Plaintiff's Counsel: Or try it yourself as a court.

“By the Court: I rather imagine the method of procedure is largely to the discretion of the county attorney as to whether it shall be a commission or whether the jury shall determine the matter.

“Plaintiff's Counsel: A commission is satisfactory to me.

“Defendant's Counsel: If the commission is appointed, I want [the record] to show that the commission is appointed on the application of the state. We are not applying for the commission.

“Plaintiff's Counsel: As I understood, here is an affidavit that purports to show that this defendant is now insane. He is in that condition where he is unable to properly prepare for a defense or make a defense. That is a showing before the court on the part of the defendant. If the court determines to try this at this time, why it is immaterial to the state which way it is tried. I merely suggest the commission as probably a briefer way to get at it, and a quicker way. I am not asking, particularly, for a commission, or court, or jury.

“Defendant's Counsel: Let the record show that we are ready to go ahead with the trial of the case.

“Plaintiff's Counsel: We are ready.

“Defendant's Counsel: Let the record show that, in announcing ourselves ready for trial, we do so, not waiving any of our rights in our affidavit for continuance.

“By the Court: The applications for continuance are overruled.”

[1] In the case of *In re Wright*, 74 Kan. 409, 89 Pac. 678, the third paragraph of the syllabus reads as follows:

“Where upon the trial of a person charged with a crime it is claimed that he is then una-

ble to make answer and defense thereto in a rational manner, because of mental incapacity which has arisen since the alleged commission of the offense, it is the duty of the court where such trial is pending to make inquiry concerning such disability, and, if found to exist, to stop further proceedings in the trial until such disability has been removed. Failure in this respect, whereby an insane person is forced into trial, will render all subsequent proceedings void."

In the Wright Case, the petitioner was charged with felony, arrested, and brought before the judge of the city court of Wichita for preliminary examination. The examination was postponed until April 4. On April 3 the petitioner was adjudged insane, as the result of proceedings in the probate court. On April 4 a motion called a plea in bar was filed in the city court, to discharge the petitioner, on the ground the city court had lost jurisdiction. The proceedings in the probate court, including the verdict of lunacy, were set out in the motion. The court denied the motion, held a preliminary examination, bound the accused over to the district court and, in default of bail, committed him to jail. In holding the city court did not lose jurisdiction, the court said:

"It is the law of this country, independent of any statute, that a defendant shall not be compelled to answer to, or defend against, a criminal charge if mentally or physically unable at the time to do so in a rational manner, when such disability has developed after the alleged commission of such crime; but, in the absence of a statute to the contrary, the duty of determining whether or not such disability exists rests with the court whose duty it is to hear such answer or defense.

"When the attention of a court is called to the fact that the defendant about to be arraigned before it is unable, because of mental disability, to make proper defense to the accusation against him, it is doubtless the duty of the court to take notice of the suggestion and make such inquiry concerning it as will fully protect the rights of the accused. Upon such an inquiry the findings of a court in a lunacy proceeding, and any other proper evidence, may be received and considered. The verdict and proceedings presented to the magistrate in this case can only be considered as evidence tending to show the present mental condition of the petitioner. It appears that this evidence was offered for another and different purpose, but the object and manner of its presentation are immaterial. It was sufficient to call the attention of the court to the claim that the defendant was insane and incapable of making proper answer to the charge pending against him. This was a matter of too much gravity to be ignored because of any supposed irregularity in the form of its presentation. It was the duty of the magistrate to take notice of this claim and determine the defendant's mental condition before proceeding further with the examination." 74 Kan. 411, 89 Pac. 679.

[2,3] Although authorities were not reviewed in this question, they were carefully examined before it was written, and the decision established the practice to be followed in this state. Since the decision was rendered, it has been supplemented by two statutes:

Section 4 of chapter 299 of the Laws of 1911 reads as follows:

"Whenever any person under indictment or information, and before or during the trial thereon, and before verdict is rendered, shall be found by the court in which such indictment or information is filed, or by a commission or another jury empaneled for the purpose of trying such question, to be insane, an idiot or an imbecile and unable to comprehend his position, and to make his defense, the court shall forthwith commit him to the state asylum for the dangerous insane for safe keeping and treatment; and such person shall be received and cared for at the said institution until he shall recover, when he shall be returned to the court from which he was received to be placed on trial upon said indictment or information." Gen. Stat. 1915, § 10043.

Section 2 of chapter 299 of the Laws of 1919 reads as follows:

"That whenever in a court of record, during the hearing of any person charged with a misdemeanor or crime, it shall be made to appear to the court that the person is feeble-minded the court shall summarily remand such person to the probate court of the county for examination under the provisions of this act."

The statute of 1919 took feeble-mindedness out of the statute of 1915. Should the court find the defendant to be suffering from mental defect other than feeble-mindedness, he should be committed to the hospital for dangerous insane; should he be suffering from feeble-mindedness, he should be remanded to the probate court.

[4] There can be no doubt about the sufficiency of the affidavits filed on December 14 and 15 to challenge the attention of the court and move it to investigate the defendant's mental condition. The statements contained in the affidavits were made under the oaths of responsible persons, one of them subject to discipline by the court, and both of them subject to the penalties for perjury. The affidavits contained, not merely expressions of opinion, but statements of fact which placed the defendant within the protection of the court. As indicated in the Wright Case, it made no difference that the showing of present insanity was made in affidavits supporting an application for continuance only. When the showing was presented, it was the court's duty to find out if the defendant was in fit mental condition to be tried, whether counsel for either side made application for the inquiry or not. In effect, the law made the application for the defendant and, however the attorneys might fence about the matter,

the court was not authorized to proceed with a trial on the merits until it had ascertained, by one of the statutory methods, whether the defendant was capable of making a rational defense. Trial on the merits is, of course, no substitute for the preliminary investigation. The question of capacity to commit crime on August 1 bears no relation to the question of capacity on December 15 following to defend against a charge of crime.

The judgment of the district court is reversed, and the cause is remanded for further proceeding.

All the Justices concurring.

(111 Kan. 650)

JONES v. WEBBER et al. (No. 23694.)

(Supreme Court of Kansas. July 8, 1922.)

(Syllabus by the Court.)

1. Judgment \S 255—In action to cancel note, item of damage added by supplemental petition, and not proved, held properly excluded.

In an action to cancel a note given for the purchase of a stallion, on the ground that the animal was worthless as a breeder, when the case was called for trial the plaintiff sought to add an item of damage for care and feed for the horse by what he called a supplemental petition. This was excluded by the court, and on the motion for a new trial no showing was made as to any evidence on this point. *Held*, no error to exclude such item of damage.

2. Appeal and error \S 1005(3)—Finding by jury on conflicting evidence must stand.

The plaintiff claimed a warranty that the horse was a 90 per cent. foal-getter. Much of the evidence was to the effect that he was represented as one whose fluid test was 90 per cent. pure. There was evidence of a physical defect. The jury on conflicting testimony found for the defendant. *Held*, that such finding, having been approved by the trial court, must stand.

3. New trial \S 143(5) — Jurors cannot impeach own verdict by disclosing reasons therefor.

Jurors cannot be heard to impeach their verdicts by disclosing the mental operations and sentimental considerations by which their conclusions were reached.

Appeal from District Court, Seward County.

Action by Sam Jones against Anne E. Webber and others. From a judgment for defendants, plaintiff appeals. Affirmed.

B. W. Davis, of Liberal, for appellant.

Sawyer & King and V. H. Grinstead, all of Liberal, for appellees.

WEST, J. The plaintiff bought a stallion at the defendant Anna E. Webber's sale, gave

his note for \$275, found the animal worthless as a breeder, sought rescission, failed, and sued to cancel the note. The defendant bank bought the note before maturity, but the plaintiff claims it was nonnegotiable because it had written thereon, "This note given for stallion under guaranty as given at Webber sale." The plaintiff alleged that as part of the transaction by which he bought the horse the defendant by her agent the auctioneer warranted and guaranteed the horse to be a good foal-getter, first class for breeding purposes, which warranty and guaranty proved false.

The defendant Mrs. Webber answered by general denial, and also alleged that she made the sale as administratrix, and, being inexperienced in business affairs, had her brother, Will Brier, look after the sale; that the clerk of the sale, T. A. Tegarden, looked after the notes taken, but she did not know under what condition this note was executed; that no express warranty or guaranty was made or authorized by her; that it was announced that this horse had a record which record would go with him; that his fluid tested 90 per cent. pure, and that a purchaser could look up his record and be satisfied before taking him that he would not be guaranteed as a foal-getter; that such fluid test for the previous year was correct; that when the plaintiff came for the horse after the sale he said he guessed he was all right, and thereupon took him; that she did not authorize Will Brier nor the auctioneer to warrant or guarantee the horse as first class for breeding purposes, and, if any such warranty were made, it was without her knowledge; and that the words on the note were placed there without her knowledge or consent.

[1] When the case was called for trial, the plaintiff sought by what he calls a supplemental petition to include damages for \$150 for feeding the horse. The jury found for the defendant. The plaintiff moved for a new trial and presented an affidavit that several of the jurors found for the defendant because she was a "widow woman," and that there was no question that the horse had been warranted as claimed by Mr. Jones.

It appears that when the opening statement was made plaintiff's counsel included a claim for the feed and care of the horse, and on objection the court stated that this would not be considered.

There was testimony that the auctioneer had stated that the horse was a 90 per cent. foal-getter. But a number testified that no such statement was made, but that he was proclaimed as a horse whose fluid tested 90 per cent. pure. There was abundant evidence of his worthlessness as a foal-getter. An interesting item of evidence was that the banker who acted as clerk of the sale stated

he made the indorsement on the note at the time Mr. Jones signed it; "that he would not have placed the indorsement on the note if he had not known the horse had been guaranteed, and that he absolutely knew what Mr. Jones had in mind when he [Jones] signed the note." No claim of authority to make such indorsement was even hinted at. There was convincing evidence that, regardless of any fluid test, the horse was practically inefficient.

While the feed bill might have been a proper element of damages if it had been included in the original petition (*Hostettler v. Bartholomew*, 95 Kan. 217, 147 Pac. 1134; *Cooper v. Ragsdale*, 96 Kan. 772, 153 Pac. 516), still no excuse was shown for presenting it for the first time when the case was called for trial under the guise of a "supplemental" petition, and, moreover, no showing was made on the motion for a new trial as to any evidence on that point; hence for that reason no error was committed in denying the motion. Civ. Code, § 307 (Gen. St. 1915, § 7209).

We find no error in respect to the admission or exclusion of evidence or in the instruction.

[3] Of course, jurors cannot be heard to impeach their verdict by statements that they violated their oaths as jurors, and decided for the defendant because she was a "widow woman." Things that inhere in the verdict belong to the inner sanctum are not to be spread out for the gaze of the losing party to a lawsuit, else there might never be an end to litigation.

[2] The jury evidently believed the witness who said the horse was not stated to be a 90 per cent. foal-getter, but to have a 90 per cent. pure fluid test, a thing compatible with such utter worthlessness as he seemed to have manifested, a physical defect testified to, possibly accounting for the difficulty.

At any rate, there was the usual conflict of evidence, which the jury and trial court settled in favor of the defendant, and, finding no material error, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 588)

STATE v. AVERY. (No. 24152.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Banks and banking §21—Worthless Check Act not related to the false token, bogus check, and false pretense group of crimes.

The offense created by the Worthless Check Act (Laws 1915, c. 92), making it unlawful to issue a check on a bank, knowing at the time there are no funds on deposit to meet the check on presentation, and providing punishment for

any one who willfully violates the act, is not related to the false token, bogus check, and false pretense group of crimes, the purpose of the act being to discourage overdrafts and resulting bad banking, to stop the practice of "check kiting," and generally to avert the mischief to trade, commerce, and banking which the circulation of worthless checks inflicts.

2. Banks and banking §21—Intent to defraud not an element of the offense of drawing a check without sufficient funds.

Intent to defraud and accomplishment of fraud are not elements of the offense, and are not essential to validity of the act.

3. Banks and banking §21—Constitutional law §83(3)—Worthless check act held not to sanction imprisonment for debt nor compounding a felony.

The statute does not sanction imprisonment for debt nor compounding of felony.

4. Banks and banking §21—In prosecution for passing worthless check, it was no defense that defendant told payee that he had no funds to meet check.

All the elements of the offense being present, the maker of check is not relieved from punishment by the fact he told the payee, when check was issued, he had no funds in the bank to meet it.

5. Banks and banking §21—Worthless check statutes held applicable to postdated checks.

The act applies to postdated checks.

Appeal from District Court, Pawnee County.

Frank Avery was convicted of drawing a check on a bank knowing that he had no funds on deposit to meet the check when presented, and he appeals, and from judgment quashing two counts of the information the State appeals. Judgment denying motion in arrest of judgment affirmed. Judgment sustaining motion to quash reversed, and cause remanded for further proceedings.

Cline & Cline, of Larned, for appellant.

Richard J. Hopkins, Atty. Gen., and H. S. Rogers and Richard H. Browne, both of Larned, for the State.

BURCH, J. The defendant was convicted of violating the statute prohibiting a person from drawing a check on a bank, knowing he has no funds on deposit to meet the check when presented, and appeals. Two counts of the information were quashed, and the state also appeals.

Section 1 of the statute reads as follows:

"It shall be unlawful for any person, corporation, or partnership, to draw, make, utter, issue or deliver to another any check or draft on any bank or depository for the payment of money or its equivalent, knowing, at the time of the making, drawing, uttering, or delivery of any such check or draft as aforesaid that he has no funds on deposit in or credits with such

bank or depository with which to pay such check or draft upon presentation." Laws 1915, c. 92, § 1; Gen. Stat. 1915, § 3471.

Section 2, as amended in 1917, provides a penalty for "willfully violating" any of the provisions of section 1 (Laws 1917, c. 170).

Section 3 reads as follows:

"That in any case where a prosecution is begun under this act, the defendant shall have a right, upon application made for that purpose before trial, to have said action abated by showing to the court or judge that he has had an account in said bank upon which said check or draft was drawn, thirty days next prior to the time said check or draft was delivered and that said check or draft was drawn upon said bank without intent to defraud the party receiving the same, and if the court shall so find, said action shall be abated and the defendant shall be discharged upon paying into court the amount of such check and the costs in said case." Laws 1915, c. 92, § 3; Gen. Stat. 1915, § 3473.

Another section defines the term credits; another makes the statute inapplicable in case the check be paid; and another distinguishes the statute from the false token statute and other existing laws. At the same session the Legislature passed an act which provides punishment for obtaining money or other valuable thing by cheats, frauds, and bogus checks. Laws 1915, c. 203, § 1; Gen. Stat. 1915, § 3470.

The first count of the information was based on a check to the Dodge City Wholesale Grocery Company, for \$133.44, dated August 9, 1920. The second count was based on a check to the Dodge City Wholesale Grocery Company, for \$96.57, dated September 7, 1920, and the count contained an allegation that, when the check was delivered to the payee, the defendant told the payee he had no funds on deposit to meet it. The third count was based on a check to the McCord-Kistler Mercantile Company, for \$129.04, dated November 22, 1920, but drawn and delivered to the payee on November 20, 1920. All the checks were drawn on the Farmers' State Bank of Larned.

The defendant filed a motion to quash the information, on the ground it did not state facts sufficient to constitute a public offense. The motion was overruled as to the first count, and sustained as to the second and third counts. The defendant then pleaded guilty to the first count, but moved the court to arrest judgment, on the ground the first count did not state facts sufficient to constitute a public offense.

[2] The defendant contends the criterion of guilt in criminal law is wrongful intent, and the statute does not require criminal intent in order to constitute the felony denounced. The statement is entirely too broad. The worthless check must be willfully drawn, knowing at the time there are no funds on deposit to meet it. Beyond that,

the Legislature may, for protection of the public interest, require persons to act at their peril, and may punish the doing of a forbidden act without regard to the knowledge, intention, motive, or moral turpitude of the doer. There is no constitutional objection to such legislation, the necessity for which the Legislature is authorized to determine. *State v. Brown*, 38 Kan. 390, 393, 16 Pac. 259; 16 C. J. '76-78. Whether or not the Legislature has enacted such a statute is a matter of interpretation.

[1] The defendant contends the offense of giving a worthless check is related to the false token and false pretense group of crimes, and consequently, in order to constitute a crime, the check must be given with intent to defraud, and fraud must be accomplished by procuring money or other valuable thing. That the Legislature was not adding to the list of punishable deceits and frauds is manifest from the interpretative section of the statute, and from the fact the Legislature at the same session passed the bogus check act. The purpose of the statute was to discourage overdrafts and resulting bad banking (*Saylors v. Bank*, 90 Kan. 515, 518, 163 Pac. 454) to stop the practice of "check kiting," and generally to avert the mischief to trade, commerce, and banking which the circulation of worthless checks inflicts. Although the statute tends to suppress fraud committed by the worthless check method, the evils referred to are all quite distinct from those consequent on fraud, and the statute is to be regarded as creating a new and distinct offense.

In Kentucky, the worthless check act makes the giving of such a check, with intent to defraud, a crime. In the case of *Commonwealth v. McCall*, 186 Ky. 301, 217 S. W. 109, the court distinguished the worthless check act from the statute relating to obtaining money or property by false pretense or false token, as follows:

"This section creates a new and distinct offense, the commission of which is accomplished by giving a check with the intent to defraud on a bank in which the maker knows he has not sufficient funds to pay the check, and it is not essential to constitute an offense under this section that any false representation, statement or pretense should be made by the maker of the check concerning the state of his account in the bank, on which the check is given, or in connection with the transaction. No questions need be asked by the person to whom the check is given or information volunteered by the person giving the check. The mere giving of such a check with the intent to defraud, will constitute the offense, and the intent to defraud will be present whenever money, property or other thing of value is parted with by the person to whom the check is given." 186 Ky. 305, 217 S. W. 110.

In the case of *State v. Miller*, 74 Kan. 667, 87 Pac. 723, cited by the defendant, the court

concluded, from the title of the act and the language of the section under consideration, that the statute forbidding sale of mortgaged property without written consent of the mortgagee, contemplated intent to defraud. In the recent case of *State v. Taylor* (S. D.) 183 N. W. 998 (decision not yet officially reported), the legislative intention was indicated by a change of definition. In that case, the substance of the charge was that the defendant willfully, knowingly, unlawfully, and feloniously obtained money, by giving a check on a bank which he knew did not exist. The Supreme Court of South Dakota held the words "willfully, knowingly, unlawfully, and feloniously," were equivalent in meaning to "designedly," and said:

"The crime of false pretenses, as defined by section 645 of the Revised Penal Code 1903, was changed by section 4249, Code of 1919, by omission of the words 'with intent to cheat and defraud.' The new section, so far as material here, reads:

"Every person who designedly, by color or aid of any false token or writing, * * * obtains from any person any money or property, is punishable," etc.

"Under this section a specific allegation that the act was done 'with intent to cheat or defraud' is not required, and such intent is not a necessary element of the crime defined by this statute. The statute requires only that the act shall have been done 'designedly.'" 183 N. W. 999.

In this instance it seems clear that fraudulent intent was purposely omitted from the enumeration of elements of the crime.

[3] The defendant contends the statute is in conflict with section 16 of the Bill of Rights, which forbids imprisonment for debt except in case of fraud. It is said the check was given to pay an acknowledged debt, long past due, and neither debtor nor creditor made or lost anything, but the debtor must be imprisoned because the debt was not discharged by the check. The information does not disclose the consideration for the check. It may be conceded, however, the statute applies to a transaction of the character described. Nevertheless, the statute does not impose imprisonment for debt. This subject was considered by the Supreme Court of Georgia, in the case of *Hollis v. State* (Ga. Sup.) 108 S. E. 783 (decision not yet officially reported). The Constitution of the state of Georgia declares "there shall be no imprisonment for debt." The Worthless Check Act of 1919 resembles the statute of this state, except that the check must be drawn with intent to defraud. The court said the drawer of the check is not imprisoned for debt, but for fraud, and cited the case of *Smith v. State*, 141 Ga. 482, 81 S. E. 220, Ann. Cas. 1915C, 999. In the cited case, the court had under consideration the act designed to punish fraudulent practices in obtaining board, lodging, and other accommodation at hotels,

inns, boarding houses, and eating houses, and held imprisonment was not imposed for debt, but for the forbidden practices. Under the statute of this state, the offense does not consist in nonpayment of debt, but in resorting to a practice which the Legislature regarded as demoralizing to business.

[4] The second count of the information was not vitiated by the allegation that, when the check was given, the defendant told the payee he had no funds in the bank to meet it. The payee was not deceived, but deception of the payee of a worthless check is not the primary evil which the statute was designed to frustrate.

[5] The third count of the information was based on a postdated check. The specific evils which the statute was designed to remedy follow from the giving of a worthless postdated check, and no reason is apparent for excepting such a check from operation of the statute if, when it is given, the drawer knows it is worthless for want of funds.

In the case of *Neidlinger v. State*, 17 Ga. App. 811, 88 S. E. 687, the court had under consideration the Worthless Check Act of 1914 (Acts 1914, p. 86) of the state of Georgia, which read as follows:

"Any person who shall draw and utter any check, draft, or order for present consideration upon a bank, person, firm or corporation with which such drawer has not at the time sufficient funds to meet such check, draft, or order, and shall thereby obtain from another, money or other thing of value, or induce such person to postpone any remedy he may have against such drawer, shall be guilty of a misdemeanor and upon conviction shall be punished as prescribed in section 1065, of the Code; provided, that if such drawer shall deposit with such drawee of such paper, within thirty days thereafter, funds sufficient to meet such check, draft, or order together with interest which may have accrued, there shall be no prosecution under the provisions of this act." 17 Ga. App. 812, 88 S. E. 687.

The court held the act was not intended to cover postdated checks. The court reasoned as follows: A fraudulent intent must exist and be operative before the giving of a worthless check could constitute a crime; the statute penalized conduct similar to forms of cheating and swindling, and consequently the court should assume the elements of the offense were similar to those of cheating and swindling; otherwise, the statute would simply afford means of collecting debts through the instrumentality of the criminal law; one who knowingly takes a postdated check for an article of value relies, not on funds in bank to meet the check, but on ability of the drawer to have funds on deposit when the check is presented; there is an implication that the drawer does not have present funds on which to draw; and the payee is apprised that the paper constitutes no more than a promise to pay in the future.

The major premise of this argument is unsound, and, if the statute were passed as the result of activities of bankers and business men's associations, as in this and other states, the court failed to view the statute from their standpoint. The offense is not committed against the payee of the check, but consists in the public nuisance resulting from the practice of putting worthless checks in circulation.

In 1919, the Legislature of Georgia passed a new worthless check act which by express declaration made intent to defraud an element of the offense. In the case of *Strickland v. State* (Ga. App.) 110 S. E. 39, the maker of the check told the payee he did not have money to spare, and wished to date the check ahead. In holding the maker not subject to prosecution, the Court of Appeals followed the *Neldlinger* Case.

The defendant contends the statute is bad because it sanctions compounding of felony. Use of the expression "compounding of felony" is fallacious in this connection. The Legislature could affix such punishment, mild or severe, as it desired, and could provide for relief from prosecution on such terms as it desired without offending against any guaranty which the drawer of a worthless check is authorized to invoke.

In the case of *Commonwealth v. McCall*, 186 Ky. 301, 304, 217 S. W. 109, the court had under consideration the Kentucky "cold-check" law, which contains this provision:

"Provided, however, that if the person who makes, issues, utters, or delivers any such check, draft, or order, shall pay the same within twenty days from the time he receives actual notice, verbal or written, of the dishonor of such check, draft, or order, he shall not be prosecuted under this section, and any prosecution that may have been instituted within the time above mentioned, shall, if payment of said check be made as aforesaid, be dismissed at the cost of defendant."

This provision was interpreted as follows:

"It is clear under this statute, in fact so provided, that if the maker of the check 'shall pay the same within twenty days from the time he receives actual notice, verbal or written, of the dishonor,' he cannot be punished for giving the check, and that if any prosecution has been instituted before the expiration of the twenty days it shall be dismissed if the check within that time is paid. But the maker of the check cannot save himself from the penalty of the statute by returning property received on the faith of it, or any property or other thing of value except money, in the full amount of the check. * * *

"Nothing short of this will acquit the maker, no matter what he and the payee have agreed to. Their agreement to settle the matter in any other way than as provided in the statute will not be allowed to stay the prosecution or prevent the enforcement of the penalty." 186 Ky. 306, 307, 217 S. W. 111.

The worthless check act of Florida provides punishment for a person who gives a worthless check, who shall not, within 24 hours after written notice of presentation and nonpayment, make full and complete restitution by returning the consideration received for the check. In the case of *McQuagge v. State*, 80 Fla. 768, 87 South. 60, the Supreme Court of Florida held this statute to be constitutional, without, however, stating the objections to constitutionality or the reasons for the decision.

The judgment of the district court denying the motion in arrest of judgment is affirmed. The judgment sustaining the motion to quash counts 2 and 3 of the information is reversed, and the cause is remanded for further proceedings.

All the Justices concurring.

(111 Kan. 730)

HOLLINGSWORTH v. BERRY et al.
(No. 23863.)

(Supreme Court of Kansas. July 8, 1922.)

(Syllabus by the Court.)

Master and servant §297(2)—Special findings held not inconsistent with verdict.

In an action by a servant against his master for damages for personal injury caused by the negligence of the latter, it is not error for the court to deny a motion for judgment on the answers to special questions submitted to the jury where those answers are not inconsistent with the general verdict.

Appeal from District Court, Montgomery County.

Action by Ray Hollingsworth against George D. Berry and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Thos. E. Wagstaff, of Independence, for appellants.

Chas. D. Welch, of Coffeyville, for appellee.

MARSHALL, J. The defendants appeal from a judgment against them for damages sustained by the plaintiff on account of personal injuries received by him while working for the defendants in drilling an oil well.

The petition alleged that the defendants were negligent in giving him an unsafe place in which to work; that the defendant Herman H. Fisher, one of the employers of the plaintiff, was working with the latter; and that Fisher was guilty of negligence in the manner in which he handled a sledge hammer with which he was working. The defendants pleaded contributory negligence on

the part of the plaintiff and the assumption of risk by him.

Trial was by a jury, and verdict was rendered for the plaintiff. Special questions were answered as follows:

"Q. 1. Do you find that the defendant, Fisher, was in charge of and directing the work at and prior to the time of plaintiff's injury? A. Yes.

"Q. 2. Do you find that the tools were caused to fall on account of the striking of the chain which held the brake? A. Yes.

"Q. 3. If the above question is answered 'Yes,' please state who held the sledge at the time it struck the chain. A. Fisher.

"Q. 4. Do you find that the defendant Fisher by the exercise of reasonable care and prudence could have prevented said chain from being struck with the sledge? A. Yes.

"Q. 5. Do you find that the place where plaintiff was working at the time of his injury was a safe place to work? A. No.

"Q. 6. Do you find that the defendants by the exercise of reasonable care and prudence could have rendered said place a safe place to work? A. Yes.

"Q. 7. Do you find that the defendants used reasonable care to adopt a safe method of doing the work on which Ray Hollingsworth was engaged at the time of his injury? A. No.

"Q. 8. How much time do you find that plaintiff lost by reason of his injury? A. Don't know.

"Q. 9. If you find that Ray Hollingsworth was guilty of any negligence which contributed to his injury, please set out and describe his said negligence. A. No.

"First. Do you find plaintiff was an experienced tool dresser at the time he was injured? A. Yes.

"Second. Do you find that the plaintiff knew the tools were suspended above the casing while plaintiff was assisting defendant Herman H. Fisher to set said casing? A. Yes.

"Third. Do you find that it was the usual custom established by the defendants to hoist the tools above the casing and hold them there while ripping or cutting off the casing at the top of the well? A. Yes.

"Fourth. Do you find it was the customary and usual method in the oil field to suspend the tools above while cutting the casing beneath the same? A. Yes.

"Fifth. Do you find that the plaintiff was perfectly familiar with the operation of a Lidecker drilling machine at the time of his injury? A. No.

"Sixth. Do you find that the injuries plaintiff sustained were the result of an unavoidable accident? A. No.

"Seventh. If you answer question No. 6 in the negative, then do you find from the evidence that the plaintiff knew the brake was so tightened down by the chain that if the chain was struck suddenly the machinery would be released and the tools fall? A. Yes.

"Eighth. If you answer question No. 6 in the negative, state whether plaintiff without direction of the defendants tightened down the chain attached to the brake. A. Yes."

The defendants moved for judgment in their favor on the answers to the special questions. That motion was denied, and judgment was rendered for the plaintiff on the verdict. There was no motion for a new trial. All questions concerning the evidence or instructions are therefore eliminated. No question concerning the pleadings is argued. Nothing remains for discussion except the order denying the motion for judgment on the special findings of the jury.

The rule is:

"Where the general verdict of a jury and their special findings of fact can be harmonized and made to agree by taking into consideration the entire record of the case, and construing the same liberally for that purpose, it is the duty of the court to so harmonize them." *Bevens v. Smith*, 42 Kan. 250, 21 Pac. 1064.

See, also, *Osburn v. Ry. Co.*, 75 Kan. 746, 90 Pac. 289; *Lewellen v. Gas Co.*, 85 Kan. 117, 116 Pac. 221; *McClain v. Railway Co.*, 89 Kan. 24, 28, 130 Pac. 646, Ann. Cas. 1914C, 699; *Tarin v. Railway Co.*, 98 Kan. 605, 608, 158 Pac. 874; *Burzio v. Railway Co.*, 102 Kan. 287, 292, 171 Pac. 351, L. R. A. 1918C, 997.

In *Osburn v. Railway Co.*, 75 Kan. 746, 90 Pac. 289, it was said:

"It is error for a court to set aside a general verdict and enter judgment on the special findings, unless the special findings compel such action. Where it is possible to harmonize the special findings with the general verdict the latter is controlling." *Young v. Railway Co.*, 82 Kan. 332, 337, 106 Pac. 99.

See, also, *Wurtenberger v. Railway Co.*, 68 Kan. 642, 75 Pac. 1049; *Railway Co. v. Morris*, 76 Kan. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100; *Barnett v. Cement Co.*, 91 Kan. 719, 725, 139 Pac. 484; *Whetzell v. Railway Co.*, 105 Kan. 289, 182 Pac. 409.

From *Emporia v. Kowalskia*, 66 Kan. 64, 71 Pac. 232; *Plaster Co. v. Reedy*, 74 Kan. 57, 85 Pac. 824; *Railway Co. v. Green*, 75 Kan. 504, 89 Pac. 1042; *Railway Co. v. Loosley*, 76 Kan. 103, 113, 90 Pac. 990; and *Barnett v. Cement Co.*, 91 Kan. 719, 725, 139 Pac. 484—this rule may be deduced: That a servant does not assume the risk of injury from the master's negligence unknown to the servant. In the present case the injury was sustained at the time the negligent act occurred.

The jury specifically found that the plaintiff was not guilty of any negligence which contributed to his injury. The answers to the questions did not show that the plaintiff assumed the risk of injury to him and were not inconsistent with the general verdict.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 755)

GILLET et al. v. ELMHURST INV. CO.
et al.**SAME v. ORLANDO PETROLEUM CO.**
et al.

(Nos. 23874, 23875.)

(Supreme Court of Kansas. July 8, 1922.)

*(Syllabus by the Court.)***Action** \Rightarrow 50(3)—For violation of covenant to fully develop oil lease and to render stipulated oil royalty not misjoinder.

The lessor in an oil and gas lease assigned an undivided one-tenth interest in the lease to each of his seven children. The lessee assigned to operating companies. The implied covenants of the lease, to develop fully and with diligence the oil resources of the land, and to prevent the land from being drained of oil by wells drilled on adjoining land, were broken, and the express covenant to render a stipulated oil royalty was broken. The lessor and his assignees joined in an action for damages against the lessee and his assignees. The district court sustained a demurrer to the petition, on the ground of misjoinder of causes of action. *Held*, the district court erred.

Appeal from District Court, Marion County.

Actions by Jules Gillet and others against the Elmhurst Investment Company and others and against the Orlando Petroleum Company and others. From dismissal of the actions, plaintiffs appeal. Reversed and remanded, with directions.

Madden & Madden, of Wichita, for appellants.

Carpenter & Carpenter, of Marion, and Godard & Myers, of Topeka, for appellees.

BURCH, J. These actions were commenced to recover damages for breach of the covenants embraced in an oil lease. Demurrers to the petitions were sustained, on the sole ground of misjoinder of causes of action. The plaintiff appeals.

The land covered by lease is the south half of the southeast quarter and the south half of the southwest quarter of a described section. The lease was given by the owner, Jules Gillet, and his wife, Rose Gillet, to S. W. Forrester. So far as it applied to the east 80 acres, Forrester's interest in the lease came into the hands of the Elmhurst Investment Company, the principal defendant in case No. 23874. So far as it applied to the west 80 acres, Forrester's interest in the lease came into the hands of the Orlando Petroleum Company, the principal defendant in case No. 23875. The petitions alleged these companies were under the same officers, operated in conjunction with each other under the same managing representative, and controlled the leases on the land

north, south, and west of the Forrester lease. A well was drilled on the west 80 acres, which produced 1,000 barrels of oil per day. The lessors then deeded to each one of their seven children an undivided one-eighth of the mineral in place on the two tracts, subject, however, to the Forrester lease, and by the same instrument fully vested in each grantee an undivided one-tenth interest in the Forrester lease, its rents and royalties, to the same extent as if each grantee were lessor. The petitions alleged failure to deliver oil produced and saved, inexcusable waste of produced oil, and calculated waste by the Elmhurst and Orlando Companies of stores of oil in the ground, by refraining from caring for and operating drilled wells, and by refraining from drilling wells necessary to prevent the land from being drained by wells of great capacity outside its borders. The lessor and his assignees joined as plaintiffs. The court held the petition stated a cause of action, but held several causes of action were improperly joined. The plaintiffs asked leave to file separate petitions, each one stating a single cause of action, but the court would not permit, and dismissed the actions at the cost of the plaintiffs.

The joinder did not consist in uniting several causes of action different in nature, unrelated to each other, and affecting the parties in different ways, but in the joining of several plaintiffs in presenting a common cause of action, for relief on account of a common injury, measured by damages in a common sum, in which each plaintiff had a share; and it would be a reproach to our system of procedure if it required going through the maneuvers of bringing eight separate lawsuits, with eight attendant cost bills, to establish the same state of facts before eight juries, at eight trials, so that each plaintiff might receive his proportionate share of the damages which the defendants caused.

The Forrester lease was given, as it stated, for the sole purpose of drilling and operating for and producing oil. The lessee impliedly covenanted that he would fully develop the oil resources of the land with diligence, and impliedly covenanted that he would prevent escape of oil from the land; by drilling a sufficient number of wells to offset those drilled by others outside the lease boundaries. *Hawerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47, 34 L. R. A. (N. S.) 34; 1 Thornton, *The Law of Oil and Gas* (3d Ed.) p. 156. The lessee also covenanted to render a stipulated oil royalty, and the case is one for damages for breach of covenant.

Tenants in common, by acquisition of undivided interests from a lessor, stand on the same footing as the lessor. Assignment of undivided interests in the lease by the lessor did not split the covenants; they remained

entire. Breach of the covenants as to one tenant in common with the lessor was a breach as to all; they were all equally affected by breach, and in such cases all may join, although the damages recovered may be apportioned between them. *Cantwell v. Moore*, 44 Ill. App. 656; *Wall and another v. Hinds*, 4 Gray (70 Mass.) 256, 64 Am. Dec. 64; *Tylee v. McLean*, 10 Wend. (N. Y.) 373; *Marshall v. Moseley*, 21 N. Y. 280.

In the Massachusetts case the head note reads as follows:

"Tenants in common may maintain a joint action for the rent due under a sealed lease of the joint estate, all the covenants in which are with them jointly, although by an agreement annexed to the lease, and made part thereof, it is stipulated that half of the rent shall be paid to each." 4 Gray (70 Mass.) 256, 64 Am. Dec. 64.

The result is the case is covered precisely by section 34 of the Civil Code, which reads:

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article." Gen. Stat. 1915, § 6924.

No other provision of the article is pertinent to the present controversy.

The plaintiffs cite the cases of *Palmer v. Waddell*, 22 Kan. 352, and *Jeffers v. Forbes*, 28 Kan. 174. The defendants assert the decisions in those cases are favorable to them.

In *Palmer v. Waddell*, John, John W., and James W. Palmer, sued Waddell for damages resulting from the flooding of land and the destruction of crops consequent on diversion of a water course, and for equitable relief by way of injunction and abatement of nuisance. It was held each plaintiff should sue separately for damage to his own crops; all might join for abatement of nuisance common to several tracts of land owned individually. The distinction was between separate interests as the subjects of action leading to separate relief, and common causes of action for a common injury redressible by common relief. The distinction was made clear by the decision in *Jeffers v. Forbes*. In that case, landowners by inheritance from the same ancestor executed separate deeds to a grantee who procured all the deeds by fraud. It was held the grantors could not join in an action to set aside the deeds. There was no unity of cause of action or in the relief demanded. The fraud on one induced a separate deed of his separate interest in the land, but did not injure any of the others, and no one was interested in having the deed of any one else set aside. In this instance, the plaintiffs were authorized to join, just as the Palmers were authorized to join in suing Waddell for damages resulting from flooding the crop of wheat which the Palmers owned in common.

The defendants suggest a misjoinder of causes of action because of diversity of interest on the part of the defendants. Forrester is liable on the covenants, because he made them. Other defendants are liable on the covenants, because they stand in Forrester's shoes. Other subjects discussed by the defendants are not open to consideration, because the defendants did not appeal.

The judgment of the district court is reversed, and the causes are remanded, with direction to overrule the demurrers.

All the Justices concurring.

(111 Kan. 431)

GRILLEY v. MYERS. (No. 23809.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Contracts ¶175(3)—In action for damages for breach, evidence held to support allegations of petition.

The evidence examined, and found sufficient to support the allegations of the petition touching the contract sued on, to thrash the plaintiff's wheat as soon as cut.

2. Damages ¶189—In action for breach of contract, evidence held to support verdict as to amount of damages.

The evidence is found to support the verdict as to the amount of damages stated therein.

3. Contracts ¶90—In action for breach of alleged contract consideration and acceptance held fairly established.

Consideration for the alleged contract, and acceptance thereof, held to be fairly established.

4. Damages ¶189—In action for breach, evidence held sufficient basis for damages awarded.

Sufficient basis appears for the damages awarded by the jury.

5. Appeal and error ¶1050(1) — Witness' statement of conclusions held not erroneously admitted, where he had previously given conversations from which they were drawn.

No material error appears touching the admission of evidence.

Appeal from District Court, Wyandotte County.

Action by H. V. Grilley against Charles Myers. Judgment for plaintiff, and defendant appeals. Affirmed.

J. O. Emerson and James F. Getty, both of Kansas City, for appellant.

Carson & Miller, of Kansas City, for appellee.

WEST, J. The defendant appeals from a judgment recovered against him for damages for failure to thresh the plaintiff's wheat.

The plaintiff lived in the north bottoms near Kansas City, Kan., and rented wheat land there, and the defendant owned a threshing machine. It appears that in these bottoms the soil is very rich, and that after the wheat is put in shock, unless speedily threshed, dampness and growth of heavy vines usually cause considerable damage.

The plaintiff alleged that in the summer of 1918 he entered into an oral contract with the defendant that as soon as the plaintiff's wheat was cut and ready for threshing the defendant would immediately begin to thresh the same and complete the work without delay. A résumé of this agreement was given by the plaintiff on the stand; that the defendant asked him if there was any ground in the bottoms that he could get:

"Now, if I could get ground down there, I would bring my thresher down there just as soon as the last bundle was cut, and would thresh it." So I talked with Mr. Reimer in regard to his field. The next day we made a deal. I talked to Mr. Reimer about it, and Mr. Reimer and I came to a conclusion as to what we would do, which was afterwards presented to Mr. Myers. * * * Mr. Reimer, Mr. Myers, and myself afterwards had a conversation with reference to that piece of land Mr. Reimer and I rented from Mr. Stanley. * * * I took Mr. Stanley out there, and Mr. Myers told us if we would turn him over this ground to put in wheat, as soon as the last bundle was cut there he would be there with his machine to thresh it. He told me that if I would turn over this ground he would come and thresh my grain as soon as the last bundle was cut, which I did, between 40 and 50 acres."

He further testified that he finished cutting his wheat in July, shocked it well, but it was tangled and was heavy, well-grained wheat; that he had about 115 acres; that it was left shocked according to the custom there; that the defendant failed to come and thresh it, and it turned out that he had moved away, and it was claimed he had sold his machine. The plaintiff stated he made an effort to get his threshing done; that he knew of one other machine in that part of the country, but could not get it; finally another man came with the same machine the defendant had had and did the work; that by that time the wheat was growing over with vines, and there had been rains and heavy dews; that the wheat had begun to sprout, and it was very wet, and the price was greatly diminished. He finally got 1,200 bushels out of the crop, and he had 60 bushels too wet to sell to the elevator. He testified to renting from Mr. Stanley 40 acres of the land, which was a part of the land the defendant afterwards put in wheat.

Henry Reimer testified that he had been growing wheat in these bottoms for the last few years, and was present when some conversation was had between the parties in the presence of others about threshing the

crop in the season in 1919. Myers said he would like to have some wheat land, and witness and Mr. Grilley talked the matter over and came to an agreement:

"We got together over there by the threshing machine. When Mr. Myers was present, Mr. Myers, Mr. Grilley, and I talked over the matter of the fall threshing of 1919. * * * And Myers said then that if he would get that land, we sure wouldn't have to wait for a threshing machine—when the last bundle was cut he would be right down there and thresh for us. He got the land. I had 50 acres of the land rented. I would not have given up the land if Mr. Myers had not made the agreement to come and thresh immediately as soon as the last shock was cut. Mr. Myers got the land with the consent of Mr. Stanley, who was present."

Witness said that he rented 50 acres from Stanley, the same 50 acres Myers put in wheat.

"I rented that 50 acres of Stanley some time when we were cutting wheat in July. I rented it from him myself, and I am the man that had the 50 acres that was finally given up to Mr. Myers. Stanley rented it to me.

"Mr. Grilley also had some land down there that he rented from Stanley. Mr. Grilley rented about 43 or 45 acres from Mr. Stanley; I don't know the exact number. Both what I had and what Mr. Grilley had was turned over to Mr. Myers."

A. C. Bates testified among other things that—

He helped work in this wheat after it was shocked; that he and several others worked together. "When we first started, the vines was all that was necessary to be tore off. The wheat was in fairly good enough shape to thresh then. After the rain come, and the wheat got to growing, of course, it grewed and matted together. Then we had to take and tear the shocks all apart, and scatter them around, so the sun would dry them out. We put in about two or three days doing this; probably four days. The threshing was going on while we were doing this. Monday morning we got started to threshing, and we just threshed about three hours, and that was when the rain come; and from that time then when we got started threshing again it was between seven and eight days. I saw the first wheat that was threshed on that first morning. It was in good shape. * * *

"I observed the wheat after it was threshed and all excepting what they threshed the first morning that the machine started on Mr. Grilley's wheat was all wet wheat and sprouted. * * * That was all damp and sprouted. There was anyway two-thirds of the grain sprouted. This is true of all the wheat except the wheat that was threshed the first two hours."

An elevator employee testified that he made a record showing the grade of plaintiff's wheat which tested 55 pounds to the bushel, moisture 12.2, graded 4 on account of test weight; that 55 pounds to a bushel

represents a low quality of wheat; 4,720 pounds of Grilley's wheat graded No. 4 and brought \$2.06; the government price on No. 1 was \$2.18, No. 2, \$2.15, and No. 3, \$2.12.

Jack Adair testified that he helped get the Grilley wheat ready for threshing, and when they took the vines off the wheat it had sprouted and the wheat was damp all the way down through the shock. Some of it would not go through the machine, and they had to throw out one or two or three bundles out of every shock.

J. P. Jobe testified that—

He helped through the threshing of the Grilley wheat, which was four or five weeks after the cutting was finished; that when the threshing was begun the wheat was in pretty fair shape, and then came the rain, and it began to grow and sprout. "The wheat was wet and sprouted, and it choked up the separator. They would have to pull the straw out at the back end of the machine. I noticed that the wheat was being blown out through the blower; the wheat went through the blower and choked it." He judged between a third and a half of the wheat was wasted by the bundles thrown away.

The plaintiff's son swore to substantially the same matter.

Mr. Stanley who had charge of the land testified about the conversation touching the renting of this land to the defendant; that Myers and Grilley said they thought it would be the best for everybody if they could get this threshing machine down there first, and the witness said they made arrangements to rent the land to Mr. Myers and Kopfer.

"Mr. Grilley and Mr. Reimer told me that Mr. Myers and his engineer Kopfer wanted to rent some wheat land, and they, Reimer and Grilley, would relinquish the land I had rented to them to Myers and Kopfer on condition that Myers would thresh there first next year. * * * I agreed on behalf of F. N. Clark to rent that available wheat land to Mr. Myers and Mr. Kopfer on the basis of one-third of the grain. * * *

On cross-examination, he testified:

"During June or July, 1918, I rented the land to Reimer and Grilley that Kopfer and Myers afterwards put in."

The defendant assigns as error the admission of incompetent evidence, the exclusion of competent evidence, the overruling of the demurrer to the plaintiff's evidence, the refusal of certain instructions, the giving of others, and the denial of a new trial.

[1] It is first contended in the brief that no valid contract was proved; that the arrangement testified to was too uncertain and indefinite to amount to a binding agreement, and authorities are cited touching the certainty and definiteness necessary to constitute a valid contract. We find no difficulty, however, in believing from the testimony that the defendant wanted some of this

bottom land to put in wheat, and agreed with the plaintiff if he would rent him something like 40 acres he would begin threshing as soon as the wheat was cut.

It is argued that there was no acceptance of the provisions shown, but the testimony indicates that the proposition came from the defendant, and was accepted by the plaintiff, and that an arrangement was made by which something like 40 acres of plaintiff's leased land was turned over to the defendant, so that he might sow it in wheat.

The trouble seems to be that after getting the land the defendant sold his machine, and apparently went out of the threshing business, paying no attention to the contract by virtue of which he had secured the land.

[3] It is further contended that no consideration passed from the plaintiff to the defendant to sustain the alleged contract, but one of the primer principles of contract law is that a promise is a good consideration for another promise, and the plaintiff testified that the defendant promised to thresh his wheat promptly, in consideration of which the plaintiff promised to turn the land over to him, and did so.

Some difficulty is professed to be found in giving proper significance to the phrase "turn him over the land," but the testimony made it quite clear that after the plaintiff had rented certain land he allowed the defendant to step into his shoes as lessee; thereby "turning it over" to him, and allowed him to sow wheat as plaintiff intended to do.

It is further suggested that if the plaintiff was to transfer the right to the use of the land for the ensuing year he had no assignable or transferable interest, and in support of this suggestion it is pointed out that the defendant proceeded to lease the land of Mr. Stanley, agent of the owner. Very true, but Mr. Stanley testified that it was in pursuance of the agreement on the part of the plaintiff that the land which he had already rented to Grilley and Reimer should be turned over to the defendant.

[2, 4] It is argued that there is no evidential basis for the amount of damages assessed. It is pointed out that one of the plaintiff's claims was for \$2,616, or one-half the wheat worth \$2.18, and another that about 1,200 bushels were damaged to the amount of \$340, and it is argued that the \$1,800 returned must have been based, or partly based, upon the first claim. From the evidence, however, the jury might well have concluded that had the contract been lived up to, and the threshing done as soon as the wheat was cut, a very different yield and price would have resulted to the plaintiff, and the testimony touching the result of the delay, the grade of the wheat, its dampness, and its price afforded substantial basis for the verdict returned.

[5] The objections to certain rulings on

evidence have been examined and considered, and we find no materially prejudicial error therein. The complaint that Mr. Stanley was permitted to state that he had rented the land to Myers that he had previously rented to the plaintiff and Reimer who "relinquished" it are not serious in view of the fact that he had already gone all over this matter, giving in substance the conversations from which these conclusions as to "renting" and "relinquishing" are fairly to be drawn.

Finding no error affecting the substantial rights of the defendant, the judgment is affirmed.

All the Justices concurring.

(111 Kan. 770)

MOODY v. WICKERSHAM. (No. 23887.)

(Supreme Court of Kansas. July 8, 1922.)

(Syllabus by the Court.)

1. Limitation of actions §121(2) — Tardy amended petition, merely eliminating parties, held not to affect limitation.

The second amended petition, filed in time, made the defendant a party, and charged him substantially as the third amended petition did. Held, that although such third amended petition was not filed till more than two years after the injury complained of, it was a mere elimination of other parties defendant, and did not materially change the charge against the remaining defendant, and hence the action was not barred.

2. Health §18—Health officer held liable for treatment to quarantine patient.

The defendant, a local health officer, in quarantining a patient whom a physician had pronounced suffering from smallpox, was acting in a ministerial and not in a judicial or quasi judicial capacity, and was liable for damages caused such patient by his treatment.

3. Record shows no material trial error.

The record furnishes no showing of material error touching instructions refused or given, in the conduct of the court, or in reaching the verdict.

4. Health §18—\$50 actual, and \$1,162.50 punitive damages held properly awarded.

Actual damages were shown, and punitive damages were properly awarded.

5. Health §7(3)—Officers, quarantining patients in times of epidemics, must be reasonably humane and considerate.

Health officers, in quarantining patients in time of smallpox or other epidemics, must act in a reasonably humane and considerate manner.

Appeal from District Court, Montgomery County.

Action by Elizabeth G. Moody against E. C. Wickersham. From judgment for plaintiff, defendant appeals. Affirmed.

Thos. E. Wagstaff and Chester Stevens, both of Independence, and E. D. McKeever, of Topeka, for appellant.

Lamb & Reed, of Coffeyville, for appellee.

WEST, J. The plaintiff was a housekeeper for the Carl Leon Hotel in Independence, Kan. Prior to February 14, 1918, she had been sick, and on the 13th she began to break out, and on the morning of the 14th the manager said she had better call a physician. Dr. Aldrich was called, and pronounced the case smallpox, and said he would have to see the health officer, and sent for or called the defendant, Dr. Wickersham, secretary of the board of health and acting health officer.

The plaintiff's story, in brief, was that Dr. Wickersham came to the hotel and took her away, giving her no reason, but said he would give her 15 minutes in which to get ready. He took her in an open car on a very cold day, and in passing through the cemetery he said:

"You had better pick you a headstone, cause here's where I am going to take you next."

He stopped at the door of a small cabin:

"I stepped up to the door, and there sat this stranger in the room; I just felt I couldn't go in. I said to Dr. Wickersham: 'You can't leave me here. I just couldn't stay.' The condition of the house was dirty and nasty, and I told him I couldn't sleep in those beds; that they were too dirty. The beds were so dirty that they were blue."

He told her she could clean it up if she wanted to, but she had nothing to clean with. There was a box for a table, off which they ate dinner, a little coal stove to cook on, and two beds in the one-room shanty, sitting end to end. The house was boarded up and down, and no paper on the walls; the windows were small.

"We put quilts up around the bed to keep the wind out because the boards did not fit together, and there were cracks. The wind was awful cold, and we burned coal. The floor was a naked floor, made out of big boards and there was no foundation under the house."

A very unkempt man, weighing about 180 pounds, was in charge of the shanty, and with this man the plaintiff was left alone.

"There were no conveniences to answer the calls of nature. The man went out. Of course I worried and fretted, and that night I had a high fever, and I wasn't up much. The man carried the slop jar out for me."

When the plaintiff told the doctor she was afraid she would catch cold, as she was used to steam heat, he turned to the man and told him that she had come from the hotel where she expected it to be a hundred. There were no screens or curtains between the beds, and there the plaintiff was left, and at night a

nurse came and took care of her until she was removed.

"I suffered very severely with the cold. Dr. Wickersham never talked kind to me while I was there. He spoke harsh. He talked gruff and short.

"The nurse turned the pillow alip wrong side out, and I put my apron over so I wouldn't have to breathe the dirt; I undressed and went to bed; the nurse went to bed too, and we slept together, although I didn't sleep a bit; the nurse slept, but I was afraid there was some kind of a germ, disease or louse or itch or something in the bed. * * *

"I stayed at this place three days. The doctor came out quite late in the evening, and said he would take me to a better place; at that time I was broken out pretty bad and was sick, and felt awfully bad and had a high fever. I lay on the bed all the time, but did not go to bed because I was afraid to; it was so dirty."

After three days Dr. Wickersham came and took her in the same car that she had been brought to the shanty in, a distance of about 14 blocks to a home on another street. She got very cold in the chilly wind which prevailed. The people with whom she was left said they could not keep her, but the doctor went away and left her there, where she chilled all the rest of the evening. The people did take care of her, however, although she was for much of the time for several days in a sinking condition. Before her sickness she had been earning \$50 a month.

The defendant's version of the affair was that he diagnosed the plaintiff's case as smallpox and told her she would have to be isolated and to get ready as quickly as she could:

"I went back right away, and she was ready; she was dressed warmly. I took her out to the pesthouse in my automobile. It was cold; the top was up, but the curtains were not on. She was very patient going out, and I jocularly said, 'Well, now, here is the cemetery right handy if anything happens.' She laughed. When we got to the pesthouse she looked very much awe-stricken and displeased. The place was not sanitary; it was very crude. I knew of no other place to segregate people having contagious diseases. * * * At the time I took her to the pesthouse, I told her I would remove her to a better place as soon as one could be obtained. At the time she was removed from the pesthouse she was in the pustular stage; * * * she had secondary fever. The ordinary and usual course of smallpox includes sinking spells; the respiration is diminished; the heart action is weakened; the pulse is more rapid; and the patient is in a condition of lassitude."

Alice Butler testified that she went out to the pesthouse on the evening of the 14th:

"The pesthouse was dirty. The only occupants were a man and the plaintiff. The man was a gentleman, and treated us all right. The

day I went out material was sent for a curtain, and I sewed it and the man put it up. The day the plaintiff was taken from the pesthouse it was cold. I had been at the pesthouse along in the summer. The beds and pillowcases and blankets and towels were still there when the plaintiff was quarantined. The boards on the walls were wide enough apart that you could put your fingers through. In the summer there was some paper on the walls, but the wind had blown it off. I hung up a blanket or comforter to keep it off."

The jury returned a verdict in favor of the plaintiff for \$1,212.50, and by their answers to special questions said the defendant did not act in good faith; that he was not considerate towards her at all times in removing her from the hotel to the pesthouse and from there to the Smith home; that she suffered unusual inconvenience, and that the defendant was negligent towards her; that the negligence consisted of improper conveniences and being confined with a man alone for 12 hours in an unsanitary pesthouse. They allowed her \$25 for pain and suffering, \$25 for loss of time, and \$1,162.50 for punitive damages.

[1] The defendant appeals from the judgment, his principal complaint being that the court erred in giving and refusing instructions, in submitting the question of punitive damages, and in denying a new trial, one ground on which it was asked being that the jury reached the verdict by the quotient method. It is also argued that the action was barred by the two-year statute of limitation, and hence the demurrer to the evidence should have been sustained. The injury complained of occurred in February, 1918. On the 20th of the following April the plaintiff sued the city of Independence. A demurrer was sustained to the petition, and an amended petition was filed December 12, 1918, making the city and Dr. Wickersham defendants. A demurrer being sustained to this pleading, a second amended petition was filed July 15, 1919, joining with the city the board of county commissioners and the defendant, Wickersham. Both of these pleadings told practically the same story about the conduct of the health officer as was contained in the final petition which was filed September 8, 1920, making El C. Wickersham the sole defendant. The second amended petition alleged, among other things, that Wickersham acted under the general direction of the board of county commissioners as the local board of health and also in conjunction with the city commissioners and the city health officer, and charged the defendants with gross and wanton negligence and carelessness. In the third amended petition, the plaintiff alleged the same gross conduct on the part of the defendant and told the same story and alleged carelessness and wanton conduct on his part. Hence, so far as he is

concerned, the case had been pending some time before the two-year statute of limitation had run, and the last amended petition did not operate to suspend the statute.

[2-5] A health officer, while required to obey his lawful orders and perform his official duty, is never excused for wanton conduct and inhuman treatment to patients suffering from serious illness, and it does not militate in the defendant's favor that by amendments the other defendants were eliminated from the case.

It is argued that as the defendant was a quasi judicial officer he was not responsible in damages for his acts, and it is pointed out that it is the duty of health officers to segregate from the public and to quarantine all persons sick with smallpox, and it is said that in moving the plaintiff from the hotel he was exercising quasi judicial powers and performing a governmental function. A physician had already pronounced the case smallpox, and it took no exercise of judicial power on the part of the health officer to move the patient to a place where guests and occupants of the hotel would be free from danger of infection. Of course, in removing her he was acting in a governmental capacity, but persons who act in that capacity are required to treat other human beings in a reasonably humane and considerate manner. The law no less than humanity requires humane and decent treatment of those who must be segregated from their usual conveniences and friends, and whoever acts with utter disregard of this requirement renders himself liable. *Murphy v. Fairmount Township*, 89 Kan. 760, 133 Pac. 169; *Hicks v. Davis*, 100 Kan. 4, 163 Pac. 799; *Throop on Public Officers*, §§ 724-726; *Beers v. Board of Health et als.*, 35 La. Ann. 1132, 48 Am. Rep. 256; *Barry v. Smith*, 191 Mass. 78, 87-90, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028, 6 Ann. Cas. 817; *Beeks v. Dickinson County*, 131 Iowa, 244, 108 N. W. 311, 6 L. R. A. (N. S.) 831, 9 Ann. Cas. 812; 21 Cyc. 405; 12 R. C. L. 1267, § 5.

It is contended that the evidence was insufficient to establish a cause of action. This suggestion needs no discussion.

Fault is found with the court for certain comments made during the trial, but we find nothing of substance in this complaint.

We have examined the instructions refused and those given, and find no error whatever touching these matters.

It is argued that there was no evidence to show that the defendant acted carelessly, wantonly, or maliciously, but the jury found otherwise, and the evidence warranted the finding.

There was an attempt to show that the verdict was arrived at by the quotient process, but after hearing all the testimony on this point the trial court found nothing

wrong with the verdict, and we are satisfied with that conclusion.

The judgment is affirmed.

All the Justices concurring.

(111 Kan. 562)

TOELLE v. SELLS-FLOTO SHOWS CO.
(No. 23822.)

(Supreme Court of Kansas. June 10, 1922.
Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Master and servant ⇨277—Evidence held to show circus employé worked for defendant.

In an action for damages for negligence to an employé of a traveling circus, the evidence examined, and held to show that the defendant corporation was the proper party defendant, and properly held liable for the negligence which caused his injuries.

2. Depositions ⇨81—Certificate of notary and stenographer who took depositions that he made mistake in copying notes held inadmissible.

A statement or supplementary certificate of a notary and stenographer, who took depositions reciting that he had made a mistake in copying the questions and answers, which conformed to no rule of evidence, was properly held inadmissible.

3. Master and servant ⇨268—Cross-examination as to transfers of circus property held admissible on issue of employment.

Cross-examination of witnesses to show possible explanations of nominal transfers of title to corporate property was properly permitted.

4. Evidence ⇨207(1), 208(1)—Files in the action held admissible.

Certain files in the action, the summons, sheriff's return, and answer of defendant, and the testimony of the clerk of the court touching what pleadings had been filed, were admissible in evidence.

5. Master and servant ⇨284(2)—Employment by defendant held for jury.

Demurrer to evidence and motion for directed verdict, filed in defendant's behalf, were properly overruled.

6. Trial ⇨352(5)—Special question assuming truth of disputed fact properly refused.

A special question which assumed the truth of a disputed fact was properly refused submission to the jury.

7. Evidence ⇨471(26)—Exclusion of testimony that witness told sheriff that he was attaching property that did not belong to defendant held not ground for reversal.

Matters offered in evidence, and rejected, and brought on the record in support of the motion for a new trial, examined, and held not to require the granting of a new trial.

8. Attachments \Leftrightarrow 191, 263—Difference between forthcoming bond and a bond to pay a judgment stated.

The difference between a forthcoming bond and a bond to pay a judgment which discharged an attachment discussed.

9. New trial \Leftrightarrow 73—Special findings on pertinent issues of fact not set aside where supported by evidence.

Special findings of a jury on pertinent issues of fact, when supported by evidence, need not be set aside on a motion to that effect.

10. Trial \Leftrightarrow 260(8)—Refusal to instruct as to significance of documentary evidence touching the corporate existence of successive owners and lessors held not error.

Instructions given and refused examined, and no error discerned therein.

11. Master and servant \Leftrightarrow 91—Circus employer held negligent as to minor sleeping on flat car.

An employer who hires a boy of 14 years to travel with a circus, on a promise to pay him wages, board, and lodging, but the only lodging furnished him is a pile of canvas under circus wagons on a flat car without sides, whereby the lad while asleep is flung from the flat car as the circus train travels around a curve on the railway, is guilty of actionable negligence.

Appeal from District Court, Wyandotte County.

Action by John Toelle, a minor, by Katherine Toelle, his next friend, against the Sells-Floto Shows Company. Judgment for plaintiff and defendant appeals. Affirmed.

Herrod & Roberts, of Kansas City, Kan., and Frank M. Lowe, of Kansas City, Mo., for appellant.

J. H. Brady and T. F. Railsback, both of Kansas City, Kan., and J. Francis O'Sullivan, of Kansas City, Mo., for appellee.

DAWSON, J. This was an action by a boy of 14 years for injuries sustained through the alleged negligence of the defendant, a concern engaged in operating a circus throughout the country.

Without the knowledge or consent of his parents, a foreman of the circus engaged his services at an agreed compensation of \$5.80 per week, together with his board and lodging. He was given a meal ticket which entitled him to eat with the circus employés, and a "bunk car" was provided as sleeping quarters, but it was fully occupied by other employés, and when bedtime came the foreman told the lad: "You haven't been here long enough to have a bunk. You got to be here three weeks before you get a regular bunk." The foreman directed another employé to take the plaintiff to a flat car which was to be his temporary sleeping quarters; and for a few nights, as the circus traveled and ex-

hibited in Topeka, Junction City, Hastings, and elsewhere, he slept on some canvas in the flat car under the circus wagons. There were no sideboards on this flat car, and one night in Nebraska, while the railway train carrying the circus was rounding a curve, the boy was flung from the flat car, and was severely injured. Next morning he was discovered by some witnesses who saw him leaving the railway track, walking as if he were dazed, "as though he was drunk, staggering and stumbling back and forth across the road." A witness testified:

"Boy was walking like he was all in-dazed; boy walked past us and stopped and sat down in a ditch; he laid down there and then got up and started toward us; his nose was cut, and his eye along the top was cut; had blood all over him, and he was weak; his arm was hurt; Joe Budd and my dad took him to town and to the doctor's office."

The boy's skull was fractured, his eyelid cut, his collar bone broken, likewise his nose and left arm, and three of his ribs were fractured. Some days later his mother came and took him home, and this lawsuit followed. The plaintiff prevailed, and defendant appeals, assigning various errors, the chief of which raises the question whether the plaintiff sued the right party—whether the liability did not rest on some one other than the Sells-Floto Shows Company, defendant herein. At the trial this was a perplexing question of fact. The evidence on this point was lengthy, complicated, and contradictory.

It appears that the beneficial ownership and control of the property known as the Sells-Floto Circus have been vested for many years in one way or another in two enterprising Denver capitalists, F. G. Bonfils and Harry A. Tammen. These two men have put large sums of money into the circus, and at various times have placed its nominal ownership in one or another of several corporations or similar business concerns which they have caused to be created. In 1907 the titular holder of the property was the American Amusement Company, and at that time Bonfils and Tammen caused the corporate name of the concern to be changed to the Sells-Floto Shows Company. Under that name, or a popular abbreviation of it, the Sells-Floto Circus, the concern became widely known throughout the country; and notwithstanding some nominal changes in titular ownership, the institution has preserved as valuable its trade-name, "Sells-Floto Circus." Because the beneficial interest of Messrs. Bonfils and Tammen in the circus property has always been virtually complete and exclusive, there was little necessity to maintain the same careful records and transfers of nominal title, such as would have been requisite if there had been other partners or fellow stockholders holding a substantial in-

terest in the concern. There was evidence to show that at one time the property was mortgaged by Bonfils and Tammen as officers and directors of the Sells-Floto Shows Company, a Colorado corporation, to Bonfils and Tammen, as individuals, for over half a million dollars, which was computed to be the amount which these men had put into the circus, and later this mortgage was foreclosed and bought in by the mortgagees. Bonfils and Tammen then gave Henry Gentry an option to lease the circus. Then Bonfils and Tammen transferred the ownership of the circus to a nominal corporation of their creation, the Continental Investment Company. Then the attorney for Bonfils and Tammen organized another nominal corporation, the Champion Shows Company, naming Gentry and certain employes of Bonfils and Tammen as the stockholders, with a nominal capital of \$25,000, but no money or other assets; and a lease of the circus property was made in the name of the Continental Investment Company, a lessor, to the Champion Shows Company. Under this nominal arrangement the circus property was operated for two or three years, but also under an arrangement whereby Bonfils and Tammen financed the business and had supervision of its finances, and under which arrangement the nominal lessee made no money for itself. On cross-examination Tammen's testimony, abridged, reads:

"I was very much interested in its (the circus') success; had a great interest in it; since 1902 the witness had had something to do with this property; sometimes it was run in the name of the American Amusement Company, sometimes Sells-Floto Shows Company; sometimes Continental Investment Company, sometimes by just the witness' brother and himself as individuals, sometimes by the Champion Shows Company. * * * The Continental Investment Company was organized about 1916, and it consisted of Bonfils and the witness as principal owners. That they owned all of the stock in it. That their lawyer, Bottom, got up the Champion Shows Company's papers. * * * He and Bonfils own the Continental Shows Company. * * * That this was 'our' circus, 'my adopted thing,' and it will be mine as long as I live; that the witness owns an interest in the physical property of the show. * * * That he had a man to go around with the Champion Shows Company to check up and see how much was being made and spent. * * *

"The minutes of the meeting of the Continental Investment Company were drawn by witness' attorney either at the meetings or afterwards; witness did not remember when the last meeting of the Continental Investment Company was held; couldn't tell what was before the meeting; the Sells-Floto Circus is now in witness' individual name. Witness, when asked why he had testified yesterday that the Continental Investment Company owned the property, when it had been taken out and placed in his name, answering, said, 'Some time the end of the season; I think in Novem-

ber.' There was no lease upon the property given any one at the time of the trial. Witness said he had authority to make a lease, but none had been made; the Continental turned the whole business of this circus over to the witness to operate, just like the 'Sells-Floto Shows Company' did."

Neither the Continental Investment Company, nominal lessor, nor the Champion Shows Company, nominal lessee, nor Messrs. Bonfils and Tammen, the beneficial owners of the circus property, have intervened in this lawsuit. The attachment of the circus property promptly brought this defendant into court for all purposes, without tactical or dilatory pleas of any sort. A bond was promptly given in its behalf to pay the judgment; by whom is not shown, but it was not given by the lessee in whom the possession and operation of the circus were nominally vested. If, indeed, the Sells-Floto Shows Company went out of business in 1916, that fact could readily have been shown beyond cavil by the record of surrendered or canceled charters in the state of its creation. If this circus property were a tract of valuable real estate, it would baffle an expert in the law of conveyancing to tell who holds the fee title at this time, although it is perfectly clear that Messrs. Bonfils and Tammen are and always have been the beneficial owners; but, since they have put forth such nominal title holders, one after the other, as suited their business convenience, with little or no regard to formalities of transfer, the Sells-Floto Shows Company, one of their corporate creatures, which has had more to do with the circus than any other, can be held to answer as a defendant in this lawsuit. In so holding we do not minimize or disparage the familiar principle of corporation law that formally organized and independently conducted corporations are separate legal entities, each having a separate legal statute, although the organizers and stockholders may be the same persons. State v. Harvester Co., 81 Kan. 610, 615, 106 Pac. 1053.

John Eberle was the foreman who employed the plaintiff in July, 1920, and when he was injured. Tammen, one of the proprietors of the circus, testified:

"Q. (Counsel for defendant): I will ask you to state whether or not John Eberle was employed or in the employ of the 'Sells Floto Shows Company' during the years 1918, 1919, 1920, and 1921? A. Yes, sir."

Eberle's deposition was taken by the defendant:

"Q. Mr. Eberle, what is your position with the Sells-Floto Shows Company? A. Boss canvas man."

Another witness, William Connors, deposed for the defendant:

"Q. Do you work for the Sells-Floto Shows Company? A. Yes, sir."

"Q. How long have you been working for them? A. Ever since they left Boston, about four or five months ago."

[1] There was much testimony to the effect that the circus wagons and circus advertising bills bore the words "Sells-Floto Shows Company," although the accuracy of that testimony was persuasively disputed by testimony and evidence to the contrary, which included photographs of circus wagons bearing the words "Sells-Floto Circus," and checks, meal tickets, and other business papers which bore the legend, "Sells-Floto Circus," in large type, followed in less conspicuous type with the words "The Champion Shows Co." But it cannot be gainsaid that under the evidence the jury had a right to determine this stoutly contested question, and to find that this defendant, the Sells-Floto Shows Company, was operating the circus at the time the plaintiff was injured. *Bruington v. Wagoner*, 100 Kan. 439, 164 Pac. 1057.

[2] Defendant complains because of the trial court's refusal to permit it to correct the depositions of John Eberle and William Connors in which they deposed that they were working for the Sells-Floto Shows Company. Defendant took these depositions, but wanted the answers changed to say that the deponents were working for the Sells-Floto Circus. To effect this correction, the defendant offered a certificate of the notary, who was also the stenographer who wrote the depositions, reciting that he had made a mistake in copying his stenographic notes, and that the words "Sells-Floto Shows Company" in these depositions should have been written "Sells-Floto Circus." This certificate was properly rejected. It conformed to none of the rules of evidence. 13 Cyc. 722. Furthermore, once the depositions were taken the plaintiff had as much right to use and rely on them as the defendant. *Golder v. Golder*, 102 Kan. 486, 170 Pac. 803.

[3] Error is assigned because the plaintiff was permitted to cross-examine defendant's witnesses touching certain damage or damage claims in Missouri against the Sells-Floto Shows Company which grew out of the collapse of some circus seats. The purpose was to develop a possible explanation of some of the transfers of title to the circus property. Although the court first ruled against this evidence, yet as the trial developed it changed its ruling, and we see no error in permitting a limited inquiry of this sort.

[4] Objection is also made because the summons, the return of the sheriff, and defendant's answer were admitted in evidence. Defendant says:

"The only reason that is now and was at the time of the trial discernible by us was the effort on the part of counsel for appellee to

do everything within their power to prejudice the jury."

When these were offered, the court said:

"The Court: I don't understand what it is for."

"Counsel for Plaintiff: It was issued and they have answered this summons by filing an answer. I next propose to introduce the answer and the record showing that no other motion was filed to this summons."

"The Court: If that is all it is for, all right."

"Counsel for Defendant: It isn't evidence in the case."

"Counsel for Plaintiff: Will you admit that you answered without filing any demurrer or motions to quash?"

"Counsel for Defendant: The record will show whatever we did."

"Counsel for Plaintiff: You don't care to admit it, then? We can find the answer. We offer in evidence the answer, Plaintiff's Exhibit 3, a general denial."

"Counsel for Defendant: To which defendants make the same objection."

"The Court: Overruled. * * *

"The Court: Well, I don't know whether the record should be read or not. What do you want to prove?"

"Counsel for Plaintiff: To show that there wasn't any motion filed prior to the filing of the answer. If they will admit that, we won't have to prove it."

"R. J. McFarland, * * * clerk of the district court of Wyandotte county, * * * produced the appearance docket, * * * and then testified, over the objection of the defendant, which was overruled by the court, that prior to the filing of the answer in this case, on the 13th of September, neither a demurrer nor any motion of any kind was filed by the defendant in this case."

In view of the defense that the Sells-Floto Shows Company had been out of business since 1916, and was not operating the circus when the plaintiff was injured, we think these matters were competent. 2 R. C. L. 845, 850. They tended to show that when the action was begun the real defendant came promptly into court in a general appearance, and that the defense afterwards set up was not then seriously contemplated by the defendant and its managing officers.

[5] Error is also assigned in overruling defendant's demurrer to the evidence and defendant's motion for a directed verdict, but, in view of what we have set down above, these rulings were obviously correct, and require no discussion.

Defendant also complains of the court's refusal to submit a question touching the possible extension of a lease of the circus property. Some other questions, more in point, were submitted and answered:

"Question 1. Who was the owner of the Sells-Floto Circus at the time plaintiff alleges to have been injured? Ans. Sells-Floto Shows Co. * * *

"Question 3. At the time plaintiff received

his alleged injuries was the circus being operated under lease? Ans. No. * * *

"Question 7. Was the circus property transferred by Bonfils and Tammen to the Continental Investment Company? Ans. Do not know."

[8] Since these findings show that the defendant owned the property, and it was not under lease, and the finding, "Do not know," means "No" (Bank v. Claypool, 91 Kan. 248, 137 Pac. 949; Sheerer v. Kanavel, 106 Kan. 220, 187 Pac. 658), the question refused was as effectually answered as if it had been propounded. Moreover, the question was objectionable because it assumed the earlier existence of a bona fide lease, which was one of the contested questions in this lawsuit. Elliott v. Reynolds, 38 Kan. 274, 16 Pac. 698.

Defendant's next complaint relates to the rejected proffer of evidence in its behalf. That part of it which pertained to the correction of alleged errors in the depositions of Eberle and Connors has already been discussed. Touching the proffered evidence of Otto Floto, Max Levand, and H. S. Roberts, this evidence was submitted as affidavits in support of the motion for a new trial. In these it was shown that if permitted Floto would have testified that he told the sheriff "That he was attaching the property of the Continental Investment Company; that the property did not belong to the Sells-Floto Shows Company."

"Counsel for Defendant: Is your honor holding that we haven't any right to introduce evidence to impeach this return or attack it?"

"The Court: Introduce all the evidence you want to be on the fact, but you cannot come in here and testify to a lot of stuff somebody told somebody else. If the sheriff was on the stand, it would be another matter."

"Counsel for Defendant: His return is here."

"The Court: Yes; but his return can't be attacked that way."

"Counsel for Plaintiff: You had a chance to do that five months ago."

[7, 8] The rejected testimony of Levand and Roberts was to the same general effect. We do not think the rejection of this testimony was prejudicial. Certainly the question as to the ownership of the property, and who was operating it at the time of plaintiff's injury, and at the time of the trial, was not unduly limited; rather the contrary; and, regardless of what these witnesses told the sheriff, that officer did not have to believe them, and apparently he did not err in attaching the circus as the property of the Sells-Floto Shows Company, for that attachment very speedily brought this defendant into court, not specially, but generally, and in its behalf a bond was given to pay any judgment entered against this defendant (Civ. Code, § 201 [Gen. St. 1915, § 7093]), which was a vastly different thing from a forthcoming or redelivery bond, such as provided in

section 200 of the Civil Code (Gen. St. 1915, § 7092). McKinney v. Purcell, 28 Kan. 446. A forthcoming bond would have served merely in lieu of the sheriff's physical custody of the property until the question of the propriety of the attachment could have been determined. (Tyler v. Safford, 24 Kan. 580, 582); but this bond to pay the judgment waived all question as to the legality of the attachment, and discharged it (Washer v. Campbell, 40 Kan. 398, 747, 19 Pac. 858, 21 Pac. 671; Stow v. Shay, 54 Kan. 574, 38 Pac. 784; 6 C. J. 327, 335-337; 2 R. C. L. 868). The evidence adduced in support of the motion for a new trial did not require that such motion be sustained.

[9] Another error is urged because the trial court refused to set aside the special findings of the jury. This contention is merely a jury argument that the evidence did not show facts upon which these findings depended. It is fairly clear, and not disputed, that the defendant company owned the circus for a number of years, and that its prestige was built up during that time. It is far from clear that the subsequent transfers of title were regular and complete. It is far from clear that the lease to the so-called Champion Shows Company was bona fide. It had many earmarks of being spurious. It is far from clear that the Continental Amusement Company was a regularly organized and independent corporation, capable of giving an outright lease of the circus property, and more than doubtful that the property was ever vested or operated in recent years by anybody except the Sells-Floto Shows Company and Messrs. Bonfils and Tammen, who owned that concern. The findings, being pertinent, and supported by substantial though much-disputed testimony and conflicting evidence, were not improperly permitted to stand, and the overruling of the motion to set aside was not error.

[10] A final complaint relates to the trial court's refusal to instruct the jury concerning the significance to be attached to the documentary evidence touching the corporate existence of the successive owners and lessors of the circus property. In view of the informal character of these concerns, and in view of the fact that some of the records of these alleged corporate transactions were not made at the time, and some of them were only recorded shortly before the trial, the rule that written records are better evidence than oral testimony was inapplicable. A very fair and pertinent instruction which the court did give sufficiently covered the main question in this lawsuit. It reads:

"(15) You are instructed that, even though you find from the evidence that plaintiff, at the time of his injury, if any, worked for what was known as 'Sells-Floto Circus,' yet before you can find for the plaintiff in this case you must find from the preponderance of the evi-

dence that the defendant, Sells-Floto Shows Company, was operating and in charge of the property that has been commonly referred to in this case as the Sells-Floto Circus, and, if you do not find from the preponderance of the evidence that the Sells-Floto Shows Company was in the actual operation of said property at the time plaintiff claims he was injured, then your verdict should be for the defendant."

[11] The foregoing disposes of the principal point urged upon our attention. Other matters discussed in the briefs have had our patient attention. We discern no prejudicial error in the record; and certainly, in view of the negligence of the defendant and its foreman in requiring the plaintiff, a boy of 14 years, to sleep on a circus flat car with practically no sideboards to keep him from rolling off the circus train as it traveled about the country, and in view of his serious and lasting injuries, the defendant was guilty of actionable negligence, and there is no injustice in the net result.

Affirmed.

All the Justices concurring.

(111 Kan. 601)

STATE V. NIXON. (No. 24018.)

(Supreme Court of Kansas. June 23, 1922.)

(Syllabus by the Court.)

1. Witnesses \S 201(1)—Statement by client admissible where not connected with subject-matter about which client was consulting attorney.

A statement made by a client to an attorney during consultation may be introduced in evidence against the client over his objection where the statement had no connection with the subject-matter about which the client was consulting the attorney.

2. Criminal law \S 1115(2) — On motion for new trial, where the truth of juror's voir dire answers is questioned, the court's finding of qualification will not be disturbed.

On a motion for a new trial, where the truth of the answers given by a juror concerning his qualifications to sit as such is questioned and evidence is introduced tending to show that the juror had not answered correctly, and other evidence that he had answered truthfully is presented, the finding of the trial court that the juror was qualified will not be disturbed in this court.

3. Criminal law \S 939(1)—Order denying motion for new trial for newly discovered evidence will not be reversed where diligence was not shown.

An order denying a motion for new trial, requested on the ground of newly discovered evidence, will not be reversed where there was no showing of diligence to secure the evidence for use on the trial.

4. Criminal law \S 386—Witness may identify person by voice over telephone.

A witness may identify another person by the latter's voice over a telephone in conversation with him. The completeness of the identification goes to the weight of the evidence, not to its admissibility.

5. Criminal law \S 1172(8)—It is not error to fail to instruct on second-degree murder, and manslaughter where not requested, and the evidence established that, if guilty at all, defendant is guilty of first-degree murder.

Where a defendant on trial, charged with murder in the first degree, does not request any instruction concerning murder in the second degree, nor any instruction concerning any of the degrees of manslaughter, and the evidence establishes that, if he is guilty at all, he is guilty of murder in the first degree, it is not error for the court to fail to instruct the jury concerning murder in the second degree or manslaughter.

6. Homicide \S 305—Evidence held to justify instructions on murder resulting from conspiracy.

There was evidence sufficient to justify the court in giving instructions concerning the law of murder resulting from conspiracy.

7. Homicide \S 348—To reverse conviction of murder in the first degree, reversible error must be shown.

To secure a reversal of a conviction of murder in the first degree, reversible error must be shown.

Appeal from District Court, Barton County.

W. A. Nixon was convicted of murder in the first degree, and he appeals. Affirmed.

Eustace Smith, F. Dumont Smith, and Carr W. Taylor, all of Hutchinson, for appellant.

Richard J. Hopkins, Atty. Gen., C. B. Griffith, of Topeka, W. J. Weber, of Ellenwood, and E. C. Cole and R. O. Russell, both of Great Bend, for the State.

MARSHALL, J. The defendant was tried for the murder of Arthur C. Banta, was convicted of murder in the first degree, and appeals.

[1] 1. Complaint is made of the admission of the evidence of R. C. Russell, an attorney at law. The defendant contends that the evidence of Russell was admitted in violation of the fourth subdivision of section 321 of the Code of Civil Procedure, which in part reads:

"The following persons shall be incompetent to testify: * * * Fourth, an attorney, concerning any communications made to him by his client in that relation, or his advice thereon, without the client's consent."

It is argued that the part of the conversation detailed by the witness came within this prohibition. A. L. Wallace operated

a restaurant in Great Bend. The defendant had a chattel mortgage on the restaurant. It seems that one Shepler had commenced an action of forcible entry and detainer to obtain possession of the property. The defendant went to Russell to talk about the matter. On the trial Russell was questioned concerning the conversation between them as follows:

"Q. Before he advised with you, did you have any conversation with him, or overhear any conversation relative to the deceased, Arthur Banta? A. Yes, sir.

"Q. Did that conversation that you had with defendant, Nixon, at that time have anything to do with the advice that you had to give to him that afternoon? A. Well, I didn't so consider it.

"Q. You may state what that conversation was."

After these questions the jury retired, and Mr. Russell made the following statement to the court:

"Dr. Nixon came into my office and came right into my private office. I was at my desk, and he says, 'This man Banta is double-crossing everybody. I didn't think he would double-cross me, but I am thoroughly satisfied that he is, and he is a double-crossing —, and is trying to do it again,' and we had some little conversation about that side of it—in other words, that is the substance of it—and then he went into the legal matter he came up to advise about. The legal matter was with reference to the forcible entry and detainer of Curly Wallace from his restaurant building that was being prosecuted by Mr. Shepler, and we talked there about the forcible entry and detainer suit, and he told me that Banta had told him that he could keep them in that building until December without any question; he would guarantee that he could do that without giving bond for double the rent; and I told him that I did not know of any law by which that could be done, and we got down the statutes and other books, and went into that, and then he tried to get Curly Wallace by phone; phoned to his office and Curly's restaurant four or five times. I told him I didn't want to advise him positively, as I didn't know of any way they could stay in there until December without giving bond for double the rent. Well, he said that he can do it; he will show all you — some new law. I said, 'Well, it will be new law to me, and he might be able to do it, I don't know,' and he stayed there about an hour, and when he got through he said, 'What do I owe you,' and I said, 'You don't owe me anything,' and he went out; he took a \$5 bill out and put it on my desk."

After the jury returned, Mr. Russell answered as follows:

"Dr. Nixon came into my office and said substantially as follows: 'I always knew that Arthur Banta was a double-crossing — and that he double-crossed everybody, but I didn't think he would double-cross me,' or words to that effect."

On the hearing of the motion for a new trial, in discussing this proposition, the court said:

"The evidence of Mr. Russell as to a statement that Dr. Dixon had made to him regarding Mr. Banta, it is urged that that is error. I looked that matter up rather carefully before I made the ruling on it, and I am not inclined to change the ruling made at this time. I don't think that a man may come into a lawyer's office and talk about matters that have nothing whatever to do with his business that he is there upon, and come in and claim that it is a confidential communication, so that the attorney cannot testify. In this case I think this evidence was just as competent, as I don't think anybody would claim that, if the defendant had gone into Mr. Russell's office, and said to him, 'I am going to kill Banta,' and then consulted with him, it would claim such a matter was privileged; so I am satisfied with that ruling."

In 40 Cyc. 2371, this language is found:

"In order for a communication between attorney and client to be privileged it must relate to the subject-matter of the employment, and be made for the purpose of enabling the attorney to correctly understand the matter in which he is employed, and of obtaining professional advice or assistance."

The rule as there stated is supported by State v. Mewherter, 46 Iowa, 88; Moyers v. Fogarty, 140 Iowa, 701, 119 N. W. 159; Denunzio's Receiver v. Scholtz, 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529, 531; Marsh v. Howe, 36 Barb. (N. Y.) 649; Dixon v. Parmelee, 2 Vt. 185, and note. The trial court rightly concluded that the communication so far as it was admitted in evidence was not privileged under the statute.

[2] 2. Complaint is made concerning a juror named Elridge York. The defendant says:

"The man York not only swore that he had no opinion, but went further and swore that he had not recently talked with any one concerning the case, when the truth was that he was talking about the case with his neighbors at the very moment he was called as a venireman."

A witness, Frank Case, testified on the hearing of the motion for a new trial as follows:

"I was standing in front of the courthouse while the jury was being impaneled in the case of State v. Nixon, and while standing talking to some gentlemen Mr. E. York came along. Mr. Gardner, one of the gentlemen to whom I was talking, said, 'Mr. York, you had better look out or they will get you on the jury.' Mr. York replied, 'No; they won't. I can't sit on the jury because I have formed an opinion in this case.' Just then Mr. Sam Kellam, clerk of the court, called Mr. York, and said that the sheriff wanted him."

York, on his voir dire, testified:

"I remember the circumstances of the killing of Mr. Banta. The circumstances were discussed among my neighbors and friends. From what I read and heard I did not form any opinion as to the guilt or innocence of the defendant, and I have not any opinion now. I never talked to any one who claimed to know anything about this case. No one has talked to me about the case lately. I know of no reason why I should not be permitted to sit as a juror in this case."

From the briefs of the defendant, it may be gathered that York on the hearing of the motion for a new trial testified as to the conversation had by him, as follows:

"I know Cliff Gardner and Frank Case. I saw them on the corner there by the Citizens' National Bank, just before I was summoned as a juror. There was quite a little crowd there. Cliff Gardner came up, and he said, 'They can't get us on this jury in the Nixon Case, can they, York, because we have all formed our opinion,' and I said, 'I guess so.' Just at that time Sam Kellam came across and said, 'There is Mr. York. Your name is drawn.'"

The court on the hearing of the motion said:

"I believed Mr. York when he stated he had no opinion of the guilt or innocence of the defendant when he was qualified as a juror in this case, and I believed his remarks that he made to-day that he entertained no opinion of it at that time; so I think he is not guilty of any misconduct in this case to procure his seat on the jury, or afterwards."

A similar complaint is made of a juror named Ernest Miller. The defendant states that Miller "swore that he had no opinion and had not talked with anybody about the case." The defendant contends that this statement was not correct, and that Miller had said to one Frank Grommes about the middle of September, "Well, I think Dr. Nixon is as guilty as the other two." When the motion for a new trial was heard, Frank Grommes testified to having such a conversation with Miller. Miller on that hearing testified:

"Q. That night you were playing at Dan Casey's, or at any other time prior to the Nixon trial, had you formed or expressed any opinion as to the guilt or innocence of Dr. Dixon? A. No, sir; not that I remember of."

"Q. Did you tell any one at that dance at Dan Casey's or at any other dance, that Dr. Nixon was just as guilty as the others? A. No, sir."

"Q. Did you say anything of that kind or character? A. No, sir."

The court, after the motion for a new trial had been presented, said that his statement concerning Elridge York applied to Ernest Miller.

On the examination of the jurors nothing appeared to show that either York or Miller

was in any way disqualified. From the evidence introduced on the hearing of the motion for a new trial, the court might have concluded that either had formed an opinion in the case; but the court was entirely justified in the conclusion that was reached, and in holding that both were competent jurors. That finding of the trial court is just as conclusive as any other finding made by the triers of fact on evidence from which reasonable minds might reach different conclusions.

[3] S. A. L. Wallace and Roy Hayes testified as witnesses for the state. They were charged with the murder of A. C. Banta, and had been confined in the jail of Barton county. The defendant argues that these men were guilty of the murder of Banta, and that they conspired to fasten the crime on the defendant. On behalf of the state evidence was introduced tending to show that, during the absence of the officers, Wallace and Hayes had not communicated with each other, and had no opportunity of so communicating, for the reason that they were confined in different parts of the jail, and were not allowed to be together. Two other persons, Willie Rippey and Harry Barnett, were prisoners in the jail during all or a portion of the time that A. L. Wallace and Roy Hayes were confined therein prior to the trial of the defendant. Willie Rippey and Harry Barnett were not produced as witnesses on the trial, but they were produced on the hearing of the motion for a new trial. No showing was made as to why they were not produced on the trial. They testified that Wallace and Hayes were with each other repeatedly, and that they talked to each other. Rippey testified that he heard Wallace say that he did the killing. Barnett testified that he was frightened away by the officers, who told him that, if he came to the courthouse, he was liable to get into trouble. The court held that diligence to obtain that evidence was not shown. It was incumbent on the defendant to show that he had exercised diligence to procure that evidence. That showing was not made.

[4] 4. Complaint is made of the admission of the testimony of Earl Jordan. He testified that he had a telephone conversation with a man whom he identified as W. A. Nixon on the night that Banta was killed; that Jordan was at the Elks' Club; that he answered the telephone when it rang, and that the person at the other end of the line called for Arthur Banta, the deceased. Jordan was questioned concerning his recognition of the voice on the telephone line. He stated that he would not swear to a man's voice over the telephone, but that he was satisfied in his own mind who it was that talked to him, and stated that the voice was that of the defendant, W. A. Nixon. A person can be recognized by his voice the same as by his face or

his form, although recognition by the voice may not be as easy over the telephone as by talking face to face. The testimony of Mr. Jordan showed that in his judgment the person talking to him was W. A. Nixon. That rendered his testimony competent, although his hesitancy may have affected its weight; that, however, was a matter for the jury.

[5] 5. The jury was not instructed concerning murder in the second degree, nor any of the degrees of manslaughter. The defendant complains of the failure of the court to so instruct the jury. No such instructions were requested.

Arthur C. Banta was killed about four and one-half miles west of Great Bend, on a cross-country road which was not much traveled. His body was left by the side of the road near his automobile. Four shots had been fired into his body; one wounded a thumb, one entered his arm, and two were fired into his breast. He was a small man, weighing about 119 pounds. There was evidence which tended to show that he was killed soon after 9 o'clock in the evening; that shortly previous to that time the defendant telephoned to Banta, who was then at the Elks' Club, and asked him to come to Nixon's office; that Banta went to Nixon's office; that the two got into Banta's car, and drove west in the city of Great Bend; that Banta was recognized in the car while it was going west; that Nixon also was recognized, not directly, but by the coat that he wore, which was produced and identified on the trial; that Nixon had made arrangements with Hayes to go in Nixon's automobile to the place where Banta's body was found, and to approach the place with dimmed lights on the car; that Hayes was signaled to go by Nixon when the latter and Banta started to leave Great Bend; that Hayes did as he was signaled, and drove to the place named by the defendant, where he saw Banta's car; that Nixon there got into the car with Hayes; that Nixon told Hayes to sit over, took the wheel, and drove rapidly into Great Bend; and that Nixon stated to Hayes that Banta would not owe anybody else. Nixon denied being at the place when Banta was killed, and introduced evidence tending to prove that fact. The evidence tended to show that the bullets—three of them—taken from Banta's body had been fired from a 32-20 Colt's revolver, and that the defendant owned such a revolver. There was evidence which tended to show that A. L. Wallace and Roy Hayes were connected with the defendant in the killing of Banta, but that evidence did not tend to reduce the degree of the crime of which the defendant was guilty, if he were guilty.

From the evidence presented to this court as above briefly summarized, it appears that the defendant must have been guilty of mur-

der in the first degree, or that he was not guilty at all. The defendant's counsel, by their failure to request an instruction of murder in the second degree or of manslaughter, must have recognized this fact, and must have felt that it would be better for the defendant to go to the jury on a charge of first-degree murder alone, and attempt to secure an acquittal, rather than risk a verdict of murder in the second degree or some degree of manslaughter. Under the evidence, and by reason of the failure of the defendant to request such an instruction, it was not reversible error for the court to fail to instruct the jury concerning murder in the second degree or the several degrees of manslaughter. *State v. Newton*, 74 Kan. 561, 87 Pac. 757; *State v. Winters*, 81 Kan. 414, 105 Pac. 516; *State v. Truskett*, 85 Kan. 804, 820, 118 Pac. 1047; *State v. Curtis*, 93 Kan. 743, 752, 145 Pac. 858; *State v. Roselli*, 109 Kan. 83, 40, 198 Pac. 195; *State v. Young*, 109 Kan. 526, 200 Pac. 285.

[8] 6. The defendant contends that error was committed by the court in giving instructions numbered 4 and 14. The fourth instruction reads:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant Nixon and Hayes, or Nixon, Hayes, and Wallace, entered into an agreement or arrangement by which they were to take money or other personal property from the person of Arthur C. Banta, the deceased, by force or putting him in fear, which acts would constitute robbery, and, in furtherance of such agreement, in an attempt to carry out to completion such arrangement, Arthur C. Banta came to his death at the hands of either of said parties to such agreement at the time and place and in the manner charged in the information, a killing of the deceased in furtherance of such agreement would constitute murder in the first degree, and the defendant, Nixon, would be guilty even though he did not personally fire the alleged shots which killed Banta, and although he might not have even been present when such alleged act was committed; all of the parties participating under such circumstances are principals, and equally guilty. In such event as before detailed, none of the parties may have intended to kill Banta, but if, in attempting to carry out such agreement or arrangement, he met his death, it would constitute murder in the first degree, and the state, under such circumstances, need not prove that the actual killing, if any, was deliberated upon or premeditated upon and planned in advance."

The part of the fourteenth instruction material for the consideration of this complaint reads as follows:

"If you have a reasonable doubt in your minds as to the presence of the defendant at the place of the killing of Arthur Banta, and his participation therein, you should acquit the defendant, unless you shall believe from the evidence, beyond a reasonable doubt, that an agreement or arrangement had been entered into between the defendant, Nixon, and Hayes and Wallace, or

either of them, to take money or personal property from the deceased by force or putting him in fear, and that, in furtherance of said agreement, Arthur Banta was killed, then, as hereinbefore instructed, the defendant would be a principal, and equally guilty whether he was present or not at the time of the actual killing of said Banta."

The argument of the defendant is that there was no evidence on which to base these instructions. The defendant's brief contains the following language:

"Hayes testified that Dr. Nixon went out with Banta and killed him, and he went out and picked the doctor up, and the crime was then complete; no one else there. Wallace testified that Dr. Nixon told him that Hayes first shot Banta while he (Nixon) was over in the wheat field, and when he came back he held Banta while Hayes finished the killing."

Wallace testified that he had a conversation with the defendant shortly previous to the time defendant left Great Bend on the evening that Banta was killed. That conversation is abstracted by the defendant as follows:

"He [the defendant] said, 'Al, you aren't going?' I said, 'No.' He said, 'You have got cold feet?' I said, 'No.' I got out of the car, opened up the door, started over, and got over, and he kind of honked the horn, and we stood there and talked a few minutes; several words passed; I don't know; he honked the horn; he said, 'Come here'—motioned for me. I went back, and he said, 'You fix an alibi.' I said, 'Very well' and I went in and fixed an alibi."

Another part of the evidence of Wallace is abstracted by the defendant as follows:

"He [the defendant] said, 'Curly, he owes me this money, and I am going to have it.' I said, 'In what way are you going to get it?' and he picked up a piece of paper—oh, I am ahead of my story there. He said to me, 'I am going to get it if I have got to kill the ———.' I said, 'Well, Doctor, that won't gain you anything.' He said, 'I can mark the bill paid,' or something like that, and pretty soon we talked around and there, and he picked up a piece of paper, which was a note, and he said, 'I am going to make him sign this note,' and hit his hand on the desk, and I said, 'Doctor, you can't make him sign that note, because he is an attorney, and it would just mean harm to you to undertake to try it,' and he said, 'I don't see how, if he ever signs this note, how it will mean harm to me.' I said, 'Very well.' I fooled around and went out."

There was evidence sufficient to justify the court in giving instructions 4 and 14.

[7] 7. Another proposition urged by the defendant is as follows:

"This court within very recent years has twice reversed criminal cases, not because there was error enough in the records to have reversed the cases, but because there was error, and coupled with that error was the fact that this court, after reading the record, felt a strong doubt of the defendant's guilt."

The defendant cites *State v. Alexander*, 89 Kan. 422, 131 Pac. 139, and *State v. Henson*, 105 Kan. 581, 185 Pac. 1059. In *State v. Alexander*, supra, this court said:

"The testimony relied on to support the verdict does not show who fired the fatal shot, and seems inconclusive as to the part taken by the defendants in the tragedy. A careful examination of the record has been made to determine whether the errors referred to probably led to a result which otherwise would not have been reached, although in other circumstances they might perhaps be disregarded. The district court, it appears, approved the verdict with hesitancy. This court is not satisfied that justice has been done and it is concluded that the errors referred to should not be disregarded." 89 Kan. 429, 131 Pac. 142.

In *State v. Henson*, supra, the court said:

"We are unable to say that there is no reasonable probability that the verdict was influenced by the rulings, held to have been erroneous, relating to the admission and exclusion of evidence bearing upon the vital matters in controversy. Their cumulative effect increases the likelihood of the actual prejudice having resulted. The conviction must therefore be set aside." 105 Kan. 591, 185 Pac. 1063.

The defendant's argument is necessarily based on the theory that this court may be dissatisfied with the correctness of the verdict, and would be disposed to reverse the judgment on slight error. The jury heard the evidence, and returned a verdict of guilty of murder in the first degree; the trial court approved that verdict; and this court, after reviewing the evidence as set out in the abstracts, must say that it, too, is satisfied with the verdict. The evidence that has been summarized in this opinion compels the conclusion that the defendant deliberately murdered Arthur C. Banta.

No error has been found, and the judgment is affirmed.

All the Justices concurring.

(111 Kan. 442)

DOYLE v. BENTRUP. (No. 23815.)

(Supreme Court of Kansas. June 10, 1922.)

(Syllabus by the Court.)

1. Chattel mortgages \S 34—Bill of sale and instrument in form of a title note held to evidence sale and create lien on property sold.

A bill of sale given to buyers, and an instrument in form a title note, given by one of the buyers to the seller, as part of the same transaction of sale, construed together, and held to evidence a sale and to create a lien on the property described in the bill of sale.

2. Chattel mortgages \S 139—Buyer privy to giving of title note to secure part of price could not acquire superior lien by subsequent mortgage.

One of the buyers, privy to the giving of the title note as security for part of the price, could not, by subsequent mortgage, acquire a superior lien on the property.

Appeal from District Court, Kearny County.

Action by W. H. Doyle against Charles Bentrup. Judgment for plaintiff, and the defendant appeals. Affirmed.

H. O. Trinkle, of Garden City, for appellant.

E. R. Thorpe, of Lakin, for appellee.

BURCH, J. The action was one by a lienholder to recover damages for appropriation of personal property subject to the lien. The plaintiff recovered, and the defendant appeals.

The plaintiff sold to Bentrup and Harry Doyle certain cane, straw, and other property, and gave them a bill of sale in which the property was correctly described. The consideration was \$1,650. Bentrup paid \$500 in cash. Bentrup and Harry Doyle gave their note for \$450, which Bentrup afterwards paid. Harry Doyle delivered to the seller a team of horses valued at \$275. The balance of the consideration was represented by a note for \$425, given by Harry Doyle, which contained the following provision:

"The condition of the sale of the cane, straw, and pasture, for which this note is given, is such that the ownership, title or right of possession does not pass from said W. H. Doyle, vendor, until this note, original or renewal, is paid, and that in case of nonpayment thereof, or the sale, incumbrance or removal of said property from the vendee's premises in Deerfield, Kan., without the written consent of the holder of this note, or in case such holder shall at any time deem himself or his debt insecure, he shall have the power to declare and make this debt wholly due and payable, to take possession of said property and hold the same or sell at public or private sale and apply the proceeds thereof to the cost of taking and sale, then toward the payment of this note.

" * * *

This instrument was filed for record November 26, 1918. Harry Doyle gave to Bentrup a chattel mortgage on the property described in the bill of sale, to secure an indebtedness to Bentrup. Bentrup filed his mortgage for record December 6, 1918, and subsequently appropriated the property.

[1, 2] Bentrup contends the instrument, in form a title note, could not create a lien, because, as part of the same transaction, an outright bill of sale was given. Because the two instruments were part of the same transaction, they are to be construed together as evidencing a sale and creating a lien. Bentrup also contends the title note was void as a lien instrument for lack of a description of property. The instrument referred to the sale, in consideration of which it was given, and, read with the bill of sale, was not open to the objection urged. The evidence was that Bentrup was privy to the giving of the title note as security for payment of part of the purchase price of the property, and he cannot assume the position of a stranger who became an innocent mortgagee.

There is nothing else of importance in the case, and the judgment of the district court is affirmed.

All the Justices concurring.

(71 Colo. 428)

HOEHNE DITCH CO. et al. v. MARTINEZ et al. (No. 10079.)

(Supreme Court of Colorado. June 5, 1922.)

1. Waters and water courses \S 152(7)—Refusal to permit evidence regarding the amount of water being used and amount of land under irrigation held error.

In a proceeding to change the point of diversion of decreed water rights from the headgate of one ditch to the headgate of another farther down the river, the refusal to permit protestants to offer evidence that water was used from the first ditch only two hours a day, that petitioners had irrigated only 17 acres of land, and that petitioners' land is located in the river bed and only 3 acres of it can be irrigated, held error.

2. Waters and water courses \S 152(8)—Evidence held insufficient to show that proposed change in point of diversion of decreed water rights would cause no injury to vested rights of other appropriators.

In a proceeding to change the point of diversion of decreed water rights from one ditch to another farther down the river, petitioners held not to have sustained the burden of showing that the proposed change would work no injury to the vested rights of other appropriators from the stream.

Department 1.

Error to the District Court, Las Animas County; A. F. Hollenbeck, Judge.

Proceeding by P. J. Martinez and others to change the diversion of decreed water

rights, in which the Hoehne Ditch Company and others protested. Judgment for petitioners, and protestants bring error. Reversed, and cause remanded, with directions.

Northcutt, Freeman & Northcutt, of Denver, for plaintiffs in error.

A. W. McHendrie and B. H. Shattuck, both of Trinidad, for defendants in error.

TELLER, J. The defendants in error began a statutory proceeding to change the point of diversion of 1.8 cubic feet of water per second of time from the Antonio Lopez Ditch, having Priority No. 2 from the Las Animas river, to the headgate of the Baca Ditch, a point seven miles down the river.

Plaintiffs in error, owners of and users of water from the Hoehne Ditch, the headgate of which is three miles down the river from the Baca Ditch, protested the change. The court found that the change would not be injurious to the vested rights of the protestants, and entered judgment allowing the change to be made. Error is alleged in the rejection of evidence as to the amount of water used from the Lopez Ditch, and the time of such use. It is also urged that the findings are not supported by the evidence.

[1] Plaintiff in error offered evidence to prove that water was used from the Lopez Ditch only two hours a day, and that from the date of the decree to the day of trial, the petitioners and their grantors have never irrigated more than 17 acres of land, and have never applied water to more than 3 acres of alfalfa. They offered also to show that all of the lands owned by petitioners are located in the river bed, and that only 3 acres of it can be irrigated. The court sustained objections to all these offers. The objection was founded, as stated by the objecting counsel, upon the proposition that the question of abandonment and nonuse, either before or subsequent to the decree, could not be considered.

This objection overlooks a distinction several times made by this court. We have held that while a decree may not be modified after the time fixed in the statute for questioning it, yet into every decree must be read a provision that only so much water is to be used as is necessary; that a decree for an excessive amount does not authorize waste or excessive use. It is also well settled that while an issue on abandonment may not be tried in a case like this, the question of the use or the nonuse of decreed water, a part of which appropriation is sought to be changed, may be considered.

Manifestly, if a portion of a decreed priority is not used, or is used excessively so that there is an appreciable return of water to the stream, and it is sought to take a portion of the decreed water out at a lower point interrupting the flow of the return waters which may be used to satisfy junior priorities, the amount of such return wa-

ters becomes very important. The court erred in sustaining these objections, as the protestants had the right to show the matters offered to be proved, as bearing upon the question above stated.

[2] The court's findings relate wholly to seepage or return waters, and entirely ignore the matter of waters left in the river because of the fact that the consumers under the Lopez Ditch used water to only a small extent of the decreed appropriation. Manifestly, if they used water but two or three hours a day, and upon a small acreage, the greater part of the eight cubic feet belonging to that appropriation was left in the river. It can hardly be said that they were using the identical 1.8 cubic feet now sought to be diverted.

The court's findings are, of course, consistent with his rulings on the evidence. He having excluded the testimony as to what portion of the decreed appropriation was used, there was no reason to consider the effect of taking from the river through the Baca Ditch this excess water which has heretofore passed the Baca Ditch headgate, and been available at the headgate of the Hoehne Ditch.

The evidence in behalf of the petitioners was only the testimony of an engineer, who testified as an expert, and gave it as his opinion that the change would not affect the protestants' rights. On the other hand, the protestants, by testimony, showed a considerable seepage from the land irrigated from the Lopez Ditch, and further that the amount diverted to the Baca Ditch would be diverted at all times, 24 hours a day. In a question of this kind it is proper and material to show the use of the water proposed to be changed as originally diverted, and its use at the new point of diversion. The testimony is undisputed that a part of Priority No. 2 is and always has been used on sandy soil with a gravelly subsoil which naturally drains to the river.

Witnesses testified to having seen seepage from this water entering the river; and that the protestant ditch company did not at all times get the amount of water decreed to it and needed. The case is, in its general features, very like that of the Baca Ditch Co. v. Coulson, 70 Colo. 192, 198 Pac. 272, recently decided by this court. The testimony that there is seepage from these lands is not disputed, and regardless of the excluded evidence, the findings of the court that the change would not injuriously affect the protestants is not supported by the evidence. The petitioners had the burden of proving that there would be no injury, and that burden has not been sustained.

The judgment is reversed, and the cause remanded, with directions for further proceedings in accordance with the views herein expressed.

ALLEN and DENISON, JJ., concur.

(71 Colo. 417)

DARROW v. ROHRER. (No. 9941.)

(Supreme Court of Colorado. June 5, 1922.)

insane persons — 91—County court authorized to allow conservator to compromise "desperate" claims.

Where a conservator of a person adjudged insane brought suit to set aside a deed executed by the latter, and the district court held that the deed was valid, grantee being sane at time of delivery, under Rev. St. 1908, § 7161, providing that the county court may authorize a sale or compounding of a desperate claim of an estate, the county court had the discretion to decide whether it was desirable to compromise, "desperate" meaning without hope, and hope denoting some degree of expectation.

En Banc.

Error to County Court, City and County of Denver; Ira O. Rothgerber, Judge.

Petition by C. W. Darrow, as conservator of the estate of Elizabeth M. Rohrer, insane, for leave to compromise suit against estate. Elizabeth M. Rohrer, by Margaret H. Murphy, her next friend, and Margaret H. Murphy, individually, opposed the petition. From an order denying petitioner the right to compromise, petitioner brings error. Reversed, with directions.

C. W. Darrow, of Glenwood Springs, and Dana, Blount & Silverstein, of Denver, for plaintiff in error.

Barnwell S. Stuart and John J. Morrissey, both of Denver, for defendants in error.

DENISON, J. Darrow, plaintiff in error, is conservator of the estate of the defendant in error, Elizabeth M. Rohrer, appointed by the county court of Denver. He brought a suit against one Mrs. Wagenblast to set aside a deed from his ward to her, on the ground that it was the deed of a lunatic.

Pending that suit he applied to the county court and obtained leave to compromise the suit by the payment to him of \$2,500 and the conveyance of a small house worth \$600. The payment was made and the conveyance executed, and they are still held by the conservator. That order of the county court was brought here on error, and we reversed it on the ground that the claim was not shown to be desperate (R. S. § 7161), and that the purpose of the compromise, which was stated to be to enable the estate of the lunatic's deceased husband to more readily defend against certain unjust claims through Mrs. Wagenblast's evidence, was an illegal purpose. We declined to determine whether Mrs. Rohrer, was actually insane, or whether she having been adjudged insane, her insanity could be questioned in the case in the district court; but we directed that that case be tried on its merits. Rohrer v. Darrow, 66 Colo. 463, 182 Pac. 18.

The case was tried on its merits. The district court took up the question of Mrs. Rohrer's sanity, found that she was sane at the time of the delivery of the deed, and that the deed was in effect a release of a mortgage and was valid, and rendered a decree in favor of Wagenblast. Thereupon the conservator again applied to the county court for leave to compromise as before. The judge of that court stated that he considered it for the best interest of the estate to make the compromise, but that he regarded his court as controlled by the opinion of this court, and therefore he directed the conservator to bring the district court case here and also to sue out a writ of error upon his own judgment denying the petition for leave to compromise. The case now before us is on error to the county court upon said denial. The district court case is also here and is determined with this.

The county court was not concluded by our former decision from granting the second petition to compromise. Neither of the reasons for our decision necessarily existed when that petition was presented. The decision of the district court had put the claim against Wagenblast in a different position, and we cannot say that the county court might not justly regard it as desperate. "Desperate" means without hope. Hope denotes some degree of expectation. If there was no expectation whatever, the case would be desperate, even though success might still be regarded as possible; and, if the settlement appeared to be for the benefit of the estate without regard to the question of Mrs. Wagenblast's testimony, then it would be proper to grant the relief.

Our conclusion is that the county court should have exercised its discretion and should have directed the conservator to consummate the compromise, if, as it seems was the fact, it regarded that as desirable and proper.

We are affirming the judgment of the district court on its finding that the transaction between Wagenblast and Rohrer was a mortgage and had been fully paid. We assume that the said payment of \$2,500 by way of compromise was regarded by the district court as fully discharging the claims of Mrs. Rohrer as heir of her husband under the contract shown in that case. If so, from the facts now before us, we can see no reason why the compromise should not be consummated.

The judgment is reversed, with directions to the court to consider, upon such facts as may be brought before it, whether the compromise is desirable and proper and exercise its judgment.

TELLER, Acting Chief Justice, and ALLEN, BURKE, and WHITFORD, JJ., concur.

(71 Colo. 422)

ROHRER v. WAGENBLAST et al.
(No. 10011.)

(Supreme Court of Colorado. June 5, 1922.)

1. Insane persons —73—Mortgagee entitled to release on payment of debt.

In an action to set aside a deed which was in effect a release of a mortgage on the ground that grantor was insane, the mortgagee, having paid the debt, was entitled to the release, whether grantor was sane or insane.

2. Appeal and error —1010(1)—Court's finding that a deed was a mortgage not shown unauthorized.

The trial court's finding that a deed was a mortgage cannot be disturbed where it does not appear that the court might not have been justly so convinced beyond a reasonable doubt.

En Banc.

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Elizabeth M. Rohrer, by her next friend Margaret H. Murphy, substituted for Charles W. Darrow, as conservator of the estate of Elizabeth M. Rohrer, lunatic, against Martha L. Wagenblast and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Barnwell S. Stuart and John J. Morrissey, both of Denver, for plaintiff in error.

Sabin & McGlashan, of Denver, for defendants in error.

DENISON, J. Elizabeth M. Rohrer brings error upon a decree of the district court of Denver declaring valid a deed from her to the defendant in error Wagenblast. See Rohrer v. Darrow, 66 Colo. 463, 182 Pac. 13, and Darrow v. Rohrer, 207 Pac. 861, decided at the present term.

[1] The essential facts are as follows: Darrow, as conservator for the present plaintiff in error, brought a suit in the district court to set aside a deed from his ward to Mrs. Wagenblast, on the ground that the grantor, at the time of the execution of the deed, was an adjudged lunatic. The decree found that, though adjudged a lunatic, she, at the time of the execution of the deed, was not such, that the title to the property described in the deed had been in her to secure an indebtedness which had been fully paid, and that she had no further interest therein. The effect of this decree was, of course, that she was a mortgagee and that the deed in question was a release, and, since Rohrer was a mortgagee and the debt was paid, Mrs. Wagenblast was entitled to a release, whether Mrs. Rohrer was sane or insane. If there had been no deed, with these facts before the court, it could not have refused a decree for a release. It is immaterial, therefore, whether it was error to try the question of the sanity of the adjudged lunatic, or whether

the evidence was sufficient to show Mrs. Rohrer to be sane, or whether the deed was valid. Even if all these things were erroneously determined, there is no prejudice, because in any event the title to the property must be held to be in Mrs. Wagenblast.

[2] It is urged that the proof that the transaction was a mortgage must be beyond a reasonable doubt, and that no such proof is shown; but it does not appear from the record that the judge below, where the witnesses all appeared, might not justly have been convinced beyond a reasonable doubt, and so we cannot say he was wrong; and, so far as payment is concerned, the defendant in error has paid, including the \$2,500 mentioned in Rohrer v. Darrow, supra, enough to justify the court in finding that she has fully discharged all liability secured by the contract between her and Mrs. Wagenblast which is shown in the record.

We find nothing incompetent in the testimony of the witnesses Howard and Parsons. It is not necessary to discuss these matters because they depend on elementary principles.

Judgment affirmed.

TELLER, Acting Chief Justice, and ALLEN, BURKE, and WHITFORD, JJ., concur.

(71 Colo. 440)

GROMER et al. v. PAPKE. (No. 10135.)

(Supreme Court of Colorado. June 5, 1922.)

1. Municipal corporations —653—Deed of vacation admissible to deny allegation that street was a highway.

In a suit to enjoin obstruction of a street, where the complaint alleged the street was a public highway, a deed of vacation, offered by defendants, purporting, under Rev. St. 1908, § 6521, to vacate the street, was competent to disprove under an allegation that the street was a highway.

2. Pleading —8(11)—Averment that premises are highway avers ultimate fact.

An allegation that certain property is a highway is one of ultimate fact.

3. Pleading —123—Allegation that street is a highway traversable by general denial.

In a suit to enjoin obstruction of a street on the ground that it is a public highway, held, that the allegation that the street is a highway may be traversed by general denial, and in such case a deed of vacation is not matter of confession and avoidance.

4. Pleading —11—Allegation of ownership of highway held evidentiary fact not affecting answer denying street was a highway.

Where the issue was whether a street was a highway, in a suit to enjoin obstruction of a street on the ground that it is a public highway, an allegation in the answer that defend-

ants were absolute owners of the land in question did not improve their answer denying that the street was a highway; such ownership being a mere evidentiary fact on the issue of whether or not the street was a highway.

Department 2.

Error to District Court, Lincoln County; Arthur Cornforth, Judge.

Suit by Paul R. Papke against J. C. Gromer and others. From judgment for plaintiff, defendants bring error. Reversed and remanded.

Floyd J. Wilson, of Denver, Charles H. Beeler, of Hugo, and Frederick Sass, of Denver, for plaintiffs in error.

John G. Reid, of Hugo, and Charles H. Haines, of Denver, for defendant in error.

DENISON, J. The defendant in error obtained a permanent injunction against the plaintiffs in error forbidding the obstruction of Boyd street, in the town of Hugo, and they bring error.

The complaint alleged that one Clarke, in 1886, filed a plat with a number of blocks subdivided into lots, which dedicated streets, including Boyd street, and that ever since that time Boyd street had been and remained a public highway; that the plaintiffs owned lots fronting thereon and that the defendants had obstructed said street with a fence; and prayed for temporary and permanent injunction. Both were granted.

The answer contained a general denial and a statement that the defendants were the absolute and unqualified owners in fee of the obstructed portion of the street. This was denied by replication.

On the trial the plaintiff introduced the Clarke plat, proved the building of the fence by defendants, gave evidence of damages, and rested.

[1-3] The defendants offered in evidence a deed of vacation, recorded November 16, 1907, which purports to vacate various streets and alleys in accordance with Rev. Stats. 1908, § 6521, including the obstructed portion of Boyd street. This was objected to and was excluded by the court on the ground that the vacation had not been pleaded. This was error. The allegation that Boyd street was a highway was an ultimate fact, like an allegation of ownership. See *Baker v. Cordwell*, 6 Colo. 199; *Elliott et al. v. First Nat'l Bank of Greeley*, 30 Colo. 279, 70 Pac. 421; *Updegraff v. Lessem*, 15 Colo. App. 297, 302, 62 Pac. 342. The plat and dedication were one kind of evidence of that fact, like the conveyances by which a plaintiff acquired ownership. Averments of a series of facts by which plaintiff acquired title are mere evidence. *Clink v. Thurston*, 47 Cal. 21; *Cuenin v. Halbouer et al.*, 32 Colo. 51, 74 Pac. 885. See, also, *Pike et al.*

v. Sutton et al., 21 Colo. 84, 39 Pac. 1084. So of the facts by which the land in Boyd street became a highway. Highway or not was the real issue. The general denial permitted the introduction of any evidence tending to disprove the allegation, and the deed of vacation was competent to that end. *Payne v. Williams*, 62 Colo. 86, 91, 160 Pac. 196; *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912; *Pike et al. v. Sutton*, 21 Colo. 84, 39 Pac. 1084. See, also, *Cuenin v. Halbouer et al.*, 32 Colo. 51, 74 Pac. 885; *Swanson Theater Co. v. Pueblo Opera Block Inv. Co.*, 70 Colo. 83, 197 Pac. 762; *Hallack-Sayer-Newton Lumber Co. v. Blake*, 4 Colo. App. 486, 36 Pac. 554; *Mott v. Baxter*, 29 Colo. 418, 421, 68 Pac. 220; *St. Louis L. B. B. Co. v. Colo. Nat'l. Bank*, 8 Colo. 70, 72, 5 Pac. 800. It was not a matter of confession and avoidance.

[4] Defendants' allegation that they were owners of the portion of Boyd street in question did not improve their answer; on the contrary, it tended to raise an issue of ownership, whereas ownership by defendants was, at most, merely evidence tending to disprove the status as a highway.

It appears from the record that at the date of said vacation the defendants or some of them owned the lots now owned by the plaintiff, but the deed by which they conveyed them, which was of a later date than the vacation, is not shown; we cannot, therefore, consider its effect.

Reversed and remanded.

TELLER, Acting C. J., and WHITFORD, J., concur.

(105 Or. 1)

BRISTOW et al. v. JENNINGS.

(Supreme Court of Oregon. June 27, 1922.)

1. Wills \Rightarrow 792(1)—Acts of widow held not sufficient to establish election against will.

The refusal of the widow to qualify as executrix under the will on the ground that it might compromise her right to take her statutory third in the husband's property, and her statements to another executor and others that she intended to take her statutory interest, and not the devise under the will, are not sufficient to establish an election by the widow under Laws 1917, p. 687, §§ 1, 3, amending L. O. L. §§ 7286, 7316.

2. Wills \Rightarrow 782(2)—Devise inconsistent with dower requires election by widow.

Laws 1917, p. 687, §§ 1, 3, which enlarged the rights of widows by permitting them to elect to take in lieu of dower the fee in one-third of the property of which the husband was seized during marriage, and protected such right against a devise by the husband, does not manifest an intention to permit the widow to take one-third of the husband's real estate in

fee in addition to the devise made to her by the will, so that she will be required to elect between the provision made for her by the will and her statutory right, where the will expressly declares, or it appears by clear implication, that its provisions were intended to be in lieu of the statutory right.

3. Wills —782(2)—Statute requiring election between will and dower changes equitable rule as to presumption that provision is in addition to dower.

Or. L. §§ 10070, 10071, requiring the widow in all cases to elect between the provisions of her husband's will, and her dower, unless it plainly appears from the will she was entitled to both, and making the failure to apply for dower within a year after the husband's death equivalent to an election to take under the will, changed the rule in equity prevailing in the absence of statute that every devise or bequest to the wife is presumed to be in addition to her dower right, and she is required to elect only where the testator expressly declares the gift to be in lieu of dower.

4. Wills —802(5)—Devise to widow electing to take under statute is applied to compensate beneficiaries disappointed by the election.

The devise made to a widow who elected to take under the statute instead of under the will is applied to compensate the beneficiaries under the will who may be disappointed as a result of her election.

5. Wills —790—Widow has reasonable time within which to elect between devise and statutory third.

Since Laws 1917, p. 687, §§ 1, 3, giving a widow the right to take a fee in one-third of her husband's estate in lieu of dower, and providing that, in the absence of a contrary intent or election, she is presumed to have elected to take the statutory third, but creating no presumption as to election between her rights under the will and her statutory third, as is made for election between her dower right and her rights under the will by Or. L. §§ 10070, 10071, the widow has a reasonable time after the death of her husband within which to make her election to take under the statute.

6. Wills —794—Widow's answer to suit by beneficiaries held sufficient election to take statutory third.

Where the beneficiaries under a will which gave a widow a life interest in the property in which she was living, and which she continued to occupy without objection by the heirs, as she was permitted to do by Or. L. §§ 10064, 10075, brought suit to quiet the title of the beneficiaries to other property devised to them under the will, the answer of the widow in such suit claiming her statutory interest in one-third of all her husband's estate was a sufficient election on her part to take under the statute, and not under the will.

Department 2.

Appeal from Circuit Court, Lane County;
G. F. Skipworth, Judge.

Suit by Darwin Bristow and others against Sadie L. Jennings to quiet title. Decree for complainants, and defendant appeals. Decree modified.

L. Bilyeu and A. C. Woodcock, both of Eugene, for appellant.

E. R. Bryson, of Eugene (Smith & Bryson, of Eugene, on the brief), for respondents.

McCOURT, J. Plaintiffs commenced this suit to quiet the title to several parcels of land in Lane county. Defendant has appealed from a decree of the circuit court quieting the title and rights of the plaintiffs to the lands in suit as against all claims and demands of defendant.

Augustus O. Jennings died December 23, 1917, leaving a widow, the defendant herein, and also 10 children by a previous marriage. By his last will and testament he devised and bequeathed to the defendant for use during her natural life the real property upon which decedent and the defendant resided, consisting of one lot and a fractional lot in the city of Eugene, also all household furniture in the premises mentioned, including family supplies and feed for cow and chickens on hand at the time of the testator's death. It was also provided in the will that, in the event of defendant's remarriage within two years after the testator's death, defendant should have the free use of the premises devised to her for two years thereafter, or, in the event of her death, the property should at once revert to the 10 children of the testator, or the issue of their bodies, share and share alike. An undivided one-tenth of all the remainder of the testator's property, after payment of debts, expenses of administration, and special bequests, was devised to each of the 10 children of the testator. The property left by decedent, other than that devised to defendant, consisted of two lots and a fractional lot in the city of Eugene and 260 acres of land in Lane county and personal property of the approximate value of \$750.

Plaintiffs Bristow and Snodgrass are the executors, and plaintiff Sarah Mildred Flint the executrix, of the last will of decedent. The other plaintiffs, and also the said Sarah Mildred Flint, are the children of the testator and devisees under his will.

This suit involves the real property devised by the will other than that in which defendant was given a conditional life estate. Defendant contends that she is the owner in fee simple of an undivided one-third of all the real property described in plaintiff's complaint, and that title thereto vested in her by virtue of the provisions of chapter 331, Laws of 1917, which so far as applicable to this case, reads as follows:

"Section 1. The widow of every deceased person shall be entitled to dower, or the use, dur-

ing her natural life, of one-half part of all the land whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof; *provided, however*, that any woman entitled to dower, may, at her election, take in lieu of such dower the undivided third part in her individual right in fee of the whole of the land whereof the husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. *And provided further*, that when a widow shall be entitled to an election under this section, she shall be deemed to have elected to take the undivided third of such lands unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower.)"

"Sec. 3. Every person of twenty-one years of age and upward, of sound mind, may, by last will, devise all his estate, real and personal, saving to the widow her dower or her election thereunder."

Section 1 of chapter 331, Laws of 1917, above set out, amended section 7286, L. O. L., by adding thereto that portion in parentheses, and section 3 amended section 7316, L. O. L., by adding thereto the portion underscored. The above-mentioned amendatory provisions have been repealed and the statutes restored to their previous form by chapter 351, Laws of 1919 (sections 10053, 10092, Or. L.)

Defendant was nominated by the will as executrix thereof to serve jointly with plaintiff Darwin Bristow and plaintiff Sarah Mildred Flint, and on February 14, 1918, defendant, in writing, refused and declined to accept the appointment or to qualify and serve as such executrix. The will was admitted to probate February 21, 1918, and the plaintiff P. E. Snodgrass, under authority given in the will, was appointed as executor, to serve instead of defendant.

At or about the time defendant executed in writing her refusal to qualify or serve as executrix, she informed plaintiffs Bristow and Flint and E. R. Bryson, attorney for the estate, that she would not accept the provisions made for her in the will, and that she declined to act as executrix for the reason that it might affect her right to take what the law allowed her, in preference to the will. After the will was admitted to probate, defendant had several conversations with the plaintiff Bristow, in which defendant informed Bristow that she never would accept of the will, in response to which Bristow said in effect that he would not accept the provisions of the will if he were in defendant's place. Defendant also discussed the matter with the plaintiffs Flint and Harbaugh on several occasions, in each of which defendant stated that she could not accept the provisions of the will, and to the plaintiff Harbaugh defendant stated that she did not want to take under the will; that she wanted her one-third interest.

Defendant used the household goods and provisions bequeathed to her and continued

to occupy the real property devised to her by the will of her husband, to which plaintiffs made no objection.

In support of the decree of the circuit court, plaintiffs insist that defendant was compelled to elect between the provisions made for her by the will and the rights given her by statute, and that, having failed to commence proceedings for the recovery of her dower, she is conclusively presumed to have taken under the will, and that by such action she relinquished or waived her right to dower, and with it, the right given her by statute to take in lieu of dower the undivided one-third part of the lands of her husband. In support of their position, plaintiffs cite Or. L. §§ 10070 and 10071:

"Sec. 10070. If any lands be devised to a woman, or other provision be made for her in the will of her husband, she shall make her election whether she will take the lands so devised or the provisions so made, or whether she will be endowed by the lands of her husband; but she shall not be entitled to both unless it plainly appears by the will to have been so intended by the testator.

"Sec. 10071. When a widow shall be entitled to an election under [section 10070] * * * she shall be deemed to have elected to take such * * * devise, or other provision unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower."

[1] The acts and conduct of the defendant above mentioned are insufficient to constitute an election between the provisions of the will and defendant's dower rights. The statute permitted defendant to occupy the dwelling and to have sustenance out of the estate, in the absence of objection by the heirs, whether her husband died testate or intestate. Or. L. §§ 10064, 10075.

Defendant's refusal to act as executrix was not conclusive on the question of election. The statute allowed her a year to determine whether or not she would reject the provisions of the will and be endowed by the lands of her husband, and, in the absence of proceedings within that time commenced by defendant to recover her dower, nothing short of conduct constituting an estoppel would amount to an election within that period. *Bretz v. Matney*, 60 Mo. 444; *Spratt v. Lawson*, 176 Mo. 175, 180, 75 S. W. 642; *Owens v. Andrews*, 17 N. M. 597, 131 Pac. 1004, 49 L. R. A. (N. S.) 1072, and note; *Alexander on Wills*, §§ 826, 828.

However, upon the expiration of one year after the death of her husband, defendant is presumed to have elected to take the provisions of the will and to have relinquished or waived her right to dower. Or. L. § 10071.

Chapter 331, Laws of 1917, created a right which the widow might take at her election as a substitute for dower, and in section 3 placed upon the power of the husband to dispose of that right by will, without the con-

sent of the wife, the same restrictions that apply to dower. The language of the statute is "saving to the widow her dower or her election thereunder."

The statutes (Or. L. §§ 10070 and 10071) provide for an election by the widow between the provisions of the will of the husband and dower, and section 1 of chapter 331, Laws of 1917, provides for an election by the widow between her primary right to the dower and her alternative right to an undivided third part in fee in the lands in lieu of dower, but no statutory provision is made for an election between the latter right and testamentary provisions in favor of the wife.

[2] Nevertheless it is obvious that in any case where the will of the husband devises real property to another in which his wife, pursuant to the statute, is entitled to claim an undivided third part in fee, and in the same instrument devises property of his own to his wife, which expressly or by clear implication is intended to be in lieu of such statutory rights, there are presented at the death of the testator all of the conditions which generally, if not universally, impose upon a widow the obligation to elect between the provisions given to her by the will of her husband and the rights given her by law. *Pomeroy Eq. Juris.* (4th Ed.) §§ 395, 462, 487, 492-494.

[3] It does not plainly appear by the will that the testator intended that the defendant should have the devise and provision made for her in the will, and also that she should be endowed by the lands of her husband. In that situation the defendant was obliged by the plain directions of the statute to make her election whether she would take the provisions of the will or whether she would be so endowed. She could not take both. Or. L. § 10070.

The rule established by the statute last cited is contrary to the rule in equity, which prevails in the absence of statute, that every devise or bequest made to the wife is presumed to be intended to be in addition to her dower right, and she is required to elect only in those cases where the testator expressly declares the testamentary gift to be in lieu of dower, or such appears to be his intention from clear, unequivocal language making testamentary provision inconsistent with the claim of dower. *Pomeroy Eq. Juris.* (4th Ed.) §§ 492-494.

[4] In either case, if the widow elects to take under the will, she relinquishes and waives her dower right, and, on the other hand, if she elects to take the right given her by the statute, thereby renouncing the will, she retains the benefits arising out of those rights, and the property donated to her under the will is applied to compensate the beneficiaries under the will who may be disappointed as a result of her election. *Pomeroy Eq. Juris.* (4th Ed.) §§ 468, 469, 517.

Defendant did not take any steps to re-

cover dower, and, as between her right to take the provisions of the will and her right to dower, defendant is deemed to have elected to take under the will; the statute declares that to be her choice of those rights, "unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower." Or. L. § 10071.

Likewise, as between her primary right to dower and her alternative right to take in lieu thereof an undivided one-third in fee of the lands of her husband, defendant is deemed to have elected to take the fee. Section 1, c. 331, Laws of 1917, adopts the language last above quoted, and provides that a widow "shall be deemed to have elected to have taken the undivided third of such lands unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower."

By force of these statutes, dower is simultaneously relinquished or waived in both cases. In the one case the provisions of the will are accepted in preference to dower, while in the other dower is rejected, and in lieu thereof the right to an undivided third part in fee of the lands of the husband is taken. But in all this no choice or election was made by defendant between the provisions of the will and her statutory right to an undivided third part in fee of the lands of her husband.

It is reasonable to suppose that the Legislature intended by chapter 331, Laws of 1917, to enlarge the rights of widows, but the extent to which those rights were enlarged must be gathered not only from the enactment itself, but by a consideration of related statutes and the general rules of law which apply to such cases. Cases may arise where a widow put to her election may have elected to take the provisions of the will in preference to dower, but who, having a choice between the provisions of the will and the one-third part in fee of the lands of her husband, will elect in favor of the latter right. In the absence, as here, of a clear and unmistakable intention of the Legislature to so provide, it will not be presumed that the Legislature intended that a widow should take both the provisions of the will and her statutory right to an undivided third part in fee of the lands, where the will of the husband expressly declares, or it appears by clear implication, that the provisions of the will were intended to be in lieu of such statutory right. In cases such as those last mentioned the widow must elect between the provisions of the will and her statutory right to take an undivided third part in fee of the lands, and without a statute controlling the obligation, time, and manner of election in such cases, the general rules of equity in respect to the doctrine of election apply.

[5] Under those rules the election must

be made within such time as is reasonable under all the circumstances of the particular case. 40 Cyc. 1975.

Statutory provisions are found in many states which give to a widow the right to take an interest in fee in the lands of her husband; either in addition to, or as a substitute for, her right to dower. In cases arising upon wills purporting to dispose of the statutory rights or estate created by the statutes mentioned the great majority of the courts in such states, in the absence of controlling statutes, proceed upon the analogy between those rights or estates and the common-law right of dower, and determine the necessity for an election in any such cases by application of the general doctrine established in England and many of the states concerning election between claims of dower and the provisions of the will of a husband. Pomeroy Eq. Juris. (4th Ed.) §§ 493, 504.

[8] In the instant case it is unnecessary to determine whether the will imposed upon defendant the obligation to elect between the testamentary provisions in her favor and the right to an undivided part in fee of the lands of the testator. The lands in which defendant was devised a life estate are not involved in this suit. If no election was required, defendant takes both the benefits given her by the will and those flowing from her statutory rights, and, if defendant was required to make such an election, her answer in this case and her assertion and prosecution of a claim to an undivided one-third part in fee of the lands in suit constitutes an election to take her statutory rights, which election under the circumstances of this case was made within a reasonable time. In either case defendant is entitled to, and is the owner of, an undivided third part in her individual right in fee of the lands described in plaintiffs' complaint.

The decree of the circuit court is modified to provide that the plaintiffs are the owners of an undivided two-thirds part in fee of the real property described in the complaint, instead of the whole thereof, and that the defendant is the owner of an undivided third part in her individual right in fee of the lands mentioned.

BURNETT, C. J., and BEAN and BROWN, JJ., concur.

(105 Or. 346)

RUNNELLS v. LEFFEL et al.

(Supreme Court of Oregon. June 27, 1922.)

I. Courts §90(2)—Decision of Supreme Court, stare decisis upon questions involved though court divided.

The deliberate decision of the Supreme Court, although pronounced by a divided court,

must be considered as stare decisis upon the questions involved.

2. Judgment §590(2)—Where former judgment barred action, that allegations in second action that partner was conspirator and falsifier did not remove bar.

Where a sale of realty was made, and the agents were to receive a commission when notes given by the purchaser were paid in cash to the vendor, in an action by one agent against his partner for his share of commissions alleged to have been collected by the partner, a decree, finding that the agent had failed to prove that the notes had been paid in cash, and that there was no sum owing the agent from his partner, was a bar to a subsequent action between the parties, and an averment that his former partner was a conspirator and falsifier did not remove the bar of the former judgment.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by A. M. Runnells against W. E. Leffel and another. From judgment for plaintiff against defendant named, he appeals. Reversed.

See, also, 93 Or. 342, 176 Pac. 802, 183 Pac. 756.

This is an appeal from the judgment rendered in an action at law prosecuted by A. M. Runnells against W. E. Leffel and G. B. Mays, as defendants, wherein the plaintiff recovered judgment for \$2,950 against the defendant Leffel. The action grew out of the partnership business of W. E. Leffel and A. M. Runnells as real estate agents. During the life of the partnership, a contract was made and entered into by and between the plaintiff herein and defendant Leffel as partners, and the defendant G. B. Mays, for the sale of lands and farm machinery belonging to him, for the sum of \$38,000, the partners to receive as commission any sum in excess thereof. The firm of Leffel & Runnells sold the lands, consisting of 2,400 acres, to one G. P. Higginbotham, for \$45,000, and in consideration of certain expense incurred by Mays it was then agreed between Mays and the agents that they should receive as commission the sum of \$5,900.

The sale was made in 1915. On November 1, 1915, Higginbotham paid \$3,000 on the purchase price of the lands. On November 24th \$400 of the commission was paid to the partners, which they divided equally. On December 11, 1915, Higginbotham made and delivered to Mays, as part of the consideration for the purchase of these lands, three notes, aggregating the sum of \$20,000, bearing interest at the rate of 8 per cent. per annum, and due November 1, 1916, November 1, 1917, and January 1, 1918, respectively. These notes were delivered to one J. E. Lenhart as escrow holder. Thereafter Ben F.

Evans was substituted for Lenhart as escrow holder of the notes, which were later delivered by Evans to Volney Lee.

It is averred that upon the collection of these notes the partners were to be paid \$5,500 of the principal, and Mays, the owner, \$14,500 thereof.

On the date of the execution of the three notes above referred to, Higginbotham executed other notes, aggregating the sum of \$16,000 as a part of the purchase price. These notes were delivered to Mays. On March 1, 1916, Higginbotham paid an additional \$8,000 on the purchase price.

The amended complaint avers, among other things, that on July 7, 1917, it was agreed between Higginbotham and Maggie Higginbotham, his wife, and Leffel, and afterwards consented to by Mays, that Maggie Higginbotham should loan to her husband, or pay for him to Mays, the sum of \$39,000, as full payment of all the notes, principal and interest, and that the land should be conveyed to Maggie Higginbotham, she to hold the same as security for the sums of money to be paid by her for Higginbotham. It was further agreed between Leffel, Mays, G. P. Higginbotham, and Maggie Higginbotham that the money advanced by her for her husband should be repaid by him to her, and that upon such repayment she was to convey the land to him.

On July 7, 1917, the interest accrued on the balance of the commission of \$5,500 was computed and a part of it deducted, and it was then agreed between Leffel and Mays that upon payment by Maggie Higginbotham the sum of \$5,900 should be paid by Mays as the balance of the commission on account of the sale of the land.

On August 6, 1917, and pursuant to the agreement of July 7, 1917, Maggie Higginbotham paid Mays \$17,000, whereupon Mays and wife conveyed the land to her, and she and her husband made, executed, and delivered to Mays and wife a note for \$22,000, securing payment of the same by a mortgage on the land. The payment of \$17,000, together with the note and mortgage of \$22,000, constituted payment of the notes executed and delivered by Higginbotham to Mays, and the deed so executed and delivered to Maggie Higginbotham was executed and delivered to her as a mortgage in order that she might hold the land as security for the sums of money advanced and paid by her for Higginbotham.

On August 6, 1917, Mays paid Leffel the sum of \$4,400, and on that date Leffel pretended to loan to Maggie Higginbotham \$1,500. In consideration thereof, she and G. P. Higginbotham made and delivered to Leffel a note for \$1,500, which was afterwards paid. This \$4,400 and note of \$1,500 were paid, and made as full payment of the balance of commission owing by Mays to the

partners on account of the sale of the land to Higginbotham.

The amended complaint further avers that by reason of the completion of the sale of the land to Higginbotham, plaintiff was entitled to have and receive one-half of the sum of \$5,900, with interest from August 6, 1917; that at the time of the making of the sale of the land to Higginbotham, it was agreed between Mays, Leffel, Higginbotham and plaintiff that a loan should be secured on the land by Higginbotham, in order that he might complete the payment of the purchase price, and that plaintiff and Leffel should assist him in securing such loan in order that the partners might secure and receive the balance of their commission as real estate agents; that on June 30, 1917, it was agreed between plaintiff, Leffel, and one F. H. Gaulke that Leffel and Gaulke should go upon the lands for the purpose of examining the same, and if the land was found to be sufficient security Gaulke would make a loan of \$25,000 to Higginbotham in order that he might complete payment for the land.

The plaintiff further averred a conspiracy between Leffel and Mays to cheat and defraud plaintiff of the sum of money that would be owing him upon payment of the notes herein referred to; that pursuant to the conspiracy and with the design of cheating and defrauding plaintiff and preventing Gaulke from making the loan, Leffel, without plaintiff's knowledge or consent, failed and refused to take Gaulke to see the land, and advised him that they would not examine it; that without the knowledge or consent of plaintiff, and in pursuance of the conspiracy, and with the design of defrauding the plaintiff, Leffel and Mays caused the escrow holder to surrender and deliver to them the notes in his possession; that in July or August, 1917, pursuant to the conspiracy, and with the design and purpose of cheating and defrauding the plaintiff, Leffel and Mays agreed that they, and each of them, should make it appear, and they did make it appear, that the notes were surrendered and delivered to Mays on July 7, 1917, and that on that date the contract between Mays and Higginbotham was surrendered and delivered to Mays, and that thereupon Higginbotham turned the land back to Mays, and thereby lost his interest in the contract and in the land, and that after the surrender of the notes and contract the land was sold to Maggie Higginbotham by virtue of a new contract of sale with her; that, in truth, Higginbotham did not surrender the contract or receive the notes on July 7, 1917, and the notes were not surrendered nor delivered to Higginbotham until August 6, 1917, the date of execution and delivery of the deed to Maggie Higginbotham, and a new contract of sale of the land to Maggie Higginbotham was not

made on July 7, 1917; that on August 6, 1917, or at some later date to plaintiff unknown, Mays prepared and Leffel signed a receipt purporting to show that the land had been sold to Maggie Higinbotham, and that a commission in the sum of \$5,900 had been paid by Mays to Leffel on account of such sale. But defendants knew that the land had been sold to G. P. Higinbotham, and that Maggie Higinbotham had loaned to him money for payment of the notes and had taken a deed as security therefor, and the receipt was made and signed only for the purpose of making it appear that the land had been sold to Maggie Higinbotham, and not to G. P. Higinbotham.

On August 6, 1917, Maggie Higinbotham, in the presence of Leffel and Mays, asked that a contract be made for the purpose of showing that Higinbotham was indebted to her for the money advanced by her for him, but defendant Leffel advised her that she should not have such contract, and did not need it. This advice was given by Leffel in order that there might not be any written contract showing the loan, and in pursuance of the conspiracy and with the purpose and intention of defrauding plaintiff.

The complaint further avers that Alice Leffel and defendant W. E. Leffel are husband and wife, and that on August 6, 1917, the \$4,400 paid by Mays to Leffel was deposited to the credit of Alice Leffel in order to prevent the plaintiff from securing the same, or any part thereof, and in furtherance of the conspiracy and for the purpose of defrauding plaintiff.

Plaintiff brought suit on the 31st day of August, 1917, in the circuit court of the state of Oregon for Wallowa county, in which W. E. Leffel and his wife, Alice Leffel, the First Bank of Joseph, and the First National Bank of Joseph were defendants. The judgment roll in that suit is Plaintiff's Exhibit A herein.

The complaint further avers:

"That said suit was brought by this plaintiff against the defendants in said suit for the purpose of securing an accounting between plaintiff and said defendant Leffel on account of the sale of said lands to G. P. Higinbotham, and for the purpose of preventing the defendant Alice Leffel and the said defendant First Bank of Joseph and said defendant First National Bank of Joseph from disposing of the money, or any part thereof, until such accounting should be had and the amount owing from said defendant Leffel to plaintiff determined, and for the purpose of securing a decree of the said circuit court of Wallowa county, Or., requiring the money received as commission on the sale of said lands and deposited to the credit of said Alice Leffel with said banks to be applied in satisfaction of such decree as might be obtained by plaintiff in said suit.

"That in the amended complaint filed in said suit it is alleged that said defendant W. E. Leffel and Alice Leffel are husband and wife;

that each of said banks is a corporation; that said partnership existed from some time in the year 1915 until some time in the year 1916; * * * and in said amended complaint it is alleged that it was agreed between said Mays and said partners that they should have a commission of \$5,900 for the sale of said lands; that \$400 of said commission was paid on or about November 24, 1915. * * *

"And it is alleged in said amended complaint that in 1917 the said lands were conveyed to said Maggie Higinbotham under and by virtue of the terms and conditions of the contract between said Mays and the said partners, and under and by virtue of the terms and conditions of said contract between said Mays and said G. P. Higinbotham; and that upon such conveyance being made the balance of the purchase price was paid after the deduction of a part of the interest accrued thereon, and that said defendant Mays paid to defendant Leffel a certain sum of money as the balance of said commission; but that plaintiff does not know what amount of money was paid by Mays to the said Leffel; * * * and that said money was deposited to the credit of Alice Leffel with said banks for the purpose * * * of defrauding plaintiff. * * *

"That answers and replies were filed in said suit and issues formed therein, and said suit came on for trial and taking of evidence therein in said circuit court for Wallowa county; and, upon the trial of said suit, the same was dismissed, with judgment to the defendants. * * *

The complaint in this action avers that upon the trial of that suit defendant Mays herein falsely testified that the notes were surrendered and delivered to G. P. Higinbotham on the 7th day of July, 1917, and the contract between Mays and Higinbotham surrendered and delivered to Mays on that date; that the land was turned back by Higinbotham to Mays, and that Higinbotham thereby lost his interest in and to the contract and to the lands, and that thereafter the land was sold to Maggie Higinbotham by virtue of a new contract of sale with her; that Mays' testimony was knowingly false; that the contract was not surrendered; and that Higinbotham did not receive the notes on that date, nor were they surrendered to him until August 6, 1917.

The complaint further avers that defendant Leffel knowingly testified falsely that the notes were surrendered and delivered to Higinbotham on July 7, 1917, and that the contract between defendant Mays and Higinbotham was surrendered and delivered to Mays on that date; that thereafter the land was turned back to Mays, and that Higinbotham lost all interest in his contract and in and to the land, and that thereafter the land was sold to Maggie Higinbotham under a new contract; that at the time of giving the false testimony in the trial of that suit, Leffel well knew that Maggie Higinbotham did not at any time purchase the land, or any part thereof; that such false testimony

was given pursuant to and in furtherance of a conspiracy and agreement for the purpose and with the intention of defrauding plaintiff by preventing him from securing or receiving any part of the commission for the sale of the lands to Higinbotham. Plaintiff demanded judgment against the defendants for the sum of \$2,950.

On June 21, 1920, defendant Leffel filed his motion to strike the amended complaint, which was denied by order of the court on September 24, 1920. Thereafter Leffel demurred to plaintiff's amended complaint, alleging that it appeared upon the face thereof: (1) That the court had no jurisdiction; (2) that several causes of action had been improperly united: conspiracy, an alleged action on the case for damages, action for perjury in judicial proceedings, action for subornation of perjury; (3) defect of parties defendant; (4) failure of complaint to state cause of action.

On December 7, 1920, the court entered its order overruling the demurrer, and defendant Leffel answered, admitting the allegations of paragraphs 1 and 2 of the amended complaint, and denying paragraphs 3 to 49, inclusive, thereof.

For a first further and separate answer and defense defendant averred, among other things, that on or about November 29, 1915, defendant Mays and wife contracted with Higinbotham to sell to him the land described in the amended complaint, for the sum of \$45,000, the purchase price to be paid as follows: \$3,000 upon the execution of the contract; \$6,000 on or before March 1, 1916; \$5,000 on or before November 1, 1916; \$5,000 on or before November 1, 1917; \$10,000 on or before January 1, 1919; \$10,000 on or before January 1, 1920; and \$6,000 on or before January 1, 1921; payments to be secured by notes bearing date November 1, 1915, with interest at 8 per cent. per annum; that on or about the 11th day of December, 1915, Mays contracted with Runnells and Leffel for the payment of the commission of \$6,000 for the sale of the land to Higinbotham, the agreement providing for the discharge of the commission due the real estate agents upon the payment by Higinbotham of certain notes described therein, and further providing that in case Higinbotham failed to make the payments set forth in the contract of sale of the land, or in case Mays should be compelled to take the ranch back in lieu of payment of the notes made by Higinbotham to him, then the interest of Leffel and Runnells in the notes would cease; that the notes of Higinbotham are the notes described in paragraphs 8 to 13 of plaintiff's complaint; that they were never paid in cash, or otherwise, by Higinbotham, or at all; that the partnership between Leffel and Runnells terminated in December, 1916, Leffel continuing in the busi-

ness; that on or about July 7, 1917, Higinbotham, being in default in the payment of his obligations, refused and neglected to pay the amount stipulated in the contract of sale and represented by the notes, and, on demand of Mays, returned to him the contract of sale, and thereupon such notes were returned to Higinbotham; that thereafter, and on the 7th day of July, 1917, defendant sold the real estate described in plaintiff's amended complaint to Maggie Higinbotham for \$39,000, and on that date Mays agreed to pay the defendant his commission for the sale of the land, which amounted to \$5,900; that the sale of the land to Maggie Higinbotham was a bona fide transaction; that the notes placed in the hands of the escrow holder were taken from him on July 7th for the purpose of returning them to Higinbotham upon the surrender of his agreement.

For a second further and separate answer and defense, Leffel alleged:

The beginning of a suit wherein "the plaintiff herein was plaintiff, and W. E. Leffel, the defendant herein, was defendant, together with Alice Leffel, First National Bank of Joseph, Or., and First Bank of Joseph, Or., and that in said suit the plaintiff sued to recover and collect from the defendant W. E. Leffel \$2,950, being the same and identical claim and money demand of said defendant that is sued upon in this action"; that in said suit Runnells, the plaintiff herein, sued upon the contract set forth in his amended complaint in this action; "that the issues presented by said suit were the same issues as those presented by the present action, and that the subject-matter and claim of said suit was the same subject-matter and claim as that presented by the within case, and that all the questions herein sought to be litigated by the plaintiff were questions and claims which either were or could have been litigated in said suit."

The defendant avers that plaintiff is estopped and barred from prosecuting this action, and refers to the pleadings and decree entered in the former suit, copies of which are attached to the answer as exhibits.

A demurrer to the defense of former judgment was filed by the plaintiff and sustained by the court. Plaintiff filed his reply. At the conclusion of plaintiff's case, Leffel moved the court for a nonsuit, which was denied. A verdict for \$2,950 was returned against the defendant.

Defendant appeals from judgment in favor of the plaintiff, assigning as error various rulings of the court involving the question of res judicata, the admission of certain testimony, and the giving and refusing of certain instructions.

A. W. Schaupp, of Joseph, and Colon R. Eberhard, of La Grande (Cochran & Eberhard, of La Grande, and A. W. Schaupp, of Joseph, on the brief), for appellant.

A. S. Cooley, of Enterprise, for respondent.

BROWN, J. (after stating the facts as above). [1, 2] This is the second judicial proceeding between Runnells, plaintiff, and Leffel, defendant, arising out of the retention by Leffel of the commission received for the sale of real estate. For the decision in prior case, see *Runnells v. Leffel*, 93 Or. 342, 176 Pac. 802, 183 Pac. 756. In the former case, it was decided by the lower court, and affirmed by this court, that no sum of money was due from Runnells to Leffel on account of their real estate transactions. The deliberate decision of this court, although pronounced by a divided court, must be considered as *stare decisis* upon the questions involved. 15 C. J. 938. This court adjudged, after having "duly examined the allegations of the parties and the testimony produced and the decree of the court below" in that cause, "that said decree correctly adjudicates the rights of the parties." The decree affirmed reads, in part:

"The court finds that the plaintiff has failed to establish by competent testimony the allegations of the amended complaint and reply, and that the plaintiff has failed to prove by a preponderance of the evidence, or at all, that the three notes mentioned in the amended complaint of plaintiff made, executed, and delivered by G. P. Higinbotham to O. B. Mays were ever paid in cash or otherwise by G. P. Higinbotham, or any other person, or at all; and the court further finds that there is no sum or sums of money due or owing from the defendant W. B. Leffel, and Alice Leffel, or either of them, to the plaintiff."

It will be remembered that the partnership was to receive its commission upon the payment of the three notes mentioned in the above excerpt.

The prevailing opinion says, at pages 348 and 349 of 93 Or., at page 804 of 176 Pac.:

"We have read all of the evidence carefully but fail to find such contention supported. The evidence shows that the original contract between C. B. Mays and G. P. Higinbotham was canceled and the notes surrendered and that a new contract was made with Maggie Higinbotham and consummated. * * * The evidence of the plaintiff clearly shows that these notes were not paid, and that no proceeds were received under the terms of said contract."

If there is any obscurity in the decree, this expression from the opinion clarifies it. *Taylor v. Taylor*, 54 Or. 560, 103 Pac. 524.

An analysis of the complaint in the second action discloses that plaintiff's right of action is based upon the assertion that \$5,900 was received by Leffel as commission due the partnership by reason of the sale of the Mays' real property to Higinbotham, and that Leffel designedly and wrongfully defrauded plaintiff out of his one-half interest therein, to his damage in the sum of \$2,950.

The principal question for us to determine

is this: Is the plaintiff barred by the former adjudication?

Discussing two main rules which govern the subject of estoppel by judgments, Mr. Black, in his work on Judgments, at section 504 says:

"The first of these chief rules is as follows: A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different. * * * The second of the main rules on the subject may be thus stated: A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies, upon the same cause of action, so long as it remains unreversed."

These rules are supported by many decisions of this and other courts.

In the recent case of *United Shoe Machinery Corporation v. United States*, 257 U. S. —, 42 Sup. Ct. 363, 365, 366, 66 L. Ed. —, Mr. Justice Day, in delivering the opinion of the court, said of a decision that has frequently been cited and followed by this court:

"Perhaps the leading case in this court upon the subject of estoppel by former judgment is *Cromwell v. County of Sac*, 94 U. S. 351, 352 (24 L. Ed. 195), in which this court, speaking by Mr. Justice Field, laid down the general rule of law, which has been followed in subsequent cases: ' * * * There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, * * * concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.'"

After quoting the above, the learned justice then says:

"In other words, to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of a matter in controversy in the second suit? To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy."

The doctrine thus announced runs through the opinions of many cases decided by this court.

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, *supra*, was an action on four bonds of the county of Sac, Iowa, for \$1,000 each, and four interest coupons for \$100 each. To defeat that action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Smith upon certain earlier maturing coupons on the same bonds. Proof was also offered that Cromwell was the owner of the coupons in the prior action, and that it was prosecuted for his benefit.

In the case of *Caseday v. Lindstrom*, 44 Or. 309, 75 Pac. 222, this court affirms the general rule that a judgment or decree rendered upon a different claim or demand than the one being presently litigated operates as an estoppel against matters actually litigated or facts distinctly in issue, and cites in support thereof *Glenn v. Savage*, 14 Or. 507, 13 Pac. 442; *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651; *White v. Ladd*, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *La Follett v. Mitchell*, 42 Or. 465, 69 Pac. 916, 95 Am. St. Rep. 780. The opinion of the court quotes the following:

"The rule is that the judgment of a court of competent jurisdiction is not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not." *Barrett v. Failing*, 8 Or. 152, 156.

Also:

"A fact or matter at issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings." *Garwood v. Garwood*, 29 Cal. 514.

The court further said:

"This is the utterance, also, of the court in *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675): 'It may be stated generally that the ultimate facts upon which the recovery is had—facts which, if found the other way, the recovery must have been different—are facts in issue.' *Marshall v. Shafter*, 32 Cal. 176, 193."

In the case of *Ruckman v. Union Railway Co.*, 45 Or. 578, 78 Pac. 748, 69 L. R. A. 480, the court states the general rule in this state to the effect that a decree rendered upon the merits is a final and conclusive determination

of the rights of the parties and a bar to future litigation upon the same cause, not only as to matters actually decided, but as to every other matter which the party might have litigated and had decided as an incident thereto, or essentially connected therewith, and quotes largely from an opinion in *Patterson v. Wold* (C. C.) 33 Fed. 791, as follows:

"The court (Mr. Justice Brewer presiding) held that the first judgment was a bar to the second, although the grounds of recovery were different. After quoting Mr. Pomeroy's analysis of the elements which constitute 'a cause of action' (*Pomeroy, Rem. & Rights*, § 519), he says: 'Now, what is the plaintiff's primary right, as alleged in these cases? Obviously, in each the same—the right to have the land; and the defendant's corresponding primary duty is to let him have the land; and the defendant's delict or wrongful act is the failure to let him have the land. These exist in each case, and in each case alike. It is true, the basis of complainant's primary right is, as alleged, different in one case from that in the other; but this is mere difference, in the language of the Supreme Court, in 'the ground of recovery.' The mere fact that different testimony would be necessary to sustain the different allegations in the two bills does not of itself necessarily make two distinct causes of action. Take this illustration: Suppose a party bring suit to recover possession of real estate, and alleges in his complaint that he is the owner by virtue of a patent from the government. After a judgment against him, would he be permitted to maintain a second action, alleging that he was the owner by virtue of certain tax proceedings or by virtue of a judicial sale? Yet different testimony would be required to sustain his allegations in the two actions. In both of such actions plaintiff's primary right—that of possession based on ownership—would be the same, the only difference being in the ground of recovery. All the grounds of recovery, all the bases of plaintiff's title, must be present in the first action, or they are lost to him forever, exactly the same as when a party sued upon a note, and having several defenses, pleads only one—the balance are as though they never existed. The party who has his day in court must make his entire showing. He cannot support a claim or defense in different actions on different grounds.'"

The court then quotes an opinion written by Mr. Justice Holmes, in *United States v. California Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476:

"* * * But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim; * * * and, a fortiori, he cannot divide the grounds of recovery."

In the case of *White v. Ladd*, *supra*, Mr. Justice Wolverton, speaking for the court, said:

"The potency of a judgment as an estoppel concludes every fact necessary to uphold it, and extends, not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with the subject-matter of the litigation."

In *Peacock v. Kirkland*, 74 Or. 279, 284, 285, 145 Pac. 281, 282, Mr. Justice Burnett wrote:

"In the replevin action here involved there was an opportunity offered by sections 153 and 198, L. O. L., to settle the status of the property and the amount of damages to be assessed against the plaintiff there if such was the right adjudication of the issue. The judgment there is conclusive of the rights of the parties on the merits of the action, and, while that decision stands, we cannot go behind it and determine questions that should have been litigated in that action."

In *United States Nat. Bank v. Shehan*, 98 Or. 155, 161, 193 Pac. 658, 660, the court, speaking through Mr. Justice McBride, said:

"We have referred to the opinion in the case because no findings were specifically made beyond the general one that 'the equities are with the defendants,' and in such cases the court may have recourse to the opinion to show what actually was decided. *Gentry v. Pacific Live Stock Co.*, 45 Or. 233 (77 Pac. 115). But beyond this we take it that the rule is firmly established that a fact properly in issue between parties, necessary to the determination of the case, will be finally concluded from re-examination in any subsequent suit or action between the same parties. *Freeman on Judgments* (4th Ed.) § 249, p. 441 et seq.; and authorities there cited; *Underwood v. French*, 6 Or. 67 (25 Am. Rep. 500); *Barrett v. Failing*, 8 Or. 152; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651; *La Follett v. Mitchell*, 42 Or. 465, 69 Pac. 916, 95 Am. St. Rep. 780; *Casaday v. Lindstrom*, 44 Or. 309, 315, 75 Pac. 222; *Wales v. Lyon*, 2 Mich. 276; *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675). Nor is the form in which the subsequent action is prosecuted material. It would be intolerable if a party, having chosen his forum and presented an issue for trial, should be permitted after defeat, by simply changing the form of his action, to relitigate the same matter in a new form of action; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Putnam v. Clark*, 34 N. J. Eq. 532; *Phillips v. Pullen*, 45 N. J. Eq. 830, 18 Atl. 849."

In the former case between these parties, the decree speaks for itself. In plain words, it adjudged that *Leffel* owed *Runnells* nothing. That judgment cuts the ground from under the plaintiff's feet. If we were uncertain as to the meaning of the decree in that case, the language of the prevailing and dissenting opinions would take away all doubt. The plaintiff has had his day in court. He chose his remedy and his forum.

Plaintiff's averment that his former partner is a conspirator and a falsifier does not remove the bar of a former judgment. The defendant's plea in law was good.

This case is reversed.

(24 Ariz. 180)

SMITH v. STATE. (No. 536.)

(Supreme Court of Arizona. June 28, 1922.)

Witnesses ~~61~~(1)—Prosecutrix in statutory rape competent even though subsequent to commission of offense she married accused.

Under the express provisions of Pen. Code 1913, § 248, in a prosecution for statutory rape, the prosecutrix was a competent witness against accused, even though subsequent to the commission of the offense she became his lawful wife.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Greer Smith was convicted of rape, and he appeals. Affirmed.

David A. Keener, of Chandler, for appellant.

R. B. L. Shepherd, Co. Atty., of Phoenix, and W. J. Galbraith, Atty. Gen., for the State.

ROSS, C. J. Greer Smith appeals from an order overruling a motion for a new trial, and from a judgment of conviction of the crime of rape. The information charged the offense as having been committed on or about the 18th day of January, 1921, against a female person of the age of 14 years. Thereafter, and before the trial, but not before his arrest, appellant and the prosecutrix were married, and at the time of the trial it is conceded by the state they were husband and wife. The prosecutrix was called by the state as a witness, and over the objections of the appellant was permitted to testify to acts of sexual intercourse between herself and appellant at times before they were married. This is assigned as error, it being contended by appellant that, being then his wife, the prosecutrix was not competent to testify to the criminal acts committed against her before she became his wife. The solution of this question involves the construction of our statute upon the competency of witnesses in criminal cases.

"According to the common-law rule the husband or wife was regarded as incompetent to testify either for or against the other. Such persons were excluded upon what were deemed to be reasons of public policy. The exclusion rested not alone upon the fact of their interests being considered identical. It was thought that by not permitting their testimony to be

received dissensions and distrust between them would be avoided, which result it was believed would not ensue in many cases if they testified to the truth. Furthermore their desire frequently to avoid such a result or to protect each other was regarded as a strong incentive to the commission of perjury. In view of such considerations as these, variously expressed by the courts, it was considered that the policy of the law would be better served by refusing to permit them to testify under such circumstances." 5 Chamberlayne, *Modern Law of Evidence*, § 3655; 4 Jones, *Commentary on Evidence*, § 734.

The common-law rule thus stated has been materially changed by our statute. Section 1228 of Penal Code 1913 has made the following exceptions to the common-law rule: First, where one of the spouses is being tried for a crime committed during the marital relation against the other, the latter is a competent witness. Second, the wife is a competent witness against her husband upon the criminal charge of abandonment or failure to provide for her or their children. By section 1228, supra, the common-law rule is further modified, so that the spouses are not compellable to testify for or against each other, but may do so upon consent or request: (1) Upon consent of the spouse on trial for crime, the other may testify in all cases. (2) Upon request a spouse may be a witness for or against the other when the latter is being tried "for bigamy or adultery committed by either husband or wife, or for rape, seduction or the crime against nature, or any similar offense, committed by the husband." Without determining whether the present case falls within any of the exceptions enumerated in section 1228 of the Penal Code, we think it quite clear the wife was competent to testify under the provisions of section 248 of the Penal Code, which reads as follows:

"Any such female referred to in the foregoing shall be a competent witness in any prosecution under this chapter to testify to any and all matters, including conversation with the accused, or by him, with or by third persons in her presence notwithstanding her having married the accused either before or after the violation of any of the provisions of this chapter."

"This chapter" referred to in section 248, is chapter 1 of title 9, entitled, "Rape, Abduction, Carnal Abuse of Children, and Seduction." This chapter, as it appears in the Penal Code of 1913, is made up of chapter 1, title 9, of the Penal Code of 1901, and chapter 31, Laws of Special Session of 1912, entitled, "An act in relation to pandering, to define and prohibit the same, and to provide for the punishment thereof." In other words, chapter 1, tit. 9, of the Penal Code of 1913, is made up of the two chapters named above. There is no question but that

section 248, supra, as it was originally written, limited the testimonial competency of the female suffering wrongs to those enumerated in chapter 31. It is, however, quite as clear, from its present position, that its terms have been extended, so that such female is a competent witness to any of the wrongs committed against her enumerated in sections 231 to 241 of such chapter, as much so as any wrongs to her enumerated in sections 242 to 246 of said chapter. As to the intention of the Legislature, it would seem that there would be no doubt. The language employed is plain and comprehensive—not to be mistaken as to its meaning. It makes a competent witness of any female who has suffered any of the wrongs enumerated in chapter 1, tit. 9, of the Laws of 1913, "to testify to any and all matters, including conversation with the accused, or by him, with or by third persons in her presence notwithstanding her having married the accused, either before or after the violation of any of the provisions of this chapter."

Counsel for appellant very ably insists that section 248 should be given its meaning as it originally appeared in chapter 31, Laws of Special Session of 1912, basing his contention on the application of the well-known principle that revisers of the law are presumed not to change the law unless it clearly appears that it was the intention to do so. But a mere statement of the principle, we think, disposes of the contention. Section 248 is identical with section 7, c. 31, supra, except the words "this chapter" are substituted in section 248 for the words "this act," as they appear in section 7. If this change had not been made in the compilation and revision of the criminal laws, there would be reasons to sustain appellant's contention. By the change it is made to affirmatively appear that the Legislature intended that a female wronged in any of the ways mentioned in chapter 1, tit. 9, Penal Code 1913, should be competent to testify to such wrongs, whether committed against her before or after marriage.

The offense for which appellant was tried, to wit, statutory rape, is one of the offenses defined in said chapter 1, tit. 9, of the Penal Code 1913, and is therefore an offense in which the prosecutrix was a competent witness, even though subsequent to its commission she became the lawful wife of appellant.

The other assignments of error become immaterial in view of the court's ruling on the competency of the prosecutrix to testify, since in no aspect of the case could they prejudice appellant's rights.

The judgment is affirmed.

McALISTER and FLANIGAN, JJ., concur.

(24 Ariz. 185)

GARDANIER et al. v. CELADA. (No. 1957.)

(Supreme Court of Arizona. June 28, 1922.)

War ⇨10(2)—**Alien enemy held to have persona standi in iudicio after issuance of federal license to trade with enemy.**

In an action on protested check drawn after issuance by federal government of license to trade with the enemy, *held*, that the Trading with the Enemy Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), no longer applied, and that alien enemies had a legal right to maintain the action, notwithstanding that the government was still technically at war with the government of plaintiff's allegiance.

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

Action by S. A. Gardanier and others, substituted as plaintiffs against Juan Celada. From judgment for defendant, plaintiffs appeal. Reversed and remanded.

Duffy & Purdum, of Nogales, and R. Wm. Kramer, of Phoenix, for appellants.

Frank J. Barry, of Nogales, for appellee.

McALISTER, J. This action was instituted in the superior court of Santa Cruz county, this state, to recover from J. Celada, defendant-appellee, \$6,130, the amount of a check dated August 2, 1919, and drawn by him on the First National Bank of Nogales, Ariz., in favor of Octavio Gaxiola. F. Unger and G. B. Burmister, residents of Mazatlan, Sinaloa, Mexico, copartners doing business there under the firm name and style of Melcher Sucs., were the original plaintiffs, but after the suit was filed, to wit, on January 24, 1921, S. A. Gardanier, Ignacio Soto, and F. J. B. Gonzales, composing a co-partnership known as the International Commission Company, were substituted for them, upon motion of Unger and Burmister, the check having been indorsed to them on November 29, 1920, by Melcher Sucs., who were at the time of the filing of the action its owners and holders, having become such in the due course of business through the successive indorsements of Gaxiola and one Eduardo Amarillas. In their complaint Unger and Burmister alleged that the bank refused to pay the check when it was presented for that purpose on or about August 10, 1919, because the drawer did not have to his credit sufficient funds to meet it.

The defense, raised both by plea in abatement and by answer, is that during all the times mentioned in plaintiffs' complaint the United States and the German Empire were at war with each other, and that F. Unger and G. B. Burmister, from the date the check was transferred to them through indorsement up to the day of the trial, were citizens and

subjects of the German Empire and alien enemies of the United States abiding outside its territory; that prior to the commencement of the action and continuing up to the day of the trial they were listed by the government of the United States in the Enemy Trading List of the War Trade Board of the United States; and that the indorsement and transfer of the check was made by them during the pendency of the war between the United States and Germany and was an attempted contract by an alien enemy of the United States, and therefore void.

A demurrer to the plea in abatement was interposed and overruled, whereupon testimony in substantiation of the plea was introduced, and upon this the court made the following finding of fact:

"That at the time of filing of the complaint by Melcher Sucs., the original plaintiffs in said action, said Melcher Sucs. were, and are now, German subjects and alien enemies of the United States of America; that subsequent to the commencement of said action said Melcher Sucs. transferred and assigned their interest in the subject-matter of said action to the present plaintiffs herein, who on motion of counsel for said Melcher Sucs. were substituted for said Melcher Sucs. in said action."

From this the court concluded as a matter of law that at the time the complaint was filed the plaintiffs F. Unger and G. B. Burmister had no standing in the courts of the United States, and that their successors in interest or indorsees, the present plaintiffs, acquired from them and had no greater rights than they. Thereupon the plea in abatement was sustained and the action dismissed. The assignments are based on these two orders, but it is necessary to discuss only the one sustaining the plea in abatement, for a correct disposition of it is decisive of the case.

Under date of October 6, 1917, the Congress of the United States passed an act entitled "Trading with the Enemy Act" (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), which defined as an "enemy," among others, the following:

"(a) Any individual * * * of any nationality, resident within the territory * * * of any nation * * * with which the United States is at war, or resident outside the United States and doing business within such territory. * * *

"(c) Such other individuals * * * as may be natives, citizens, or subjects of any nation * * * with which the United States is at war, * * * wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term * * * 'enemy.'"

On May 31, 1918, the President of the United States found that the safety of the United States and the successful prosecution of the

war required that certain other persons be included "within the meaning of the word 'enemy' for the purposes of the 'Trading With the Enemy Act' and of such trading," and issued a proclamation designating, among others, the following as enemies:

"(4) Such other individuals or body or class of individuals as may be citizens or subjects of any nation with which the United States is at war wherever resident outside of the United States, or wherever doing business outside of the United States, who are or may hereafter be included in a publication issued by the War Trade Board of the United States of America, entitled 'Enemy Trading List.'" 40 Stat. 1787.

The evidence discloses that Melcher Sucs., the copartnership composed of F. Unger and G. B. Burmister, the original plaintiffs in this case, were, in pursuance of the authority conferred by the foregoing proclamation, placed on the Enemy Trading List by the War Trade Board of the United States, but that on April 28, 1919, acting concurrently with the proper authorities of the associated governments, the War Trade Board abolished all Enemy Trading Lists compiled or issued by it except as they referred to subjects of Germany or Hungary. But on July 14, 1919, the Department of State, to which the President had by proclamation granted this power, issued, through the Chief of its War Trade Board Section, in the following language, a general license to trade with the enemy:

"Pursuant to the power vested in the President of the United States under section 5 (a) of the Trading with the Enemy Act and by the President delegated to the Department of State, the Department of State, acting through the War Trade Board Section, hereby issues a general enemy trade license to all persons in the United States, authorizing said persons, for all purposes connected with the provisions of sections 3 (a) and 3 (c) of the Trading with the Enemy Act, on and after July 14, 1919, to trade and communicate, as defined in sections 3 (a) and 3 (c) of said act with persons residing in Germany, and to trade and communicate with all persons with whom trade and communication is prohibited by the Trading with the Enemy Act."

It will be observed that the license contained in the foregoing and issued before this case was instituted or the check in question dated, drawn, or transferred to Melcher Sucs. authorizes the people of the United States to trade or communicate with persons residing in Germany as well as with all persons with whom trade and communication had theretofore been prohibited by the Trading with the Enemy Act. The authority thus conferred enabled them to do, after July 14, 1919, what they had been denied the right to do previous thereto, and carried with it the right to enforce in court any contract entered into or obligation incurred as a result of any business transactions consummated in pursuance thereof.

"If the contract on which the suit is brought," says Justice Washington in *Crawford v. The William Penn*, Fed. Case No. 3372, "arise directly or collaterally out of a trade licensed by the sovereign authority of the government in whose courts redress is sought, enemy interest in the subject in controversy will not defeat the action depending in the name of the subject as trustee. * * * The end being licensed, the ordinary legitimate means of attaining that end is considered as being also licensed. * * * Where commerce is permitted amongst enemies, contracts and actions founded upon them are permitted; 'for who,' [Bynkershoek] asks, 'will sell and carry goods to an enemy, without the right of recovering the price of them, and what hope can there be of recovering that price, if one cannot judicially compel payment from his enemy purchaser.' In cases of this nature, in courts proceeding according to the civil law, the only question is: Has the plaintiff a *persona standi in judicio*? Can he be heard as a plaintiff in that court? Bynkershoek, in the above quotation, gives the answer. The right to sue and to compel payment is a necessary incident to his right to trade and to contract."

It is appellee's contention, however, that inasmuch as Unger and Burmister were German subjects, and the United States was still at war with Germany when the check was presented for payment and this action instituted, the application of the common-law rule prohibiting an alien enemy from suing in the courts of the country with which his own country is at war compels a dismissal of the action. But the Trading with the Enemy Act defines enemies for the purpose of trade and fixed their status, and its provisions on that subject are exclusive and controlling, since it was clearly within the power of Congress to do this, and, if this act had the effect of modifying the common law in any particular, the latter would necessarily give way. So, whether Unger and Burmister, German subjects residing in Mexico, were alien enemies within the meaning of the common law, or whether they came within the exception to that rule which permits an alien enemy residing in the country or who may come into it by license of its sovereign to maintain an action, is immaterial, since the license "to trade and communicate with all persons with whom trade and communication is prohibited by the Trading with the Enemy Act," issued in conformity with and in pursuance of this act, had the effect of giving them the right to sue in the courts of this country and of setting aside by implication any rule of the common law which may have denied them such right, for the act of Congress must unquestionably govern the matter. The fact that the general license to trade was issued during the existence of only a technical state of war months after victory had been won and actual hostilities ceased, when the reason for the rule denying enemies the right to sue in the courts of this country no longer ap-

pled, would indicate that it was the intention of the government that the business of the country should not be further hampered by such restrictions.

The order sustaining the plea in abatement upon the ground that the original plaintiffs were alien enemies, and therefore without status in the courts of the country, at the time the action was filed, as well as that dismissing the action, was error.

The judgment is reversed, and the case remanded for further proceedings in conformity with the views herein expressed.

ROSS, C. J., and FLANIGAN, J., concur.

(24 Ariz. 191)

SKAGGS v. STATE. (No. 532.)

(Supreme Court of Arizona. June 28, 1922.)

1. Bastards \S 92—Appellate jurisdiction must be based on statutory provision.

The jurisdiction of the appellate court to consider a case of bastardy must be based on statutory provision.

2. Bastards \S 92—No right of appeal conferred by Penal Code.

No right of appeal in bastardy cases is conferred by Pen. Code 1913, §§ 1151-1163, inclusive, because under the express terms of the bastardy statute the prosecution thereunder proceeds upon the complaint originally filed by the woman complainant in the justice court, and section 1151 provides for an appeal only in criminal cases presented by indictment and information.

3. Bastards \S 19—Proceedings of statute civil in nature.

The bastardy statute is civil in its nature, and the proceedings authorized thereby are governed by the rules applicable to civil actions.

4. Statutes \S 226—Construction of statutes adopted from another state adopted with statute.

The Legislature by adopting the bastardy statute from the state of Minnesota adopted also the well-settled construction placed upon it by the courts of the state from which the law was taken.

5. Statutes \S 118(1)—Bastardy Law incorporated in Penal Code held void as not within title.

The incorporation of Bastardy Law in Penal Code, under title, "An act to establish a penal code," violated Const. art. 4, pt. 2, § 13, as embracing within the title quoted a subject and matters connected therewith not expressed in the title, and is therefore void.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

O. J. Skaggs was convicted of bastardy, and he appeals. Dismissed.

Baker & Whitney, of Phoenix, for appellant.

W. J. Galbraith, Atty. Gen., and George R. Hill and F. W. Perkins, Asst. Attys. Gen., and R. E. L. Shepherd, Co. Atty., of Phoenix, for the State.

FLANIGAN, J. In proceedings brought under the provisions of title 10, pt. 1 (sections 369 to 381, inclusive), of the Penal Code, entitled "Bastards," the appellant was adjudged guilty of being the father of the unborn child of an unmarried woman, and an order was accordingly made charging him with the maintenance of such child, if it should be born, and requiring him to give bond to secure his performance of such judgment and order. Thereafter the appellant moved for a new trial and in arrest of judgment, and from the orders denying said motions, and the judgment and order of the court charging him with the maintenance of the child, he gave notice of appeal to this court.

The appellant has made and argued many assignments of error, including an assignment that the judgment and order of maintenance appealed from are void because of the unconstitutionality of the Bastardy Law for conflict with section 13, pt. 2, art. 4, of the Constitution. The argument on that assignment presented in the briefs for the appellant and the state will be noticed in connection with the determinative question of whether any appeal lies to this court from such judgment and order.

[1] Our jurisdiction to consider this case on appeal must be based upon the authority of some statutory provision. Mohave County v. Stephens, 17 Ariz. 165, 149 Pac. 670.

[2] No right of appeal is conferred by the provisions of chapter 1, title 11, pt. 2, of the Penal Code (sections 1151 to 1163, inclusive), because under the express terms of the Bastardy Law prosecution thereunder proceeds upon the complaint originally filed by the woman complainant in the justice court (see the statute and State v. Brathovde, 81 Minn. 501, 84 N. W. 340); and the Code (section 1151) provides for an appeal only in criminal cases prosecuted by indictment or information.

Assuming that, under the provisions of paragraphs 1227, 1228, of the Civil Code, an appeal would lie from such judgment or order as rendered in a civil action or proceeding (paragraph 1226), the questions are directly presented whether the bastardy statute provides for a civil action or proceeding, and whether, if it so provides, it is constitutional under the terms of section 13, pt. 2, art. 4, of the Constitution.

Upon the assumption that the case is properly in this court on appeal, the parties have presented the constitutional question just re-

ferred to, and we shall advert to such of the arguments offered on that head as will aid in the clear development of the matters necessary to the decision of the determinative question of our jurisdiction.

Section 13, pt. 2, art. 4, of the Constitution reads as follows:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

The contention is that the title under which the Penal Code was enacted, being "An act to establish a penal code," of which Code the Bastardy Act is a part, is not sufficiently comprehensive to embrace the law, inasmuch as proceedings under it must be regarded as civil in character, so that the law can constitutionally have no place in the Penal Code.

[3] The bastardy statute was adopted from the Revised Laws of Minnesota 1905, being chapter 17 of such laws (sections 1567 to 1579, inclusive), and for all practical purposes is a substantial rescript of such chapter. This Minnesota act has been on the statute books of that state since at least the year 1866, appearing in the Revision of that year and of 1878 as chapter 17, and has been many times construed by the Supreme Court of Minnesota. Under these decisions there is no doubt that the proceedings authorized by this statute are to be considered civil in nature, and governed by the rules of procedure applicable to civil actions.

In *State v. Becht*, 23 Minn. 1, it is said:

"Our statute upon the subject of bastardy seems to have been borrowed from the state of Wisconsin. The supreme court of that state, in referring to proceedings under this and similar statutes, correctly say: 'They are not strictly of a criminal character, though they have always been considered as quasi criminal, and the view undoubtedly taken of them by courts in modern times is that they are neither wholly civil nor wholly criminal, but have many of the features and incidents of both.' *State v. Jager*, 19 Wis. 235, and cases there cited. Statutes of this character are in the nature of police regulations, having, as their principal object and purpose, the enforcement, upon the putative father of a bastard child, of the moral and natural duty resting upon him to furnish it adequate support and maintenance, and to indemnify the community against its becoming a public charge and burden. *Hawes v. Cooksey*, 13 Ohio, 242; *Musser v. Stewart*, 21 Ohio St. 353; *Lower v. Wallick*, 25 Ind. 68, followed and approved in *Ex parte Teague*, 41 Ind. 278. The infliction, upon the father, of a punishment for the act of begetting a bastard child, as for a criminal offense, is not the purpose of our statute, nor is such its effect. It is rather against the consequences of the act, both as re-

spects the child and the public, that its provisions are directed and intended to operate."

It has accordingly been held by the Minnesota court that in bastardy proceedings proof beyond a reasonable doubt is not required in order to convict the defendant, but merely proof by a preponderance of the evidence; that the testimony of the complainant, the mother, need not be corroborated by other evidence (*State v. Nichols*, 29 Minn. 357, 13 N. W. 153); that the county attorney in his argument to the jury is at liberty to comment upon the omission of the defendant to be sworn in his own behalf (*State v. Snure*, 29 Minn. 132, 12 N. W. 347); that the oath prescribed for the jury in civil cases is the proper one in such proceedings (*State v. Worthingham*, 23 Minn. 528); that an appeal from the district court in bastardy proceedings is to be effected in the same manner as an appeal in civil actions (*State v. Klitzke*, 46 Minn. 343, 49 N. W. 54); and that the sufficiency of the complaint in such actions is to be determined by the rules applicable to civil causes (*State v. Brathovde*, 81 Minn. 501, 84 N. W. 340). See, also, to the same effect generally the cases of *State v. Hausewedell*, 94 Minn. 177, 102 N. W. 204; *McKittrick v. Cahoon*, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. Rep. 606; *State v. Nestaval*, 72 Minn. 415, 75 N. W. 725; *State v. Wenz*, 41 Minn. 196, 42 N. W. 933; *State v. Eichmiller*, 35 Minn. 240, 28 N. W. 503.

[4] The construction of the act so made by the Minnesota court was well settled at the time of the enactment of our Penal Code, and as, under the decisions of this court, the Legislature of this state by adopting the law adopted also the well-settled construction placed upon it by the courts of the state from which the law was taken (see *Territory v. Delinquent Tax List*, 3 Ariz. 117, 21 Pac. 768; *Cheda v. Skinner*, 6 Ariz. 196, 57 Pac. 64; *Goldman v. Sotelo*, 8 Ariz. 85, 68 Pac. 558; *Elias v. Territory*, 9 Ariz. 1, 76 Pac. 605, 11 Ann. Cas. 1153; *Anderson v. Territory*, 9 Ariz. 50, 76 Pac. 636; *Copper Queen C. M. Co. v. Territory*, 9 Ariz. 383, 84 Pac. 511; *Costello v. Muhelm*, 9 Ariz. 422, 84 Pac. 906; *Territory v. Copper Queen C. M. Co.*, 13 Ariz. 198, 108 Pac. 960; *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99). It is claimed that the conclusion follows that the bastardy act is void under the constitutional provisions referred to. In further support of this contention, there is cited the case of *State v. Tie-man*, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854, in which it is held that the inclusion within the general Penal Code of the territory of Washington, which Code was entitled, "An act relative to crimes and punishments, and proceedings in criminal cases," of a statute on bastardy offended against the act of Congress providing for the organization of the territory of Washington, which

provided that "every law shall embrace but one object, and that shall be expressed in the title," because such statute did not provide for a criminal proceeding. After referring to the decisions from other states to the effect that the same or similar statutes had been held with uniformity to give rise to a civil, and not a criminal, liability, the court felt constrained to hold that the statute in question, being civil in character, could not lawfully be enacted as a part of a general enactment having for its title a reference to criminal objects and procedure only, and that the statute was repugnant to the constitutional provision referred to, and therefore void.

[5] In *State v. Brandner*, 21 N. D. 310, 130 N. W. 941, it is held that, as the Bastardy Law of that state provided for the arrest of the defendant at public expense upon a criminal complaint, in criminal proceedings brought in the name of the state, and for his imprisonment if he failed to obey the final order of the court, the proceedings were quasi criminal, at least, and the inclusion of such law within the Code of criminal procedure under the title, "An act to establish a code of criminal procedure for the state of North Dakota," did not violate section 61 of the Constitution of that state, to the effect that no bill should embrace more than one subject, which should be expressed in its title. This case cites and differentiates the decision in the *Tieman Case* on the ground that the Bastardy Law of Washington, under the holding of its Supreme Court, was in truth a civil proceeding. Both cases—the *Tieman Case* expressly, and the *Brandner Case* by implication—hold that the incorporation of a statute providing for proceedings of a purely civil nature in a code devoted to criminal proceedings, and enacted under a title embracing only criminal subjects or objects, is repugnant to the paramount law of these jurisdictions.

These decisions, so far as they determine the classification of a bastardy statute as related to the title under which a code of criminal procedure was enacted, are of little, if any, aid in the determination of the question we are now considering. This is true because the character of the proceedings provided by our own statute seems to us to be foreclosed by the Minnesota decisions. Under the authority of the *Tieman* and *Brandner Cases*, if the rights and remedies created and conferred by our statute, and the proceedings thereunder, are of a civil nature, there would seem to be no escape from holding the statute unconstitutional as violative of our mandatory constitutional provision that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title.

The gravity of the consequences following such a determination, the respect we owe to the lawmaking power as a co-ordinate branch of the government equally bound with us to obey the law, and the necessity of upholding all enactments of that power where it is possible so to do admonish us that every avenue of escape from the conclusion of invalidity must be explored before pronouncing such determination.

We therefore inquire whether the embodiment of this statute in the Penal Code in any wise shows the implied legislative intent to adopt the Minnesota construction not to have existed, or, at least, whether by such incorporation a purpose was evinced to so far modify such construction as to place the statute in harmony with the other enactments of the Penal Code, so that the statute may be upheld.

The Penal Code of this state is divided into three parts. Part 1 relates to crimes and punishments, part 2 to criminal procedure, and part 3 to prisons and jails. The bastardy statute is included in part 1, and an inspection of the titles of that part of the Code (20 in number) discloses that, with the exception of title 10 (the Bastardy Act), the general scope and purpose thereof is to define and denounce certain acts and omissions as criminal offenses, and to provide appropriate punishments therefor by way of fine and imprisonment. The bastardy statute does not in terms prohibit or denounce any act or omission as a crime, nor purport to authorize the punishment of any person as a criminal offender.

With few exceptions, unimportant to be noted, the provisions of part 2 of the Penal Code are concerned with the procedure to be had in criminal prosecutions. None of the provisions of this part of the Code have any pertinency to a proceeding under the bastardy statute, there being secured to the accused in such proceeding none of the guaranties provided by our Constitution or by the Code itself in favor of those charged with criminal offenses.

We have already seen that the right of appeal from the judgment of the superior court is secured to the defendant in proceedings prosecuted only by indictment or information (section 1151, P. C.), and that therefore the defendant in this case may under no provision of the Penal Code bring the judgment and order of the court below to this court for revision. Article 2, § 30, of the Constitution provides that no person shall be prosecuted criminally in any court of record for felony or misdemeanor otherwise than by information or indictment. And by section 24 of the same article it is provided that in criminal prosecutions the accused shall have the right to appeal in all cases. This failure to secure to the defend-

ant in a bastardy proceedings any of the rights accorded by the Constitution or the Penal Code to those charged with crime, and the other attributes of the proceedings adverted to, make it plain that the Bastardy Law does not provide for criminal proceedings as such, and could not have been intended so to provide. Whether the confinement of the defendant under the terms of this act for failure to furnish the recognizance, upon being held to answer to the complaint by the justice of the peace, or by the superior court upon failure to pay or to secure payment of moneys as required by the order of the court upon or after final judgment, where such failure is not due to contumacy, but merely to the actual inability of the defendant to comply, could be in any event properly authorized, may be doubted. See *State v. Reese*, 43 Utah, 447, 135 Pac. 270.

Disregarding, therefore, mere forms and nomenclature, and looking to the substance of the rights and remedies conferred by the statute, it will be seen that the only feature of the bastardy statute which may be supposed to bring it within the category of criminal proceedings is contained in those sections thereof which authorize the imprisonment of the accused upon failure to give the recognizance required by law for his appearance to answer the charge in the superior court, or failure to comply with the orders of the superior court upon or after final judgment of conviction. It is evident that the imprisonment to which the putative father may thus be subjected is not referable to the proceeding as one authorized to be brought under the criminal laws of this state for the punishment of a crime or offense, and that the sole reason and warrant for including what is manifestly a civil proceeding in the Penal Code, incongruously to the other terms and provisions of that Code, must be based upon the single feature of the formally conferred authority to imprison the accused as an incident to the enforcement of a purely civil obligation, the actual legal existence of that authority being, as we have seen, in some doubt if the failure of the accused to comply with the order of the court be other than contumacious. It follows that the incorporation of the Bastardy Law in the Penal Code can by no stretch of construction be held to have affected or modified its essential attributes as fixed by the Minnesota decisions, but rather that the divergencies of the Bastardy Law from laws concerned with the definition of acts and omissions as crimes, and providing the procedure for the prevention and punishment thereof, have been only the more emphasized by the mani-

fest incongruity of the Bastardy Law therewith.

It seems incontrovertible, therefore, that the Bastardy Act, viewed as a whole, is an attempted authorization of proceedings against the father of a bastard child to enforce the natural obligation he is under to support and provide for his illegitimate offspring, and that the infliction upon him of a punishment for the act of begetting such child, or for failure to comply with any order of the court made in such proceeding as for a criminal offense, is not the purpose of the statute, nor is such its effect; that in such proceedings proof of the guilt of the putative father is not required to be made beyond a reasonable doubt, but may be shown by a mere preponderance of the evidence; that the failure of the defendant to take the stand in his own behalf may be commented upon by the county attorney as in civil actions; that the sufficiency of the complaint is to be determined by the rules applicable to civil causes; that the testimony of the prosecutrix need not be corroborated by other evidence; that no act or omission of the defendant is by such act denounced, defined nor made punishable as a crime, and that the provisions of our Constitution and statutes in favor of persons accused of crime cannot be extended to the case of the defendant in a bastardy proceeding, but that, on the contrary, there are expressly withheld from him the specific constitutional guaranties to an accused person in a criminal case of the right to appeal from a judgment against him, and the right also to be prosecuted by indictment or information under the procedure established by the Penal Code.

We are therefore compelled to hold that title 10, pt. 1, of our Penal Code, denominated "Bastards," is, because of the rights and remedies it attempts to create, and in its incidents, attributes, and consequences, manifestly a civil proceeding; that its character as such renders it inconsistent with the title of the Penal Code, both as tested by the language and meaning of the title itself and by the remaining provisions of the Penal Code incongruous with the bastardy statute; that the incorporation of the Bastardy Law in such Code under the title, "An act to establish a penal code," is so clearly, and unmistakably a violation of section 13, pt. 2, art. 4, of the Constitution, as embracing within the title quoted a subject, and matters connected therewith, not expressed in the title, as renders the bastardy statute void.

The appeal is therefore dismissed for lack of jurisdiction.

ROSS, C. J., and McALISTER, J., concur.

(189 Cal. 242)

PEOPLE v. LEW FAT. (Cr. 2400.)

(Supreme Court of California. July 6, 1922.)

1. Criminal law §407(1)—Deceased's accusatory statements in defendant's presence properly admitted to show latter's acts and conduct on hearing them.

In a prosecution for murder, accusatory statements by deceased in the presence and hearing of defendant, who made no reply, were properly admitted, not as evidence of the truth of the facts stated, but to show defendant's acts and conduct on hearing such accusations.

2. Criminal law §1137(5)—Defendant cannot complain of refusal to strike hearsay testimony elicited by his own counsel by improper cross-examination.

In a prosecution for murder, where defendant's counsel, on cross-examination of a police officer, who had not testified in chief respecting defendant's membership in a Chinese tong, invited him to give a general dissertation on tongs before asking him whether defendant was a member of a particular tong, to which he replied that he had always understood him to be a member and was informed by an officer thereof that he had been expelled after the shooting, and, after a motion to strike out such testimony as hearsay was denied, persisted in pursuing such inquiries on the express assumption of defendant's membership therein, defendant could not complain of the court's refusal to strike out the testimony.

3. Criminal law §730(8)—Refusal to direct jury to disregard state's attorney's remarks as to existence and location of bullet hole near place of homicide held not erroneous.

In a prosecution for murder, where a diagram showing a bullet hole, the existence of which defendant claimed was not shown, in or near a door of the room in which the shooting took place, was in evidence and being exhibited to the jury when objection was made to remarks relative to the fact and location thereof by the state's attorney and the jury had inspected the premises with particular regard to its location, the court did not err in refusing to direct the jury to disregard such remarks; defendant not being injuriously affected thereby.

4. Criminal law §829(12)—Refusal to give instruction substantially covered by those given not erroneous.

In a prosecution for murder, where the court gave instructions in the usual and approved forms that defendant's guilt must be proved to a moral certainty and beyond a reasonable doubt and clearly and correctly charged as to the presumption of innocence, its refusal to give requested instructions with respect thereto in more diffuse and amplified forms was not error.

5. Homicide §253(2)—Evidence held sufficient to sustain conviction.

Evidence, though circumstantial, held sufficient to sustain a conviction of murder in the first degree.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Lew Fat was convicted of murder in the first degree, and he appeals. Affirmed.

George R. Perkins and R. Porter Ashe, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., Matthew Brady, Dist. Atty., Stanislaus A. Riley, Asst. Dist. Atty., and Harry E. Michael, Special Prosecutor, all of San Francisco, for the People.

PER CURIAM. The appellant herein was convicted of murder in the first degree; his crime consisting in the alleged slaying of one Lum Bing, an elderly Chinese, in a building in Chinatown in the city and county of San Francisco, on the afternoon of May 18, 1921. He appeals from the judgment following such conviction and urges several grounds of error upon his said appeal.

[1] His first ground of alleged error is that the trial court erred in the admission of evidence of certain accusatory declarations made by the dying decedent in the presence of the arresting officers and of the defendant, and of the acts and conduct of the latter at the time such accusations were made. The first of these occurred within a few moments after the deceased had been shot and mortally wounded and after the defendant had been arrested within a short distance of the scene of the crime with a discharged and still smoking weapon in his hand. The arresting officer took the defendant into the presence of the wounded man, and he testified that when the latter saw the defendant he pointed his finger at him and said in the English language, "That man shot me," to which accusation the defendant made no reply. A short time thereafter, when the mortally wounded man had been taken to the harbor emergency hospital, the defendant and an alleged accomplice were again brought into his presence, and, when asked by one of the arresting officers who shot him, the dying man pointed at the defendant and said in English, "That was the man." To all of this evidence the defendant objected on the ground that it was not shown that the defendant understood the English language. He urges the same objection here, but the record before us does not sustain him in that regard. Prior to the introduction of the evidence thus objected to, a police officer had testified to having held conversations at various times with the defendant in English and to having received replies in that language. Another officer had also testified to numerous occasions in which he had spoken to the defendant in English and received re-

plies from him in that language. There was also some testimony to the effect that during the trial of the cause the defendant and his attorney held conferences in the courtroom in the English language. This evidence brings the case fully within the rule laid down by this court in *People v. Ong Mon Foo*, 182 Cal. 697, wherein upon a much less satisfactory showing of a knowledge of the English language on the part of the defendant in that case this court held that the evidence of accusatory statements made by the deceased in the presence and hearing of the defendant were properly admitted in evidence for the limited purpose for which this class of evidence is admissible. It is to be noted that the trial court in its instructions to the jury herein carefully limited the purpose for which such evidence was admissible and was to be considered by the jury, viz. not as evidence of the truth of the facts stated in the accusation, but only for the purpose of showing the acts and conduct of the defendant in the presence of the accusation. The action of the trial court was not erroneous in the admission of this evidence for the purpose to which it was thus confined.

[2] The next contention of the appellant is that the trial court committed prejudicial error in refusing to strike out as hearsay certain evidence given by a police officer as to defendant's membership in the Suey Sing Tong. The evidence and ruling of the court thus assailed arose during the cross-examination of a police officer by counsel for the defendant, who asked the witness this question: "Q. Do you know whether this defendant is a member of the Suey Sing Tong?" It is to be noted that the witness who was asked this question had given no testimony upon his examination in chief respecting the defendant's membership in the Suey Sing Tong; his only reference to this particular society consisting in the statement that he had once seen the defendant in a building belonging to this society and had held some conversation with him there. It is thus evident that the question was not cross-examination, but was apparently an independent inquiry upon the part of the defendant's counsel for the purpose of learning what knowledge the witness had of the defendant's membership in this particular tong. The answer of the witness was:

"I have always understood him to be a member of the Suey Sing Tong and in fact I was informed by * * * Tom Wah, member of the Suey Sing Tong and also one of its officers, that following the shooting, this man [the defendant] was thrown out of the society."

The defendant's counsel moved to strike out this answer as hearsay, which, after some discussion, the court denied. Preceding this question and answer, the defend-

ant's counsel had invited the witness to give a general dissertation as to what Chinese tongs were and as to the nature and qualities of their membership and their purposes in general. After the foregoing question had been asked and answered and said motion made and denied, the defendant's counsel persisted in pursuing these inquiries upon the express assumption of the defendant's membership in this particular tong. Under the foregoing circumstances, the entire inquiry of the defendant's counsel being an excursion outside the limits of cross-examination, and being in part predicated at least upon the assumption of the defendant's membership in this tong, we fail to see what basis of complaint he can have over this bit of hearsay evidence elicited on his own initiative and in the course of an inquiry which was not properly cross-examination, and which, in the main, called for information on the part of the witness which was in the nature of things chiefly hearsay.

[3] The next contention of the appellant is that the trial court was in error in its refusal to direct the jury to disregard certain remarks made by the deputy district attorney with respect to the fact and location of a certain bullet hole in or near a door of the room in which the shooting of the deceased had taken place, and in the drawing of certain inferences by him from the fact and location of the said bullet hole at said point. The appellant claims that there was no showing of the existence of any such bullet hole, but, in the colloquy which occurred between defendant's counsel and the court at the time of making the objection, it appeared that there was in evidence, and then being exhibited to the jury, a diagram of the premises upon which a bullet hole at the indicated point was shown, and it was upon this showing that the trial court allowed the deputy district attorney to proceed with his argument. The record also discloses that the jury had been taken to the premises and had inspected the same with particular regard to the location of the bullet hole. This being so, it is apparent that the defendant could not have been injuriously affected by any remarks or inferences which the prosecuting officer might indulge in with respect to a nonexistent bullet hole, if such were the fact. We see no error in the action of the trial court in refusing to give the requested direction to the jury.

[4] The appellant's next contention is that the trial court erred in its refusal to give certain instructions requested by the defendant. The first group of these instructions which the appellant insists should have been given undertake to set forth in various forms the familiar rule that the guilt of the defendant must be proved to a moral certainty and beyond a reasonable doubt. The reason assigned by the judge of

the trial court for his refusal to give these instructions were that they had been given in substance elsewhere in the general body of his instructions. The record fully bears out this assertion as to each one of these instructions, showing them to have been framed and given in the usual and ordinary and approved forms of expression of the rule. The defendant was entitled to no more than this. The next group of his requested instructions which the defendant claims should have been given refer to the presumption of innocence to the benefit of which the defendant was entitled throughout his trial and up to the moment of the determination by the jury of his guilt or innocence. But an examination of the instructions which the court gave discloses that it covered the entire matter of these instructions with a clear, concise, and correct charge. It was not required to repeat the rule in the more diffuse and amplified form of the defendant's requested instructions.

[5] Finally, the appellant contends that the evidence is insufficient to sustain the verdict, but as to this point the appellant concedes that the evidence is substantially conflicting as to the main circumstances of the case upon which the appellant's conviction rests. In view of the fact, however, that this is a capital case, we have carefully scrutinized the record and are entirely satisfied that the evidence sustains the verdict. Without attempting to review all of the facts elicited at the trial, a single set of circumstances may be adverted to as indicating the seriousness of the case against the defendant. The deceased, an aged and inoffensive Chinese, living with his wife in a building in San Francisco's Chinatown, and seldom leaving his own room except to go to another room in the same building to play with two little children who lived there, was going from or returning to his own room on the afternoon on the day of his murder, when he was shot six times through the body. At the report of these shots two police officers, who happened to be passing the building, rushed in and dashed up the stairs, at the top of which they met two Chinese, each with a revolver in his hand. One of these pointed his weapon at the approaching officers, who promptly knocked him down and arrested him. The other defendant, the defendant herein, threw away his still smoking revolver just before his arrest, which, being recovered, was found to be still hot and smoking, with all of its cartridges exploded, and which weapon was also found to be of the same caliber as that with which the deceased had been mortally wounded. When taken immediately into the presence of the victim he was identified by him as the man who had shot him, to which

accusation he made no reply. There were many other circumstances tending to show the defendant's motive for the commission of the crime, while his explanations of his presence with a smoking revolver so near the place and moment of the homicide were neither probable nor convincing. The evidence, while circumstantial, was overwhelming as to the defendant's guilt of the crime. The judgment is affirmed.

SHAW, C. J., and LAWLOR, WILBUR, LENNON, SLOANE, and WASTE, JJ., and RICHARDS, Justice pro tem. concur.

(189 Cal. 149)

NICOLAS HERNANDEZ & CO. v. W. T. WELISCH & CO. (S. F. 9941.)

(Supreme Court of California. June 15, 1922.)

1. Brokers \S 66 — Under contract between broker in Porto Rico and broker in United States, former held entitled to share in commissions on sales made in United States.

Under a contract between plaintiff broker in Porto Rico and defendant broker in United States, plaintiff "to receive your share of the profits on all orders received directly or indirectly from your territory," plaintiff was entitled to its share of commissions earned by defendant on sales to the Porto Rico Food Commission, though the execution of the contracts on the part of such purchaser were made within the United States.

2. Brokers \S 66—Brokers held to share equally in profits under contract.

Under a contract between two brokers dealing in rice, whereby one of them was to receive "five cents per pocket of 100 pounds, which is one-half of our profit, as soon as we receive same from the seller," held that the brokers intended that there should be an equal division of the commission where it amounted to less than 10 cents per pocket, the brokerage usually received.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Nicolas Hernandez & Co. against W. T. Welisch & Co. From a judgment for part of the relief demanded, plaintiff appeals. Reversed, with directions.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Percy E. Towne, of San Francisco, for respondent.

PER CURIAM. We approve the conclusion of the District Court of Appeal in this case that, under the contract made between the plaintiff and the defendant, the plaintiff's

share of the profits on orders received directly or indirectly from the island of Porto Rico was not to be more than one-half of the amount of commissions or profits received by the defendant. In making the calculation, however, the District Court included, as a part of the profits, the sum of \$650, being 6½ cents per pocket on 100 pounds on the sale of 10,000 pockets made on June 15, 1918. It appears from the findings that the defendant did not receive \$650, either as commissions or as profits, on that sale, but received only one-half thereof; that is, \$325. The result is that the computation made by the District Court of Appeal allows the plaintiff \$162.50 in excess of the amount it is entitled to. The opinion stated that the amount shown by the findings as due to the plaintiff was \$3,325; that being one-half of the total sum of \$6,650. It should have stated that the amount for which the plaintiff was entitled to judgment was the sum of \$3,162.50, being one-half of \$6,325, which the findings show to be the total amount received by defendant, and that he was entitled to interest on \$2,000 thereof at 7 per cent. per annum from May 10, 1918, and interest on the balance from the date of the commencement of the action. With this modification, the opinion of the District Court is adopted. Excepting the last paragraph thereof, which, as above stated, we find erroneous, the remainder of the opinion is as follows:

"This is an appeal by plaintiff from a judgment in its favor in the sum of \$2,420; its contention being that the judgment should have been for a greater sum.

"Both the plaintiff and the defendant are rice brokers; the former doing business in the island of Porto Rico, and the latter in San Francisco, Cal. They entered into a written contract by which the plaintiff agreed to conduct in Porto Rico a branch office of and for the defendant, the contract being in the form of a letter addressed by the defendant to the plaintiff, the terms of which the latter accepted. Among the provisions of said contract were the following:

"Division of profits. On all sales confirmed by us we will allow you 5 cents per pocket of 100 pounds, which is one-half of our profit, as soon as we receive same from seller.

"Exclusive arrangement. It is agreed that you will not offer rice from any other source than ours with the present exception of Southern rice (La. Tex. Ark.). * * * We, in turn will not offer rice in your territory (hereinafter described) excepting through you. You to receive your share of the profits on all orders received directly or indirectly from your territory.

"Territory. Your territory will be the entire island of Porto Rico."

"According to the findings of the court the defendant during the existence of this contract, as broker, sold to the 'Porto Rico Food Commission, of San Juan, Porto Rico,' four several lots of rice, namely, 40,000 pockets on November 2, 1917, two lots of 20,000 pockets each

on April 22, 1918, and 10,000 pockets on June 15, 1918, and received as brokerage on such sales a total sum of \$6,650, being \$2,000 on each of the three lots first enumerated, and \$650 upon the last. It credited the account of plaintiff with one-half the brokerage so received upon the second and third of said lots, which it claims to have done by error, and refused to pay the plaintiff either the amount so credited or any part of the brokerage received upon the remaining two lots. The court also found that the contracts for the sale of said four lots of rice were made and executed by the seller and an officer of said Porto Rico Food Commission, of San Juan, Porto Rico, within the borders of the United States, and were negotiated by defendant without assistance from the plaintiff.

"As a conclusion of law from the facts so found the trial court decreed that the plaintiff was entitled to judgment for \$2,000, with interest thereon from the 10th day of May, 1918—the date upon which the defendant had credited the plaintiff's account with said sum, and judgment was accordingly entered. Thereafter the plaintiff moved to set aside and vacate said judgment, and for an order entering another and different judgment, upon the ground that the conclusions of law upon which it was entered were not consistent with and not supported by the findings of fact. This motion was denied, and the sole question on this appeal is whether the judgment entered was correct in view of the court's finding as to the facts in the case.

[1] "It seems clear to us that the four sales above referred to come within the terms of the contract. They were made to the 'Porto Rico Food Commission, of San Juan, Porto Rico'; and although the execution of the contracts on the part of said purchaser was made within the territory of the United States by one of its officers, the provision of the contract giving to the plaintiff the right to share with the defendant 'the profits on all orders received directly or indirectly' from its territory would seem to be designed to cover a sale made under these circumstances. That this is the true construction of the contract is strongly suggested by the action of the defendant in crediting the account of the plaintiff with one-half the brokerage on two of these sales, and the fact that it afterwards changed its mind would not affect the plaintiff's right. And in any event these four sales having been made under precisely similar conditions, if the plaintiff was entitled to recover upon two of them (as the court found), its right to recover upon the remaining two cannot be denied.

[2] "The appellant contends that it should have judgment at the rate of 5 cents per pocket upon the 90,000 pockets forming the aggregate of the sales in question; but we think that, reading the contract as a whole, the plaintiff's share was limited to one-half the amount received by the defendant. The language is, 'We will allow you 5 cents per pocket of 100 pounds, which is one-half of our profit as soon as we receive same from the seller; and in the next paragraph, 'You to receive your share of the profits on all orders received directly or indirectly from your territory.' Upon one of such sales the defendant's commission only amounted to 5 cents, and upon another one of them to

only 6½ cents per pocket. The brokerage usually received by the defendant was 10 cents, and it was doubtless expected that most of the transactions between the parties would be governed by this figure; but the statement that 5 cents was one-half the brokerage, construed with the later provision of the contract giving to the plaintiff the right to share with the defendant brokerage upon sales coming indirectly from the plaintiff's territory, sufficiently indicates that the plaintiff's share could not be more than one-half the amount received by the defendant."

The judgment is reversed, and the trial court is directed to enter judgment in accordance with this opinion.

SHAW, C. J., and SLOANE, WILBUR, LAWLOR, LENNON, and WASTE, JJ., concur.

(189 Cal. 226)

BARNES et al. v. FOLEY. (L. A. 7222.)

(Supreme Court of California. June 29, 1922.)

1. Appeal and error \Leftrightarrow 345(1)—Premature notice of motion for a new trial after verdict, but before findings, does not extend time for appeal.

Where the trial embraced several issues, some of which were tried by the court and some by a jury, a notice of intention to move for a new trial, served and filed after the verdict on the issues submitted to the jury, but before the decision on the issues tried by the court, is premature, and does not prolong the time for appeal, under Code Civ. Proc. § 939, giving 30 days after the termination of a motion for a new trial within which to appeal.

2. New trial \Leftrightarrow 153—Statute, requiring notice within 10 days after verdict, applies only where all issues are determined by a jury.

In the amendment of Code Civ. Proc. § 659, by the Act of 1915, the phrase "within ten days after verdict if the trial was by a jury" refers to cases where all the issues were submitted to the jury, and does not apply where a part of them were tried by the jury and the rest by the court.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by J. B. Barnes and others against J. T. Foley to enjoin trespass and to recover damages for trespass already committed. Judgment for the plaintiffs, and the defendant appeals. Appeal dismissed.

Walter E. Barry and Barry & McReynolds, all of Ventura, for appellant.

F. E. Borton, of Bakerfield, for respondents.

SHAW, C. J. The plaintiffs move the court to dismiss the appeal taken by the defendant

from the judgment in this action upon the ground that the appeal was not taken within the time allowed by law. The complaint states a cause of action to enjoin trespasses by the defendant upon land of the plaintiffs, and to recover damages caused by trespasses already committed. A trial by jury of the issues as to damages was demanded by the defendant. A jury was impaneled to try that issue, and on September 29, 1921, a verdict was returned thereon. The court proceeded with the trial of the cause of action for injunction, and on October 26, 1921, filed findings and rendered judgment granting the injunction and for the recovery of damages. The judgment was entered on that day. Notice of the judgment was served on the defendant on the following day, October 27, 1921.

[1] On October 8, 1921, which was after the rendition of the verdict, but before the filing of the findings and the entry of judgment thereon, the defendant filed a notice of intention to move for a new trial. On December 27, 1921, the court below made an order denying the motion for a new trial. The notice of appeal was filed on January 4, 1922, stating that the defendant appeals from the judgment rendered against him on October 26, 1921. Where the motion embraces several issues, some of which are tried by the court and some by a jury, a notice of intention to move for a new trial, served and filed after the verdict on the issues submitted to the jury, but before the decision on the issues tried by the court, is premature, and gives "to the court no power to act upon the motion which should thereafter be made under the notice." Reclamation District v. Thisby, 131 Cal. 574, 63 Pac. 918. See, also, Bell v. Marsh, 80 Cal. 414, 22 Pac. 170; Warring v. Freear, 64 Cal. 56, 28 Pac. 115; Bates v. Gage, 49 Cal. 126.

[2] The language of the amendment of 1915 to section 659 did not change this rule. The phrase "within ten days after verdict, if the trial was by jury," inserted by that amendment, refers to cases where all the issues joined in the action are submitted to a jury, and does not apply where only a part of such issues are tried by the jury. This proposition was elaborately discussed and determined by the District Court of Appeal in San Joaquin, etc., Co. v. Stevenson, 30 Cal. App. 405, 158 Pac. 768, and was approved by the Supreme Court by denying a petition for rehearing thereof.

The consequence is that the notice of intention in this case did not constitute a valid proceeding for new trial sufficient to prolong the time for appeal under the provisions of section 939, Code of Civil Procedure, giving 30 days' time after the termination of the motion for new trial within which to appeal. The appeal, taken more than 60 days after

October 26, 1921, the date of the entry of the judgment, was therefore too late.

The appeal is dismissed.

We concur: LENNON, J.; WILBUR, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.; WASTE, J.

(188 Cal. 118)

STEIN v. LACASSIE. (S. F. 9544.)

(Supreme Court of California. June 12, 1922.)

1. Appeal and error §1002—Verdict on conflicting evidence not disturbed.

Where the evidence was conflicting as to many of the essential features of the case, and a verdict either way would find a substantial support therein, the Supreme Court cannot disturb the verdict because of the insufficiency of the evidence, even though it might conclude that the evidence preponderates against it.

2. Appeal and error §1031(1)—Verdict apparently against evidence requires careful scrutiny for error.

Where the evidence apparently preponderates against the verdict, it is the duty of the Supreme Court carefully to scrutinize the rulings and instructions of the trial court in matters of law, to determine whether any errors alleged to have occurred therein had prejudicial influence upon the verdict.

3. Trial §253(3)—Instruction defining lack of probable cause regardless of facts known held erroneous.

In an action for malicious prosecution, an instruction that, if the proceedings against plaintiff were instituted by defendant over a fixed and malicious determination of her own, and not from the advice of counsel, or that she did not communicate a fair statement of all facts known to her to the sheriff and district attorney, and that the district attorney did not advise her there was probable cause, such conduct would constitute lack of probable cause, was erroneous as excluding probable cause which defendant herself might have had, regardless of the advice of others, to institute the proceedings.

4. Trial §296(2)—Short erroneous instruction held not cured by long, complicated one.

A short, erroneous instruction, requiring the jury to find lack of probable cause, though facts known to defendant might have amounted to probable cause, was not cured by a later instruction reviewing the evidence from defendant's point of view, which was much involved in detail and concluded with a direction to find for defendant if they found the facts as therein stated.

5. Malicious prosecution §72(1)—Instruction on motive held erroneous.

Where the trial court had correctly instructed the jury that malicious prosecution involved both the elements of malice and want of probable cause, an instruction that the prosecution of a person with any other motive than

to bring the guilty person to justice is in law a malicious prosecution was erroneous as implying that the presence of another motive was sufficient to establish want of probable cause, as well as malice.

In Bank.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action for malicious prosecution by Lorenz Stein against Mary E. Lacassie. Judgment for plaintiff, and defendant appeals. Reversed.

Chas. E. Snook, and Snook & Brown, all of Oakland (F. P. Tuttle, of Oakland, of counsel), for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

RICHARDS, Justice pro tem. This is an appeal from a judgment in plaintiff's favor in an action to recover damages for alleged malicious prosecution. The cause was tried before a jury. The evidence in the case may be briefly summarized as follows: During the year 1918, and for some time prior thereto, the plaintiff and the defendant lived upon adjoining ranches near Walnut Creek, in the county of Contra Costa. Plaintiff was of German extraction, but was a naturalized citizen of the United States. The defendant's husband was of French extraction. She had herself never met the plaintiff, and the evidence is in dispute as to whether there had been prior instances of discord between the two families. On April 23, 1918, the dead body of a horse belonging to the defendant was found by her in an inclosure adjoining the land of the plaintiff. The animal had been last seen alive two days before and was then in good health. Upon the discovery of the death of the horse the defendant sent for a veterinary surgeon, who, on the following day, came to the defendant's premises and examined the body of the animal, cutting it open and finding the intestines punctured, and finding also other evidences of corrosive poisoning, he concluded that the death of the animal had been caused by phosphorus poisoning, and so informed the husband of the defendant, who, in turn, told her. In the colon of the animal the veterinarian also found a dark green substance similar to filaree or clover. On the following day the veterinarian informed Sheriff Veale and his son, who was his undersheriff, that the horse had been poisoned by phosphorus, and stated his reasons for this conclusion. The defendant and her husband tracked the animal to a point near the line fence of the plaintiff and noticed that certain strands of wire upon said fence were broken near the point where the tracks of the animal were to be seen.

On April 25, 1918, the undersheriff and a

deputy sheriff came to the defendant's premises and examined the dead animal and were informed by the defendant that the horse had been traced to a point near the line fence and had been poisoned with phosphorus, and that she thought that the plaintiff might have poisoned the horse. The two officials then made an examination of the carcass, which led them to believe and state that the horse had been poisoned with phosphorus. They also noticed the dark green substance in the colon of the animal, which had the appearance of chopped alfalfa. The officials then went over to the premises of the plaintiff, where they saw some alfalfa in a pig pen similar to that found in the stomach of the horse. They then interviewed the plaintiff, who made some conflicting statements as to his possession of phosphorus and also as to his knowledge of the fact that the horse of Lacassie was dead. During this interview with the plaintiff, the undersheriff told him that he believed he had poisoned Lacassie's horse with phosphorus, and upon his return to the Lacassie premises this official informed the defendant as to what he had found upon the plaintiff's premises and of the fact that he believed and had stated that the plaintiff had knowledge of the poisoning of the horse. The defendant, upon learning these facts, desired to have the plaintiff arrested, but the undersheriff informed her that it would be necessary for her to swear to a complaint and that she had better go to Martinez on the next day and confer with the district attorney and her own attorney regarding the matter. He also, on the same evening, informed the district attorney of his discoveries and belief. On the following day the sheriff, the undersheriff, and a deputy sheriff went to the Lacassie ranch, and on their way thither met the defendant and her husband coming to Martinez to swear to a complaint, but the undersheriff advised the defendant that she had better wait for a chemist's report before swearing to a complaint. On April 29, 1918, several samples from the body of the horse were submitted to a chemist, who, some three weeks later, made a report which was rather negative upon the question of the existence of alfalfa or of signs of phosphorus in the exhibit submitted to him as coming from the body of the dead animal. During the intervening period some correspondence passed between the undersheriff and the defendant, the latter complaining of the tardiness of the chemist's report, and after it arrived declined to swear to a complaint in the face of its negative finding.

On June 10, 1918, matters were brought to a crisis by the discovery of a cow of the defendant lying dead within the premises of the plaintiff, its death having been caused by violence inflicted upon it in some manner. Upon learning of the death of her cow the defendant again called in the veterinarian,

who examined its body. She also sent for the undersheriff, who looked over the body of the cow and interviewed the plaintiff as to his knowledge of the cause of its death, and after doing so advised the defendant to go to Martinez and lay the facts before the district attorney. She went to the county seat and had an interview with the district attorney, who offered to draw a complaint for her to sign. She had an angry dispute with the undersheriff over some of the facts in the case, and finally left the office of the district attorney without signing the complaint, but later returned and had a further interview with the district attorney, who told her that if she wanted to swear to a complaint he would draw it up, but it would be difficult to get a conviction. The complaint was finally drawn in the district attorney's office; whereupon the undersheriff, the defendant, and her husband went to the office of a justice of the peace, where the complaint was sworn to and filed, and a warrant for the arrest of the plaintiff upon the charge of poisoning the defendant's horse was issued. The plaintiff was arrested thereon and put to trial, when he was acquitted of the charge. Thereupon he commenced this action.

[1-3] The foregoing is merely a summary of certain salient facts of the case. There is much other evidence bearing upon the defendant's mental attitude toward the plaintiff herein and her good faith in instituting the proceedings against him. The evidence was conflicting as to many of the essential features of the case. It is one of those cases wherein the verdict of the jury either way would find substantial support in the evidence. This being so, it is not the province of this court to usurp the function of the jury in cases of this character. *Runo v. Williams*, 162 Cal. 449, 122 Pac. 1082. We cannot, therefore, uphold the appellant's contention that the evidence is insufficient to justify the verdict, even though we might be disposed to conclude from a review of the record that the evidence preponderates in the appellant's favor. In such a case, however, it becomes the duty of this court to carefully scrutinize the rulings and instructions of the trial court upon matters of law in order to determine whether any errors alleged to have occurred therein had a prejudicial influence upon the verdict. The trial court, at the plaintiff's request, gave the following instruction:

"You are instructed that if you find from the evidence in this case that the criminal proceedings against plaintiff were instituted by defendant over a fixed and malicious determination of her own, and not from the advice of counsel, or that she did not communicate a full, fair and true statement of all the facts known to her to the sheriff and the district attorney, and that the district attorney did not advise her there was probable cause for the arrest,

then such would constitute lack of probable cause."

[4] It would seem to require no argument to show that this instruction is erroneous, and is prejudicially so, since it might well be that the defendant herself might have had abundant cause for insisting upon and procuring the plaintiff's arrest upon the charge of having poisoned her horse, even though, in so doing, she was acting upon a fixed and malicious determination of her own and without the advice of counsel; and even though she had not communicated all of the facts known to her to the sheriff and district attorney, or made a full, fair, and true statement of the facts to these officials; and even though the district attorney had not advised her that there was probable cause for the plaintiff's arrest. Nor do we find that this error has been corrected in any other or later instruction. There is a later instruction in which the trial court makes a review of the evidence in the case from the defendant's point of view. It occupies several pages of the record, is much involved in detail, and concludes with the direction to the jury that, if they shall find all of its asserted facts to be true, they should find a verdict for the defendant. But this instruction cannot be held to have removed the sting of the former instruction wherein the court had already erroneously charged the jury that, upon a few facts clearly and tersely stated, they were bound to find that the defendant had acted without probable cause in bringing about the plaintiff's arrest.

[5] The trial court wandered further in the path of error in giving the following instruction:

"You are instructed that the prosecution of a person with any other motive than to bring the guilty person to justice is in law a malicious prosecution."

The chief vice of this instruction consists in its use of the term "malicious prosecution," since this term has in law a technical meaning, embracing the twofold elements of malice and want of probable cause. The court had already, in substance, charged the jury that both of these elements must be found by the jury to exist before it could render a verdict in the plaintiff's favor; yet, in the instruction last above quoted, the jury is told in plain terms that the prosecution of a person with any other motive than to bring the guilty person to justice is sufficient in itself to constitute, in point of law, a malicious prosecution; or, in other words, to furnish sufficient proof of both of the foregoing elements to justify a verdict in the plaintiff's favor. It cannot with reason be contended that instructions such as these, so obviously erroneous, and yet so tersely put as to be easily comprehensible by the jury, were not

prejudicial, or that the verdict of the jury, in a close case like this, would not be injuriously affected thereby. In the case of *Runo v. Williams*, supra, this court has stated:

"The law is clearly and definitely settled how a jury shall be instructed in the cases of this character. *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 144; *Eastin v. Bank of Stockton*, 86 Cal. 123, 4 Pac. 1108, 56 Am. Rep. 77; *Fulton v. Onesti*, 68 Cal. 575, 6 Pac. 491; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; *Smith v. Liverpool Ins. Co.*, 107 Cal. 433, 40 Pac. 540; *Servani v. Dondero*, 128 Cal. 31, 60 Pac. 463."

To this list of cases may be added the recent decisions of this court in *Burke v. Watts*, 204 Pac. 578, and *Michel v. Smith*, 205 Pac. 113.

Since this case must go back for a new trial, the parties and the court should have no difficulty whatever, in the light of the foregoing authorities, in formulating and giving to the jury clear and definite instructions governing their duties in considering their verdict.

The judgment is reversed.

We concur: SHAW, C. J.; WILBUR, J.; SIOANE, J.; LENNON, J.; LAWLOR, J.; SHURTLEFF, J.

(189 Cal. 237)

SILVA v. SILVA et al. (S. F. 9831.)

(Supreme Court of California. June 30, 1922.)

1. Husband and wife §272(5)—Husband cannot avoid property settlement in absence of fraud or mutual mistake.

A husband cannot avoid property settlement with wife in the absence of a showing of fraud or mutual mistake.

2. Husband and wife §272(5)—That wife realized on notes more than valuation placed thereon in making settlement not ground for setting aside of settlement.

Where husband, in making property settlement with wife, agreed to accept specified sum in cash, leaving the wife what was left, including certain notes, the mere fact that the wife realized on the notes more than it was thought that she would realize at the time the settlement was entered into was not ground for setting aside of the agreement in the absence of fraud or misrepresentation.

3. Husband and wife §272(5)—Sums withdrawn from mutual bank accounts by wife without husband's consent held not ground for setting aside of property settlement.

Husband could not avoid a property settlement made with wife on the ground of withdrawals previously made by the wife from the mutual bank accounts without the husband's knowledge or consent, in the absence of a showing that the amount so withdrawn was

not used for community purposes or that the withdrawals were not considered by the parties in making the settlement.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Joseph Silva against Mary Ann Silva and another. Judgment for defendants, and plaintiff appeals. Affirmed.

James P. Montgomery, of Oakland (George F. Sharp, of Oakland, of counsel), for appellant.

F. L. De Freitas and John L. McVey, both of Oakland, for respondents.

SLOANE, J. Plaintiff brought this action for an accounting and to recover from defendants, his wife and stepson, money which he claimed was wrongfully and fraudulently withheld from him in a settlement previously had between plaintiff and his wife. Judgment was for defendants, and plaintiff appeals.

The trial court found that in the settlement referred to property affairs of the marital community were determined and adjusted by mutual agreement between the parties, and that the plaintiff had entered into such agreement voluntarily and with full knowledge of all the facts and uninfluenced by fraud or mistake, and that such settlement was final and conclusive as to plaintiff's rights.

The property consisted of bank accounts and certain notes and mortgages aggregating in value about \$9,000 or \$10,000. This property was the accumulation of the earnings of plaintiff and his wife during a period of 30 years of married life, mostly from the wages and earnings of plaintiff. The deposits of earnings were made in bank in the joint names of plaintiff and his wife, but, the plaintiff being constantly employed and unable to read or write, the management of the account was left to the wife and the defendant Manuel J. Silva, her son by a former marriage, and all deposits and withdrawals were made by the wife.

Some differences having arisen between the parties over the management of the property, the plaintiff demanded a division and employed a lawyer to represent him in effecting such settlement.

All the parties met at the lawyer's office. The plaintiff at that time, though without any definite knowledge or information on the subject, estimated the whole amount of deposits and loans at a value of \$12,000, and proposed an equal division. The wife objected to an equal division and threatened to obtain a divorce if she did not receive more than half. A basis of settlement was finally agreed to by which the plaintiff received as his share \$4,574.36 in money, and his wife received a small balance in money

and the notes and mortgages, amounting at their face value to \$4,700.

It does not appear either from the findings or the evidence at what actual valuation the notes were estimated in the settlement, or what amount of cash the wife received in addition to the notes, but the court finds that the share of the wife amounted to from \$150 to \$200 more than the \$4,574.36 received by plaintiff, which would make her portion of a valuation of \$4,724 or \$4,774. Plaintiff himself only claims that the wife's share exceeded his own by \$500.

There is testimony in the record that the plaintiff on the recommendation of his attorney agreed to making his wife's share from \$150 to \$200 more than his own, and it is a fair inference that the notes were put in at a figure which would give such result in the settlement. At their full face value it is claimed that Mrs. Silva received \$502.64 excess. It is a reasonable assumption that in taking notes instead of money, with the risk attending upon converting them into cash, that they were estimated at something less than their face in the settlement, and there was testimony that the plaintiff expressed a preference for cash as his share in the division. At any rate, the plaintiff, with the counsel of his attorney who was present and advising him, accepted the \$4,574.26 in cash as his share, and turned over the balance of the property to his wife in full satisfaction of their respective claims. There can be no question from all the evidence in the case but that this division was intended to vest a separate property in each to the amount agreed upon.

[1] Plaintiff cannot go back of this settlement in the absence of a showing of fraud or mutual mistake. There are only two averments in his alleged cause of action which give any color to such a showing, and the findings, supported by the evidence, are against plaintiff on both of these. He claims that he was induced to make this settlement by the understanding that his wife was to receive only \$150 or \$200 more than he. That was not, however, the basis of the division. The division was made by plaintiff accepting \$4,574.26 in cash and turning over to his wife what was left, and it must be presumed that the notes were included on a valuation which brought their shares to the proportion agreed upon. All of the money and property was before them, and the final terms of settlement were that plaintiff took the agreed sum of money and his wife took what was left. There is nothing to indicate that it was not at the time, and in view of the values before them and the agreed excess in the wife's favor, a fair settlement.

[2] The finding by the trial court that the wife's share exceeded that of the plaintiff by only \$150 or \$200, even if not supported by the evidence, cannot affect the judgment, be-

cause the division was made upon a valuation fixed by the parties at the time the division was made, and the circumstance that Mrs. Silva realized \$200 or \$300 more than was estimated cannot defeat the settlement, in the absence of fraud or misrepresentation, and there is no evidence of any.

[3] The other point of appellant's contention is that prior to the date of the division Mrs. Silva had drawn from the mutual bank accounts sums aggregating \$2,872.06 without plaintiff's knowledge or consent, that plaintiff was ignorant as to the amount of the deposits, and that the settlement made with Mrs. Silva did not include or take into account any of these withdrawals, and it is the claim of plaintiff that the defendants had wrongfully and fraudulently appropriated these sums to their own use.

The bank books introduced in evidence disclose the fact that such withdrawals had been made from this mutual deposit account by Mrs. Silva from time to time as follows: January 10, 1908, \$100; February 12, 1908, \$422.06; July 29, 1910, \$1,100; March 13, 1913, \$600; October 1, 1913, \$650.

The settlement and division of property between plaintiff and his wife was on or about July 30, 1914. Plaintiff testifies that he had no knowledge or notice of the withdrawal of these items and received no part of the money. It is conceded that the handling of all the community earnings was during all the period covered by these transactions intrusted to the wife, who evidently paid therefrom the household expenses, deposited the savings, and drew upon the account in her own name. While there is no explicit evidence accounting for the disposition of the amounts checked out of this account, there is evidence that loans of money from the community funds were made from time to time, some of them corresponding closely with the dates of the larger withdrawal. There was, indeed, no source disclosed other than the community savings from which the several thousands of dollars represented by the notes which were allotted to Mrs. Silva in the settlement could have been derived. Mrs. Silva was legally the custodian and dispenser of these funds, and there is not the slightest evidence in the record of any appropriation or application of any money to other than community debts and investments, and there is no ground for presumption or inference of any such misappropriation.

The finding of the trial court is that it is not true that any of these amounts "were

withdrawn from deposit in the bank by either said defendant, Mary Ann Silva, or Manuel J. Silva, in fraud or wrong of plaintiff."

Moreover, it is not shown in evidence that all these items were not considered by the parties in the settlement. It is true that the plaintiff is unlettered and lacking in business acumen, and he testifies that the fact of these withdrawals was not known to him at the time the division was made, but he was at the time represented by a competent and trustworthy lawyer. This attorney, when asked on the trial if at the time of the settlement the plaintiff was informed as to the withdrawals from the bank account, answered:

"Not in detail, but I think the total amounts, whatever the books show, were known at the time. Of course, we went to the bank."

With the books and accounts before them it must be presumed that the agreement arrived at took into consideration all that was there disclosed.

Considering the apparent ignorance and incompetence of the plaintiff, we have not confined ourselves in reviewing this matter to the portions of the evidence set out in the synopsis of the briefs, but have carefully read the entire typewritten record on appeal, and have been unable to discover anything to indicate that the settlement between the parties was not the result of "open covenants openly arrived at."

Indeed, it is difficult to conceive how the community property, under the plaintiff's own testimony that the entire income of this couple during the 30 years of its accumulation, derived from plaintiff's meager earnings of but \$60 per month during most of the time, and after deducting their necessary household expenses, could have amounted to the respectable sum of \$10,000.

There is no ground for doubting that Mrs. Silva was a frugal and careful steward of the family affairs, and that the defendant Manuel Silva acted the part of a dutiful son to both his mother and stepfather.

It is an interesting circumstance that, in the face of the years of litigation that has attended these differences over property affairs, the plaintiff and Mrs. Silva have continued to live together in the same house as man and wife.

The judgment is affirmed.

We concur: SHAW, C. J.; WASTE, J.; LENNONY, J.; WILBUR, J.; LAWLOR, J.; SHURTLEFF, J.

(189 Cal. 178)

WAER v. WAER et al. (L. A. 6727.)

(Supreme Court of California. June 17, 1922.)

1. Evidence \Leftrightarrow 597—Positive testimony of grantor he did not deliver deed supports finding against delivery.

Positive testimony by the grantor that, after executing the deed, he did not deliver it, but retained it and placed it in a drawer from which it was surreptitiously taken by one of the grantees, is not a mere general statement or assertion, and is sufficient to support a finding against delivery, notwithstanding conflicting evidence on the part of the grantees that it was delivered.

2. Appeal and error \Leftrightarrow 1011(1)—Finding on conflicting evidence not set aside, though appellate court would have found otherwise.

A judgment may not be reversed for insufficiency of evidence, when the evidence is in conflict, though it may seem to be against the weight of the evidence, and the Supreme Court, if sitting in place of the trial judge, might have found the facts differently.

3. New trial \Leftrightarrow 105—Impeaching evidence newly discovered does not require new trial.

In so far as the evidence set forth in an affidavit in support of a motion for a new trial merely narrated a statement of plaintiff inconsistent with his testimony at the trial, it was impeaching in its character and insufficient to require the granting of a new trial.

4. New trial \Leftrightarrow 104(1)—Affidavit of new evidence as to declarations of plaintiff not inconsistent with testimony does not require new trial.

An affidavit setting forth newly discovered evidence which, except in so far as it consisted of statements by plaintiff inconsistent with his testimony, consisted of declarations by him corroborating his testimony, does not require the granting of a new trial.

5. New trial \Leftrightarrow 105—Affidavit as to admission of party against interest is not impeaching.

An affidavit setting forth as newly discovered evidence an admission by plaintiff that he had deeded his property, is not merely impeaching evidence, since such an admission would be competent as a declaration against plaintiff's interest under Code Civ. Proc. § 1870, even though plaintiff had not been a witness in his own behalf.

6. Appeal and error \Leftrightarrow 981—Sufficiency of evidence to require new trial is within trial court's discretion.

Even though the newly discovered evidence on which a motion for a new trial was based was not solely impeaching or cumulative as additional evidence of the same character to the same point, under Code Civ. Proc. § 1838, its efficacy to change the result is a question peculiarly addressed to the discretion of the trial court, and the exercise of that discretion will not be disturbed except in case of manifest abuse.

7. New trial \Leftrightarrow 151—Affidavits as to newly discovered evidence can be controverted.

Not only is the introduction of counter affidavits proper upon the hearing of a motion for a new trial for newly discovered evidence, but the truth of the evidence itself, as well as the weight thereof and the credibility of the witnesses may be contested by such counter affidavits.

8. New trial \Leftrightarrow 151—Denial for new evidence contradicted by controverting evidence held not abuse of discretion.

Where the affidavit in support of a motion for new trial, setting forth an admission by plaintiff contrary to his interest was denied by plaintiff's controverting affidavits, the trial court's decision in favor of the credibility of plaintiff's affidavit was not a manifest abuse of his discretion, so as to require reversal of his denial of the new trial.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action to quiet title by Robert Waer against Charles R. Waer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Manning & Thompson, of Los Angeles, for appellants.

Walters & Anderson, of Los Angeles, Moore & Woods, of Whittier, Walters & Mauk, of Los Angeles, and A. Moore, of Whittier, for respondent.

LENNON, J. The plaintiff in this action sought and secured a judgment quieting his title as against the defendants to certain real property, and annulling a recorded deed thereto, which purported to convey title therein to the defendants and to have been made and delivered by plaintiff to the defendants. Briefly stated, the facts of the case are these: The plaintiff, an elderly widower with several children, contemplating matrimony, made and signed a deed, giving to his children, the defendants herein, the title to the property in suit, reserving, however, to himself a life estate therein.

Plaintiff admitted that he had made the deed in question, but testified, as a witness in his own behalf, that he did not at any time deliver the same to the defendants, or any of them, and that, after making the deed, he placed it in a bureau drawer in his home from which it was surreptitiously taken by one of the defendants and recorded without his knowledge and consent. The defendants, on the other hand, claimed, and one of them testified, that the plaintiff had delivered the deed to the defendants a short time after its making. The trial court found that the deed had never been delivered and the controversy here involves in part the question as to whether or not the evidence

adduced upon the whole case is sufficient to support this finding.

[1] Apparently the finding of the trial court was made and based upon the testimony of the plaintiff concerning the making of the deed, coupled with evidence of the circumstances preceding, attending, and following its making. The testimony of the plaintiff consists of much more than "mere general statements or assertions" and, taken as a whole, sufficiently supports the finding. Much may be said argumentatively against the persuasiveness of the plaintiff's testimony, but, after all has thus been said, there still remains a conflict in the evidence adduced upon the whole case, which cannot be dissipated by arguments which do no more than weigh the evidence upon which the findings in question rest, and assail the credibility of the witness giving such testimony.

[2] It is the well-settled and generally well-understood rule that a judgment may not be reversed for insufficiency of evidence when the evidence adduced upon the whole case is in conflict and that, upon appeal with the evidence in that situation, no inquiry may be made concerning the preponderance of the evidence. The fact that a judgment may seem to this court to be against the weight of the evidence and that this court, if sitting in the place of the trial judge, might have found the facts different, will not avail to obviate the application and operation of the rule. *Webster v. Lowe*, 177 Cal. 385, 170 Pac. 850; *Levi v. Chesley*, 178 Cal. 145, 172 Pac. 607; *Ross' Estate*, 171 Cal. 64, 151 Pac. 1138; *Lick v. Madden*, 86 Cal. 208, 213, 95 Am. Dec. 175; *Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. 838; *Meyer v. Great Western Ins. Co.*, 104 Cal. 381, 38 Pac. 82. In the face of a substantial conflict in the evidence, in the instant case, the trial court's finding of nondelivery of the deed in controversy will not be disturbed.

[3,4] In support of a motion for a new trial grounded, in part, upon alleged newly discovered evidence, the defendants presented in evidence upon the hearing of the motion an affidavit of one Flora Smith, which alleged that in January, 1920, after the controversy over the deed had arisen, in a conversation with her concerning the loss of the deed, the plaintiff said that "it was taken out of his possession, that four or five days after the deed was executed he discovered the deed was gone, that Elva (meaning defendant Elva Luella Smith) had seen the deed and notified Charles Waer (one of the defendants) and they had concocted to steal it and had stolen it." It was an admitted fact in the case that the deed in question had been made and signed by plaintiff on or about May 10, 1919, and, upon the trial of the case, plaintiff testified that he had not discovered the loss of the deed until December, 1919, at which time he had made a search for the deed

and failed to find it. In so far as the affidavit immediately under consideration purported to narrate a statement of the plaintiff which in effect was contradictory of something he had testified to at the trial, it was impeaching in its character and, therefore, insufficient on appeal as the basis of review of a motion for a new trial, for it is the rule in this state that "newly discovered evidence which is merely * * * designed to contradict a witness is not of a character to warrant a new trial." *People v. Anthony*, 53 Cal. 397; *Chalmers v. Sheehy*, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; *Hanton v. Pacific Electric Railway Co.*, 178 Cal. 616, 174 Pac. 61. Moreover, the affidavit in question, in addition to being impeaching in its nature, purported to embody evidence which had it been produced at the trial of the case would have had no probative force against the testimony of the plaintiff concerning the nondelivery of the deed, for the reason that it was in harmony with and corroborative of the plaintiff's testimony that the deed in question had been purloined from him and not by him or any one in his behalf delivered to the defendants. Upon the whole, therefore, the affidavit in question, standing alone, was valueless as a support for the motion for a new trial.

[5] In addition to the affidavit last mentioned, the defendants offered and there was received in evidence upon the hearing of the motion for a new trial the affidavit of one Caroline Boring, which averred that plaintiff, subsequent to the time of the alleged delivery of the deed to the defendants, told her "that he had deeded his home and property to his children but that he had a home there as long as he lived and a pension and that if she would marry him she could have a home there as long as she lived." This alleged newly discovered evidence embodied a direct admission of the plaintiff that he had "deeded" his home to his children and it would have been competent evidence in behalf of the defendants upon the original trial of the case, because it tended to show declarations of the plaintiff which were against his interest. It was obviously material to the paramount issue in the case and it was not solely impeaching within the meaning of the rule which prevents the granting of a new trial where the newly discovered evidence is merely cumulative and impeaching. It was not solely impeaching for it would have been admissible even if the plaintiff had not been a witness in his own behalf. *Code Civ. Proc. § 1870*; *Kenezleber v. Wahl*, 92 Cal. 202, 208, 28 Pac. 225.

[6-8] But conceding all this and that it was not cumulative for the reason that it is not "additional evidence of the same character to the same point" (*Code Civ. Proc. § 1838*), nevertheless it does not follow that, because the affidavit last in discussion did

not fall within the inhibition of the rule which ordinarily rejects newly discovered evidence, which is merely cumulative and impeaching, that the court below erred in refusing to grant the defendants a new trial. The question as to the efficacy of newly discovered evidence is peculiarly one which is addressed to the discretion of the trial court (*People v. Oxnam*, 170 Cal. 211, 215, 149 Pac. 165), and the exercise of this discretion will not be disturbed except in case of a manifest abuse (*People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100). While the alleged newly discovered evidence, in the instant case, was competent and material and not solely impeaching and perhaps not cumulative and would probably have justified an order granting a new trial on the ground that such evidence was of sufficient importance as to render a different result likely on a retrial of the case, still the fact remains that the affidavit of Caroline Boring was contradicted by the counter affidavit of the plaintiff. Not only is the introduction of counter affidavits proper and permissible upon the hearing of a motion for a new trial, grounded upon newly discovered evidence (*People v. Fice*, 97 Cal. 459, 32 Pac. 531; *People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235), but it is well settled that the truth of the evidence itself, or the truth of the facts as alleged, as well as the weight thereof and the credibility of the witnesses may be contested by counter affidavits (*People v. Vitro* [Cal. App.] 201 Pac. 610). The trial court in the instant case evidently balanced the affidavits one against the other and, deciding in favor of the credibility of the plaintiff's affidavit, denied the motion for a new trial. This being so, this court is not prepared to say that there was a manifest abuse of discretion on the part of the trial court in denying the motion for a new trial. The judgment is affirmed.

We concur: SHAW, C. J.; LAWLOR, J.; WILBUR, J.; SHURTLEFF, J.; WASTE, J.; SLOANE, J.

(189 Cal. 153)

PEOPLE v. SAMA. (Cr. 2415.)

(Supreme Court of California. June 16, 1922.
Rehearing Denied July 13, 1922.)

1. Criminal law §1208(9) — Indeterminate sentence for attempted robbery is for maximum term of half of defendant's life.

Under Pen. Code, §§ 213, 671, the maximum penalty for robbery is imprisonment for life, and under section 664, a person convicted of attempted robbery may be sentenced for half the maximum sentence permitted for the completed offense, so that the maximum sentence for attempt to rob would be half of defend-

ant's natural life, and an indeterminate sentence imposed under Pen. Code, § 1168, as added by St. 1917, p. 665, can be sustained only as a sentence for the maximum punishment permitted.

2. Constitutional law §80(2)—Criminal law §1208(9)—Prison directors cannot be given power to fix the sentence.

In so far as Pen. Code, § 1168, as added by St. 1917, p. 665, authorizing indeterminate sentences, purports to vest in the state board of prison directors the power to fix the sentence, it is invalid as an invasion of the judicial powers, contrary to Const. art. 3, § 1.

3. Criminal law §1208(9) — Indeterminate Sentence Law does not apply where maximum sentence is half of defendant's life.

Where the maximum sentence that could be imposed is half of the sentence for life, which is obviously impossible of ascertainment, the Indeterminate Sentence Law, which can be sustained only as an imposition of the maximum sentence, cannot apply.

4. Criminal law §1208(3) — Court can fix term where maximum sentence is half of defendant's life and unenforceable.

Where the Indeterminate Sentence Law cannot apply because the maximum sentence would be half of defendant's life and unenforceable, but the imposition of the maximum sentence is not required, the court has authority, under Pen. Code, §§ 264, 664, 671, to sentence the defendant for a definite term of years.

5. Pardon §2 — Indeterminate Sentence Act did not impliedly repeal Parole Law.

The Indeterminate Sentence Act did not, in terms or by implication, repeal the provisions of the Parole Law, so that a defendant who cannot be sentenced under the Indeterminate Sentence Act may be paroled under the Parole Law after sentence for a definite term.

In Bank.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

Joe Sama was convicted of attempt to commit robbery, and he appeals. Judgment reversed, and cause remanded, with instructions to impose proper sentence.

Rehearing denied; Sloan, J., not voting.

Milton W. Sevier, of San Francisco, and Geo. M. Naus and Chester H. Case, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LAWLOR, J. Appellant was accused, by information filed on January 5, 1921, of the crime of attempt to commit robbery, to which he pleaded not guilty, and upon the trial was found "guilty of an attempt to commit robbery as charged in the information." The judgment purports to be rendered under the Indeterminate Sentence Law (St. 1917, p. 665), and provides that appellant "be con-

fixed in the state prison of the state of California as prescribed by law." From that judgment, appellant takes this appeal.

The only question presented on appeal is whether the judgment is invalid because under the sentence a definite maximum punishment was not in legal effect imposed. Appellant contends that it is void for uncertainty, because "it sentences appellant to be imprisoned for one-half of his life, and no one knows, or can know, before appellant's death, what one-half of his life will be." It is insisted the decisions are unanimous that an indeterminate sentence is really one for the maximum sentence; that the prison board in fixing the term at less than the maximum is merely exercising executive clemency; that the maximum sentence in this case is one-half of appellant's life; that such a sentence has always been held void for uncertainty; that, therefore, there is no valid penalty provided in this case, and the court cannot impose any punishment for the commission of the crime, and that appellant should be discharged. Respondent's contention is that there is a definite minimum term of six months; that when the minimum sentence has been served it becomes the duty of the state board of prison directors to determine what length of time appellant shall serve; that there is, therefore no time during which the penalty is vague or uncertain; that the maximum term of imprisonment for this crime was the same before the adoption of the Indeterminate Sentence Law as it is now, and that then the trial court had power to fix a term of imprisonment; that the Indeterminate Sentence Law has transferred this power to the said board; that the statement that an indeterminate sentence is a sentence for the maximum term is but a theory.

The Penal Code provides:

"Robbery is punishable by imprisonment in the state prison not less than one year." Section 213. "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: 1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, * * * the person guilty of such attempt is punishable by imprisonment in the state prison, * * * for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted." Section 664. "Whenever any person is declared punishable for a crime by imprisonment in the state [prison] for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed." Section 671. From these statutory provisions it would appear that the longest term of imprisonment

for an attempt to commit robbery is one-half the natural life of the offender.

[1] The problem presented is, Does the Indeterminate Sentence Law have any applicability to this case? Section 1168 of the Penal Code, as added by St. 1917, p. 665, declares:

"Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment."

In the case of *In re Lee*, 177 Cal. 690, 171 Pac. 953, the prisoner was granted relief on habeas corpus from a purported indeterminate sentence of from 1 to 10 years' imprisonment for the crime of manslaughter, upon the ground that section 1168 was *ex post facto* as to him. In discussing the constitutionality of section 1168 generally, the court declared:

"It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. [Citing cases.] In answering the claim that the authority vested by the Indeterminate Sentence Law in the board of prison directors is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the Indeterminate Sentence Law. The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character and properly exercised by an administrative body."

[2] This being the settled law, it follows that the sentence imposed in the case at bar is one for the maximum term prescribed by law, which, as already indicated, would be for one-half of appellant's life. It also follows from *In re Lee*, *supra*, that the function which the state board of prison directors would perform in determining what term of years appellant must serve is no part of the actual fixing of the sentence itself, and that if it were so regarded it would be the exercise of a judicial function by an executive board, and void under section 1, article 3, of the Constitution. The Legislature has no authority to vest this judicial power in the state board of prison directors, and in so far as

section 1168 of the Penal Code purports to do so it is in violation of that section. Hence, in determining whether or not this sentence is valid the test is the term of imprisonment called for by the judgment—one-half of appellant's life—and not the term of years which would be fixed by the state board of prison directors at the expiration of the minimum term.

[3] In *People v. Burns*, 138 Cal. 159, 89 Pac. 16, 70 Pac. 1087, 60 L. R. A. 270, the defendant was convicted of an attempt to commit robbery, and admitted having suffered the two previous convictions of felony alleged in the information. In that case it was held that, under subdivision 1 of section 666 of the Penal Code, the court might, for the offense there in question, sentence the defendant to any term of imprisonment between the minimum of 10 years and life. Discussing a sentence of imprisonment for one-half the defendant's life, the court said:

"What the actual life of a particular person would be, and what would be the half of it, cannot be known; and if one-half of the life of the appellant were the only punishment prescribed for the crime of which he was convicted, such punishment would be too vague and indefinite to be possible of enforcement, and no judgment could be rendered against him."

Since a sentence for half a life would be invalid, authority to sentence appellant must be found apart from section 1168. This view of that section does not mean that it may not operate in cases where it is applicable, for it is not necessary that the provision, to be uniform in its application, shall apply universally. It is sufficient that the law bear equally, in its burdens and benefits, upon persons in the same category, and this depends upon the facts that characterize the offense. *People v. Judge of the Twelfth District*, 17 Cal. 549, 554.

It follows that section 1168 of the Penal Code makes no provision for an indeterminate sentence in the case of a conviction of an attempt to commit robbery, and for that reason the sections of the Penal Code providing for the sentencing of persons applicable before its adoption remain in full force and effect.

[4] In the case of *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, the defendant was sentenced to serve a term of 5 years in the

penitentiary for an attempt to commit rape. Under sections 264, 664, and 671, the maximum punishment for that offense was not more than one-half of the defendant's natural life, but the maximum was not required. The sentence of 5 years was upheld on the grounds that, inasmuch as a defendant convicted of the complete crime of rape might, under section 671, be imprisoned for the term of his natural life or for any term not less than the minimum, the court had power to impose either the maximum punishment, or any term of years between the minimum and the maximum; that for an attempt to commit rape the sentence, under sections 664 and 671, might be one-half of the defendant's life, or any term of years less than that period; that whether a sentence for a term of years were regarded as longer or shorter than one for the defendant's life, imprisonment for a term of years would be less than one-half the maximum term which might be imposed, and would be proper under sections 664 and 671. This reasoning was adopted in *People v. Burns*, supra. There is no difference in the punishment between the case at bar and *People v. Gardner*, supra, save in the minimum. It follows from the latter case that the trial court had authority to sentence appellant for a definite term of years.

[5] As section 1168 has no application, the state board of prison directors is without authority under that section to determine the length of time appellant shall be confined. We are not to be understood as intimating that appellant, while undergoing punishment, may not apply for, nor the state board of prison directors have authority to grant, such relief as was afforded before the adoption of section 1168. In this connection it may be remarked that neither section 1168 nor any other provision has in terms or by implication repealed the provisions of the "Parole Law." St. 1913, p. 1048, as amended by St. 1915, p. 981.

The judgment is reversed, and the cause remanded, with instructions to the superior court to render a judgment sentencing appellant to imprisonment in the state prison for such a term of years as, in its opinion, would be a just and fair punishment.

We concur: SHAW, C. J.; WILBUR, J.; LENNON, J.; SHURTLEFF, J.; WASTE, J.

(188 Cal. 783)

SPAULDING v. DESMOND et al.
(S. F. 10057.)(Supreme Court of California. May 26, 1922.
Rehearing Denied June 23, 1922.)

1. **Mandamus** ⇨77(1)—Mandamus is proper remedy to compel city clerk to file oath of office of city tax collector.

Mandamus is the proper proceeding to compel a city clerk to file an official oath of office of a city tax collector.

2. **Municipal corporations** ⇨48(2)—Charter adopted by city, approved by Legislature, is organic law of city.

Under Const. art. 11, § 8, a charter adopted by the qualified voters of a city and approved by the Legislature by concurrent resolution becomes the organic law of the city, and supersedes an existing charter and all laws inconsistent with the charter so adopted.

3. **Municipal corporations** ⇨48(2)—Charter of city passed by concurrent resolution of Legislature and enrolled is conclusive as to form of charter adopted.

Under Const. art. 11, § 8, providing that a charter adopted by a Legislature of qualified voters of a city and approved by concurrent resolution of the Legislature shall become the organic law of the city and that one copy shall be filed with the secretary of state and that thereafter the courts shall take judicial notice of the provisions of the charter, a charter adopted by the city of Sacramento and approved by concurrent resolution of the Legislature, enrolled and authenticated by the officers thereof, and filed in the office of the secretary of state, is conclusive as to the form of charter adopted.

4. **Statutes** ⇨286—Act signed, enrolled, and filed constitutes a record which is conclusive evidence of its passage.

Where an act has been passed by the Legislature, signed by the proper officers of the senate and assembly, approved by the Governor and properly enrolled and authenticated, and filed in the office of the secretary of state, it constitutes a record which is conclusive evidence of its passage and of its terms and provisions, and neither the journals of either house nor the bill as originally introduced, nor any of the amendments thereof, nor parol evidence can be received to show that it did not become a law in accordance with the prescribed forms or as so enrolled.

5. **Evidence** ⇨1—"Judicial knowledge" defined.

"Judicial knowledge" is not reached by the use of evidence; it is a matter pertaining to the judicial function, and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered.

6. **Evidence** ⇨31—No judicial notice taken of city charter not authenticated by officers of either house thereof.

Under Const. art. 11, § 8, providing that the courts shall take judicial notice of the

provisions of a charter of a city adopted by a majority of the qualified voters and passed by concurrent resolution of both houses of the Legislature and filed in the office of the secretary of state, no judicial notice can be taken of a charter of a city authenticated by the mayor and the city clerk of the city, but not authenticated by officers of either house of the Legislature.

7. **Municipal corporations** ⇨48(2)—Charter of city of Sacramento filed in office of secretary of state held to supersede former charter and laws inconsistent therewith.

Under Const. art. 11, § 8, providing that a charter, adopted by a majority of the qualified voters of a city and passed by concurrent resolution of both houses of the Legislature and filed in the office of the secretary of state, shall be the organic law of the city, the charter of the city of Sacramento so adopted and so approved and filed in the office of the secretary of state January 24, 1921, is the existing and valid charter of that city, superseding the charter of 1911 and all laws inconsistent with the provisions of the charter so adopted and so filed.

On Rehearing.

8. **Evidence** ⇨31—Courts must take judicial notice of city charter ratified by people of city and approved by concurrent resolution of Legislature and filed with secretary of state.

Under Const. art. 11, § 8, declaring that, when a city charter is ratified by the people of the city and approved by concurrent resolution of the Legislature, one copy thereof shall be filed with the secretary of state, one with the recorder of the county in which the city is located, and one in the archives of the city, and that thereafter the courts shall take judicial notice of the provisions of the charter, the courts must take judicial notice of the charter, a copy of which is so filed.

9. **Evidence** ⇨328—Only competent evidence as to form of city charter ratified by people is copy attached to or included in concurrent resolution of the Legislature and copies filed as directed.

Under Const. art. 11, § 8, providing that, when a city charter is ratified by the people of the city and approved by concurrent resolution of the Legislature, one copy of the charter so ratified and so approved shall be filed with the secretary of state, one with the recorder of the county in which the city is located, and one in the archives of the city, and that the courts must take judicial notice thereof, the only competent evidence of the contents of the charter is either the copy attached to or included in the copy of the concurrent resolution and the copies filed as specified in the Constitution, and, in case of conflict between the copies so filed and the copy attached to the concurrent resolution, the latter prevails.

10. **Constitutional law** ⇨68(1)—Remedy for mistake in enacting charter of municipal government is for Legislature.

Where a city charter is adopted under Const. art. 11, § 8, providing that a charter ratified by the people of a city and adopted

by concurrent resolution of the Legislature shall become the organic law of the city, if by mistake the charter adopted by the Legislature is different from the one ratified by the people, the question of correcting the error is one for the Legislature, since the matter of the formation and government of such municipal corporation is political and does not determine private rights nor involve due process of law, so as to bring the question of the mistake in adopting the charter within the jurisdiction of the courts.

In Bank.

Application by L. H. Spaulding for writ of mandate, to be directed to M. J. Desmond, as Clerk of the City of Sacramento, and the City of Sacramento. Writ denied.

R. Platnauer, of Sacramento, for petitioner.

R. L. Shinn and Devlin & Devlin, all of Sacramento, for respondents.

SHURTLEFF, J. This is an original application for the issuance of a writ of mandamus directed to Harry G. Denton, who has been regularly substituted as a defendant in the place and stead of M. J. Desmond, deceased, directing the said Denton, as clerk of the city of Sacramento, to file the oath of plaintiff as the alleged city collector of said city. Plaintiff bases his right to have such oath filed upon the provisions of the charter of said city, known and hereinafter referred to as the charter of 1911 (Statutes 1911, Extra Session, p. 305), which provided for a city commission in which was vested the power of appointing a city collector, and which charter plaintiff contends is still in force. It would, we think, conduce to a better understanding of the questions arising upon this application to state at this point that, on November 30, 1920, the electors of said city of Sacramento ratified a new charter, hereinafter designated as the charter of 1920, which provided for a municipal governing body termed the city council, and which charter, if legally adopted, became operative on June 30, 1921, with the one exception that, for the sole purpose of the election of said city council, the members of which were the only officers under said charter to be elected by the people, it should go into effect immediately after its approval by the Legislature, which approval, it is claimed by defendants, was accorded on January 20, 1921. Stats. 1921, p. 1919.

The petition, in substance, alleges: That, at all the times in it mentioned, the city of Sacramento was a municipal corporation of the state of California, organized and existing under the laws of said state, governed in accordance with the provisions of a charter adopted and approved by the Legislature in 1911, in the manner provided by the Constitution. That the defendant M. J. Desmond

from July, 1913, up to the time of his death on December 27, 1921, was the duly appointed, qualified, and acting city clerk of said city. That, on the 15th day of November, 1921, which, it will be noted, was after the charter of 1920, if valid, became fully operative, the said commission of said city of Sacramento, which derived its authority as previously stated, if any it had for such act, from the charter of 1911, appointed the plaintiff city collector of said city, and that, in compliance with the provisions of an ordinance of said city, adopted in January, 1919, he executed his bond as such collector, with sufficient sureties to said city in the penal sum required, which bond was approved and filed with the auditor of said city. That, on the 18th of November, 1921, and after such approval of said bond, plaintiff, as such city collector, regularly subscribed and took his official oath in writing, and presented it to M. J. Desmond, the then clerk of the city of Sacramento, as such clerk, and demanded that it be filed, which demand was refused. That the reason assigned by said Desmond for such refusal was that the charter of 1911 was superseded and abrogated by the charter of 1920, and that there was no longer a city collector or any law creating such an office. That, on the 30th day of November, 1920, the qualified electors of said city ratified a proposed charter for the government of said city, framed as provided by section 8 of article 11 of the Constitution of California. That the last-mentioned charter was never submitted to the Legislature of the state of California for its approval or rejection, and was never approved by the Legislature. That the Legislature, at its session in 1921, by concurrent resolution; passed by a majority of the members elected to each house thereof, approved what purported to be a copy of the charter of 1920 as ratified, but which in truth and in fact was not a complete copy thereof.

The city makes two appearances, one by answer of the city commission, admitting all the allegations of the petition, and the other through or by the city council, which demurred and answered at the same time. We have therefore separate appearances of the alleged governing bodies created respectively by the charter of 1911 and the charter of 1920. It is not necessary to give any consideration to the answer of the city commission, for it raises no issues in that it concedes the correctness of plaintiff's contentions. We will therefore confine the discussion to the petition and pleadings of the city council, and it will be understood, unless otherwise stated, that the use of the term defendants refers to the city thus appearing and the defendant Denton.

The demurrer alleges, first, that the petition does not state facts sufficient to consti-

tute a cause of action, or a cause "for the issuance of a writ of mandamus"; and, second, that it appears upon the face of the petition that the only possible cause of action stated therein is one in favor of the people of the state of California, which must be made the subject of a proceeding by the state in quo warranto. The answer of the defendants, in substance, avers: That the charter of 1911 was superseded by the charter of 1920, and that, ever since the 20th day of January, 1921, the last-named charter has been and is the organic law of said city; that, on November 18, 1921, a copy of the charter of 1920, so ratified and approved, was filed respectively with the secretary of state of the state of California, the county recorder of the county of Sacramento, and in the archives of said city of Sacramento. That said M. J. Desmond was the city clerk of the city of Sacramento under said charter of 1911. From July, 1913, the exact date not appearing in any of the pleadings, until the 30th day of June, 1921, upon which latter date the charter of 1911 ceased to have any operative effect. That, upon said last-mentioned date, the said M. J. Desmond voluntarily surrendered his office as city clerk under the charter of 1911, and ever since the 30th day of June, 1921, neither he nor either of his successors has been city clerk of the city of Sacramento under said charter of 1911. That on said 30th day of June, 1921, said M. J. Desmond was elected city clerk of said city by the city council of said city, pursuant to, and charged with the duties provided in, the charter of 1920, and that thereupon he duly qualified as such city clerk under said charter of 1920, and that ever since said 30th day of June, 1921, he, or a successor to him, of whom the defendant Denton was one, has been the duly appointed, qualified, and acting city clerk of the city of Sacramento, with the duties provided for in the said charter of 1920. That the ordinance, pursuant to which plaintiff alleges that he filed his bond and took his office, is not and has not been in effect at any time since June 30, 1921, and that since said date there has not been any such office as city collector of said city. The answer further denies that the charter of 1920 was ever submitted to the Legislature for its approval or rejection, but avers that it was so submitted, and, by concurrent resolution passed by each house of the Legislature, was, on January 20, 1921, approved, and that the charter so approved by the Legislature was the same charter ratified by the qualified electors of said city of Sacramento on November 30, 1920. The answer admits the averments of the petition touching the oath by plaintiff as city collector, his attempt to file the same with the city clerk, the latter's refusal to make such filing, and the reasons assigned for such refusal. It is alleged as

a separate defense that there is another action, in the nature of quo warranto, pending between the same parties and involving the same subject-matter, but, in view of the conclusions which follow, it is not necessary for us to consider this special defense, and we express no opinion concerning it. To the defendant's answer, plaintiff demurs upon the ground of its insufficiency. Inasmuch as the questions, the decision of which is in our opinion determinative of this controversy, are raised by the petition and answer as well as by the demurrers, we will not separately consider the latter pleadings, but dispose of the matter upon its merits.

The record shows that an enrolled copy of the concurrent resolution, approving the charter of 1920, authenticated by the proper officers of the senate and assembly, was filed in the office of the secretary of state on January 24, 1921.

[1] What we regard as the controlling questions raised by the pleadings are: First, do the facts alleged in the petition support a proceeding in mandamus? And, second, is the charter of 1920 the organic law of the city of Sacramento, and, if so, can we, in this proceeding, question the verity or validity of the enrolled copy thereof filed with the secretary of state? The first of these propositions must be answered in the affirmative. The plaintiff is not, as contended by defendants, attempting in this application to try the title to his alleged office or to have himself judicially declared to be the city collector of the city of Sacramento, but, as already stated, is asking for an order directing the defendant, as city clerk, to file his official oath as such city collector, which he claims is essential in order for him to be fully clothed with official authority. That this is the proper proceeding to accomplish such result, if he is legally entitled to have such oath filed, and it is the duty of the city clerk, under the law, to file it, does not admit of doubt, for it is well settled in this state that mandamus is proper to compel the performance of a duty especially enjoined by law. *Kelly v. Edwards*, 69 Cal. 460-462, 11 Pac. 1; *Peck v. Board of Supervisors of Los Angeles Co.*, 90 Cal. 384, 27 Pac. 301; *Bannerman v. Boyle*, 160 Cal. 203, 116 Pac. 732; *Fox v. Workman*, 6 Cal. App. 683, 92 Pac. 742; *Code Civ. Proc.*, § 1085.

[2] We pass to the discussion of the second and more important question. The provision of the Constitution with which we are directly concerned is the following:

"If a majority of the qualified voters voting thereon at such general or special election shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be submitted to the Legislature, if then in session, or at the next regular or special session of the Legislature. The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or

amendment; and if approved by a majority of the members elected to each house it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith. One copy of the charter so ratified and approved shall be filed with the Secretary of State, one with the recorder of the county in which such city is located, and one in the archives of the city; *and thereafter the courts shall take judicial notice of the provisions of such charter.*" Article 11, § 8. (Italics ours.)

In speaking of this provision and the legal status of a charter approved thereunder, this court, in *Brooks v. Fischer*, 79 Cal. 173-176, 21 Pac. 652, 653 (4 L. R. A. 429), said:

"It provides: 1. For submission [of the ratified charter] to the Legislature for its approval or rejection. 2. That if approved by a majority vote of the members elected to each house, it shall become the charter of said city. This does not in terms require any action on the part of the governor, but expressly provides that, immediately upon its being approved by a majority of the members of the two houses of the Legislature, it shall become the charter of the city. * * * It seems to us that this language is so plain and unequivocal that it cannot call for a construction by this court. It is enough that the Constitution has so provided."

Again, in a more recent case, addressing itself to the same subject, this court used the following language:

"It is now expressly provided that the charter may be approved by concurrent resolution, and that then such charter 'shall become the organic law thereof'—that is, it is a special mode for the enactment of a law by the Legislature. It is clear that it is made a law by the Legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the Legislature or rejected, as it shall see fit." *Ex parte Sparks*, 120 Cal. 395-399, 52 Pac. 715, 716.

[3-5] It is, therefore, settled that it is the charter adopted by the Legislature which becomes the organic law of the city by which it was ratified and submitted for approval. The correctness of this proposition is not contested by any of the parties to this proceeding, but plaintiff affirms that he can impeach the validity of the charter filed with the secretary of state, or either of the other depositaries designated in the Constitution, by showing, through the means of comparison or otherwise, that it is not a correct copy of the charter ratified by the electors; and the defendants assert that they have the right to prove by the journal of the respective branches of the Legislature that, in fact the charter adopted was the one ratified, and that they are not precluded by the

filed copy. But in our opinion neither of these contentions can be sustained. It has long been the law of this state that, where an act has been passed by the Legislature, signed by the proper officers of the senate and assembly, approved by the Governor and properly enrolled and authenticated, and filed in the office of the secretary of state, it constitutes a record which is conclusive evidence of its passage and of its terms and provisions, and that neither the journals of either house, nor the bill as originally introduced, nor any of the amendments thereof, nor parol evidence, can be received in order to show that it did not become a law in accordance with the prescribed forms or as so enrolled. *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *County of Yolo v. Colgan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41. While, so far as the briefs and our research disclose, it has never been held that this rule applies to an enrolled and authenticated copy of a concurrent resolution filed with the secretary of state, we can see no reason, resting upon principle, why it is not applicable here. That it is controlling finds support in that portion of the Constitution quoted, which affirms that, when the charter is filed as directed, the courts shall take judicial notice of its provisions. We think this mandate, reinforced by the foregoing rule, precludes us in this hearing from going behind the enrolled and filed charter.

"Judicial knowledge [notice] is not reached by the use of evidence; it is a matter pertaining to the judicial function and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered." 18 Cyc. § 850.

The Constitution goes even further than the quoted text and, in effect, declares that, when the controversy involves a provision of the charter, the courts shall determine it from what appears in the copy filed with the secretary of state or with the other depositaries mentioned in the Constitution. It would practically nullify this provision of the Constitution to construe it as meaning that the courts must take judicial notice of the contents of the filed copy, except where the issue is that such copy is invalid because not an exact reproduction of the charter as ratified by the electors and approved by the Legislature. Taking judicial notice of the contents of the charter is taking notice of such contents as a whole—as a completed document—as well as of some specific part thereof. The wisdom and purpose of this requirement of the Constitution are manifest. It is essential, commercially and otherwise, that there exist some established memorial, some authoritative and permanent record of the charter, which is conclusive and unimpeachable, at least against an attack such as the one made here, and to

which those desiring to be advised of its terms may with security and confidence resort. Were it otherwise, a municipal government would be constantly exposed to the possibility of having its organic law assailed upon the ground that the enrolled and filed copy of the concurrent resolution approving it is defective by reason of the asserted omission therefrom of some portion of the ratified and approved charter.

Sherman v. Story, *supra*, although decided under the Constitution of 1849, contains language in point here. We quote the following from the opinion (30 Cal. 278, 89 Am. Dec. 93):

"There is nothing in the Constitution * * * that requires or authorizes us to *avoid, correct or in any way modify*, by aid of the Journals, the acts of the Legislature properly enrolled, authenticated and deposited with the secretary of state as records of the act. * * * Much less is there any authority for resorting to the bill as originally introduced, * * * or to parol evidence for the purpose of impeaching the record. * * * The question, then, whether an important public law, upon which the rights of all our citizens depend or may depend was ever passed, is to rest, through all time, upon equivocal memoranda upon amendment tags and the frail recollection and veracity of man." (Italics ours.)

And this question the court there answers emphatically in the negative. County of Yolo v. Colgan, *supra*, decides that the change from the old to the new Constitution did not abrogate or affect the rule that the record of the authenticated and enrolled statute in the office of the secretary of state cannot be impeached by evidence of any fact outside of such record.

The late Chief Justice Beatty, speaking for the Supreme Court of Nevada, of which court he was then a member, used these words:

"How is a court to be satisfied as to the existence and terms of a statute? Is it bound by the statute-roll, or can it look beyond the record? And if so, how far can the investigation be extended? * * * Whoever engages in any transaction the validity or construction of which depends upon statutory provisions, whoever holds or acquires any sort of property, or right, the title or enjoyment of which may be affected by the operation of any law, is bound to take notice, at his peril, what the law is. And it is not enough for him to know what the law is after a court of last resort has made an investigation and determined what part of the statute-roll is to stand and what part to fall, but he must know in advance of litigation, and govern his conduct accordingly. If there is any record or document outside of the statute-roll to which a court will resort for the purpose of testing the validity of an enrolled law, he must not overlook it. If a court will hear oral testimony to impeach the record, he must be able to conjecture in advance what the testimony will be, and what weight will be allowed to it. Considering the exigency of this

rule it is easy to perceive of what extreme importance it is that there should be some high, authentic and unquestionable record to which not only courts and public officers, but private citizens, may resort, and, by a simple inspection, determine for themselves with infallible certainty what are the statutes of the state, and what are their terms." Nevada v. Swift, 10 Nev. 176-182.

[6] As before noted, defendants in their answer aver, that on November 18, 1921, a copy of the charter of 1920, as ratified and approved, was filed in the office of the secretary of state, and, while the demurrer to the answer would ordinarily admit the truth of this averment, we treat it as denied in obedience to the rule that the averments of the answer are deemed denied. The answer sets forth a copy of the charter, which it avers was filed on November 18, 1921, as aforesaid, but it is not authenticated by the officers of either house of the Legislature, but by the mayor and city clerk of the city of Sacramento. We know of no law authorizing the filing of this document, so attested, and we regard it as of no potency whatever. Clearly, it is not a record of which this court can take judicial notice, or a certified copy of which would be admissible here. As we have said, it is the copy attested by the proper officers of the respective legislative bodies approving the charter, filed with the secretary of state, and no other, of which the courts take judicial notice, which, in this instance, is the one so filed on January 24, 1921.

[7] Our conclusion is that, in this inquiry, we are precluded from going behind the said copy of the charter of 1920, which was filed in the office of the secretary of state on January 24, 1921, and that, as so filed, it is the existing and valid charter of the city of Sacramento, superseding the charter of 1911 and all laws inconsistent with the provisions of said charter of 1920. It follows, therefore, and we so hold, that there is no such office as city collector of the city of Sacramento, and that plaintiff has failed to establish his right to have his oath as such alleged city collector filed in the records of said city as demanded by him or otherwise.

In view of what precedes, it is unnecessary to consider the additional points urged in the briefs.

The application for a writ of mandate is denied.

We concur: SHAW, C. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; RICHARDS, Justice, pro tem.

On Rehearing.

SHAW, C. J. The respondent has filed a petition asking the court to modify in certain particulars the opinion hereinbefore rendered,

[8, 9] Upon further consideration of the matter, we are satisfied that the modification should be made. The Constitution (art. 11, § 8) declares that, when a city charter ratified by the people of the city has been submitted to the Legislature and has been approved by concurrent resolution, "one copy of the charter so ratified and approved shall be filed with the secretary of state, one with the recorder of the county in which such city is located, and one in the archives of the city; and thereafter the courts shall take judicial notice of the provisions of such charter." The natural meaning of this language is that the courts must take judicial notice of the charter, the copy of which is so filed. We have held, and we adhere to that opinion, that the doctrine of the decision in *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, and *Yolo County v. Colgan*, 132 Cal. 266, 64 Pac. 403, 84 Am. St. Rep. 41, is applicable to city charters approved by the Legislature, certified and filed with the secretary of state, as fully as it is to statutes enacted by the Legislature, and enrolled, authenticated, and filed with the secretary of state. Under that doctrine the only competent evidence of the contents of such charter is either the copy attached to or included in the concurrent resolution, if any copy was so attached or included, and the copies so filed, as specified in the part of the Constitution above quoted. In case of a conflict between the copies so filed, and the copy, if any, attached to the concurrent resolution, the latter would prevail. No judicial proceeding has been provided in which the inquiry whether or not such copy is a true copy can be made or in which the question can be determined, or in which a mistake, if one was made, can be corrected. The imperative reasons upon which that doctrine rests are clearly and forcibly set forth in the two decisions cited, and need not be repeated here.

[10] The petitioner suggests that under this doctrine it would be within the physical power of the Legislature, if it were disposed to act in bad faith, to impose upon a city a charter for its government wholly different from the one which the people of the city had ratified. One answer to this objection is that the courts will not impute bad faith to the legislative department of the state. Another is that, even assuming that the same result might be caused by a mistake, the

matter of the formation and government of such municipal corporations is political; that it does not determine private rights nor involve due process of law (*People v. Ontario*, 148 Cal. 634, 84 Pac. 205; *People v. Cal. Fish Co.*, 166 Cal. 606, 138 Pac. 79), and that the remedy, if any is desired, is to be provided by the Legislature. In view of the fact that during the 72 years of the existence of this state, in the vast mass of laws enacted, no instance of such bad faith, nor any serious mistake, has occurred, the necessity for a remedy does not seem urgent. The possibilities of dangers from such occurrences are inconceivably less detrimental to the public good than would be the difficulties produced by the doctrine that extrinsic evidence could be given to show an error in the official record of general or local laws and that no one could be assured that he was acting in accordance with law at any time, because he could not foresee that some other person would not be able to discover and prove an error which had eluded his own search.

The decision in *People v. Gunn*, 85 Cal. 238, 24 Pac. 718, as we understand it, is not contrary to the above. It holds that, in a quo warranto proceeding the validity of such charter may be disputed, not by showing that the copies thereof officially filed as aforesaid are erroneous, but by showing that the election at which it was ratified by the people of the city was not lawfully held, and that point was put upon the ground that such ratification was a condition precedent to the power of the Legislature to approve the charter, one for which the Legislature was not responsible, and one into which it could not inquire, and, hence, that it was a judicial question for the courts to determine. If there is anything in that decision that is contrary to the doctrine of *Sherman v. Story* it must be deemed to have been overruled by the decision in *Yolo County v. Colgan*, supra.

Anything in the opinion hereinbefore rendered suggesting that the accuracy of such copies might be disputable in some other proceeding and leaving that question open is to be considered as withdrawn.

The application by the petitioner for a rehearing is denied.

We concur: WILBUR, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.; WASTE, J.

(189 Cal. 183)

BARRY v. HANDLIN et al. (Sac. 3172.)

(Supreme Court of California. June 20, 1922.)

1. Partnership \Leftrightarrow 21—Contract for admission as partner could not be terminated by defendants without creating liability for damages.

Under a contract between defendants, who furnished money for a business, and plaintiff, who was employed for two years at a certain salary, with a provision that he should be admitted as a partner when one-third of the profits reached a certain amount, *held*, that plaintiff was to have one-third of the profits, subject only to the contingency that he remain in the employment of the firm, and that his rights could not be terminated by the defendants without creating a liability for damages.

2. Partnership \Leftrightarrow 21—Employee wrongfully deprived of right under contract to become partner in business entitled to damages suffered.

One employed by others forming a partnership, with the provision that he be made a partner when the profits reached a certain amount, was entitled to such damages as he could show he suffered by reason of being wrongfully deprived of his prospective interest in the profits of the business, where his employers wrongfully terminated the relation without cause.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by W. E. Barry against L. F. Handlin and another. Judgment for defendants, and plaintiff appeals. Reversed.

Ralph H. Lewis, of Sacramento, for appellant.

Chas. A. Bliss and Thomas B. Leeper, both of Sacramento, for respondents.

WILBUR, J. Plaintiff brought this action to recover the sum of \$13,500 damages for a breach of contract. Defendants had judgment on demurrer, and the plaintiff appeals. The breached contract is an exhibit to the complaint. It is an agreement by Barry, Handlin, and Barton to form a copartnership. Handlin and Barton were to advance the sum of \$10,000 for the purchase of a wall paper business, and were to constitute the copartnership until the plaintiff under the terms of the contract had secured an equal interest therein as a copartner. The plaintiff was to be manager of the business, and receive \$150 per month, and to be credited with a third interest in the profits as hereafter stated. This third interest in the profits was to be carried on the books as the "Barry reserve fund." It was provided that when this fund amounted to \$3,333.33 one-half of this fund should be paid to Handlin and one-half to Barton, and thereupon the part-

nership should be composed of Barton, Handlin, and Barry. The contract was entered into on the 2d day of June, 1919, and on the 4th day of October, 1919, the plaintiff was discharged, and his further participation in the business was prevented by the defendants. Plaintiff alleges that at the time of his discharge the profits of the business amounted to \$8,000. The defendants demurred to plaintiff's complaint generally, and for lack of jurisdiction. The defendants' contention is, in effect, that plaintiff's employment was to continue for two years; that unless at the end of that term the Barry reserve fund then amounted to \$3,333.33 or more plaintiff was not entitled to enter into the copartnership or to any part of the profits; that if, in the meantime, for any reason plaintiff ceased his connection with the business he was not entitled to any part of the profits; and upon this hypothesis they claim the only injury sustained by reason of his discharge is the sum of one month's salary accruing between the date of discharge and the date when plaintiff secured other employment, and that this amount (\$150) was not sufficient to give the superior court jurisdiction.

It will be observed that at the date of the discharge one-third of the profits amounted to \$2,166.66, and that, if the profits had been continued for another month at that rate, one-third of the profits would have been \$3,333.33. The contract provided:

"7. When said Barry reserve fund shall have amounted to thirty-three hundred thirty-three and one-third dollars (\$3,333 $\frac{1}{3}$), one-half thereof shall be paid to the party of the first part and one-half thereof to the party of the second part, and thereupon and thereafter the party of the third part shall be let into and become an equal partner with the parties of the first and second parts in said business, provided he shall have continued in the employ of said partnership as hereinabove provided, and shall have during said time, in all matters and things, promoted and worked for the best interests of said partnership, and in all other particulars complied with his obligations and duties under this agreement."

It is clear that Barry's third interest in the copartnership was to begin as soon as the profits amounted to \$10,000, unless there are other provisions of the contract modifying paragraph 7. Paragraph 5 of the contract with relation to the profits is as follows:

"5. Upon the 1st day of January of each year after the signing of this agreement an inventory of said business shall be taken, and balance shall be struck, and the net profit of the previous year shall be ascertained and determined, and thereupon said profit shall be disposed of as follows:

"(a) One-third thereof shall be paid to the party of the first part.

"(b) One-third thereof shall be paid to the party of the second part.

"(c) One-third thereof shall be put in a fund to be known as 'Barry reserve fund'; said reserve fund shall be carried on said books as cash on hand, but the same may be used by said partnership for the purpose of carrying on said business, discounting bills, etc., provided, however, that before a balance shall be struck for the succeeding year said reserve fund shall be restored and be intact at the time of ascertaining the profit for such year."

Paragraph 3 is as follows:

"3. The party of the third part shall be employed by said partnership at a salary of one hundred and fifty dollars (\$150) per month, beginning with the 1st day of June, 1919, and shall give his entire time and attention, and his best energy and efforts in promoting the welfare of said business and the interests of said partnership; and agrees to continue in such employment for a period of two years, and thereafter until this agreement has been fully carried out, and has become an equal partner in said business enterprise as hereinafter provided."

It is not necessary for us to determine whether if the profits had continued at the rate of \$2,000 per month for another month the plaintiff would have been entitled to his partnership interest on November 4th or would have been compelled to have waited until the first of the next January, when the inventory was to be taken, subject to the postponement of his partnership interest in the event that during the period of November 4, 1919, to January 1, 1920, there were losses instead of profits. It is sufficiently clear from the paragraphs quoted that the plaintiff suffered a substantial damage by reason of the loss of his contingent interest in the profits of the business, and that if his dismissal was wrongful he was entitled to such damages.

[1, 2] The defendants claim that section 9 deprives plaintiff of any interest in the profits or in the Barry reserve fund in the event that his employment is terminated from any cause, even though such termination may have been wholly without his fault and wrongful on their part. We do not think that the contract is reasonably susceptible of such construction. There was a definite agreement that the plaintiff was to be employed for two years at \$150 per month. It was also clear that he was to have one-third of the profits, subject only to the contingency that he remain in the employment of the company, and that such profits amount in the aggregate to \$10,000. It is clearly not contemplated that the plaintiff should be penalized for the wrongful conduct of the defendants. That is to say, the termination of the employment referred to in subdivision 9 of the contract which terminates plaintiff's right in the profits must be caused by the fault of the plain-

tiff or by agreement. It is not a reasonable construction of the contract to hold that it was agreed that the defendants reserved the right to discharge the plaintiff at their whim at any time, and that this discharge might occur the day before an inventory is taken, which inventory would disclose that the plaintiff is then entitled to a third interest in the partnership. Plaintiff was entitled to such damages as he could show he suffered by reason of being wrongfully deprived of his prospective interest in the profits of the business. He alleges his damages at \$15,000, and asks judgment for this amount, and this brings the case within the jurisdiction of the superior court. The demurrer should have been overruled.

The judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint.

We concur: SHAW, C. J.; LENNON, J.; SLOANE, J.; LAWLOR, J.; SHURTLEFF, J.; RICHARDS, Justice pro tem.

(189 Cal. 228)

VAN HOOSEAR v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 10076.)

(Supreme Court of California. June 30, 1922. Rehearing Denied July 27, 1922.)

1. Contempt §24—Jurisdiction to punish rests on ability of accused to comply with order.

It is essential to the jurisdiction to punish for contempt for disobeying the order of the court that the party charged shall have been able to comply with such order, unless he has voluntarily and contumaciously disabled himself.

2. Contempt §63(4) — Adjudication must show power of guilty party to perform order.

Adjudication of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of the guilty person to perform the act.

3. Public service commissions §19(4)—Lack of frankness in dealing with tribunal is not disregard affording basis for contempt proceedings.

That a party fails to act with frankness in dealing with the Railroad Commission, as in appearing at hearings concerning public utilities involved in certain properties without disclosing that he was not their owner, is not a contumacious disabling of himself from complying with the Commission's order such as to render him punishable for contempt.

4. Prohibition §11—Does not lie to correct errors of tribunals having jurisdiction.

Prohibition does not lie to prevent a subordinate court from deciding erroneously or from enforcing an erroneous judgment in a case over which it has jurisdiction, and in such cases the superior court will leave the party ag-

grieved to his 'ordinary remedies, such as writ of error or certiorari.

5. Prohibition ~~42~~—Record will be examined to ascertain petitioner's ability to obey order of the Railroad Commission in proceeding to restrain enforcement of judgment of contempt.

An application for writ of prohibition to restrain the Railroad Commission from enforcing its judgment of contempt, bringing up a complete record, will be treated as application for writ of review, and the court will determine jurisdictional facts and give the relief that the record warrants, notwithstanding the Public Utilities Act limits all review of the Commission's rulings to writ of certiorari, and where the evidence shows petitioner's inability to obey the order upon which the contempt is founded, as where the Commission had not adjudicated the extent of his control over a water system regarding which its order was issued, relief from the judgment of contempt will be granted.

In Bank.

Application for writ of prohibition by William S. Van Hoosear, petitioner, prayed to be directed against the Railroad Commission of the State of California, respondent, to prevent the enforcement of a judgment of commitment for contempt. Order convicting petitioner of contempt annulled.

H. S. Craig, of Oakland, for petitioner.

Hugh Gordon and William W. Clary, both of San Francisco, for respondent.

SLOANE, J. This is a proceeding to prohibit the enforcement of a judgment committing the petitioner for contempt in disobeying an order of the State Railroad Commission.

In proceedings duly had the Railroad Commission determined on December 23, 1919, by the decision of said Commission, that the petitioner, William S. Van Hoosear, was in the control of a certain public utility water system within this state, consisting of a flowing spring and pipe line therefrom, used and operated for the purpose of supplying water for domestic and other purposes to several consumers; that without authority of law he had discontinued such service, and it was by the Commission adjudged as follows:

"It is hereby ordered that said William S. Van Hoosear be and he is hereby directed to re-establish the public utility service of water to his consumers in Castro Valley within (5) five days of the date of this order and to continue such public utility service at the rates herein found to be the legal rates in effect.

"It is hereby ordered that William S. Van Hoosear be and he is hereby directed to file the above rates with this commission within 10 days of the date of this order."

This proceeding and order of the Railroad Commission was afterwards before this

court on a writ of review, and on December 22, 1920, an opinion and order was filed therein, affirming the order and decision of the Commission. 194 Pac. 1003.

The foregoing order of the Railroad Commission, thus approved and affirmed, is the basis for the contempt proceedings now before us. Van Hoosear, the petitioner here, was cited for contempt for failing and refusing to comply with the order to restore the water service.

Proceedings in due form were had before the Commission, and petitioner was found guilty of contempt for disobeying the order of the Commission, and on the 1st of December, 1921, it was adjudged by the Railroad Commission that he be punished therefor by paying a fine of \$250, and in default thereof that he be imprisoned in the county jail for 30 days.

Petitioner seeks to restrain the enforcement of this judgment on the ground that the Railroad Commission has exceeded its jurisdiction in imposing this penalty.

The facts in the case are practically undisputed, and we will proceed to consider such issues as are presented which are essential to determining petitioner's right to the relief demanded without reference to the manner or order in which they are pleaded.

That the Railroad Commission has jurisdiction to punish for contempt is sufficiently manifest. Const., art. 12, § 22; Public Utilities Act (St. [Ex. Sess.] 1911, pp. 48, 62) §§ 54, 81; Pacific Telephone, etc., Co. v. Eshelman, 166 Cal. 640, 650, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. The jurisdiction of the Railroad Commission in this matter is sustained on the face of the record so far as concerns the validity of the order which petitioner is charged with disobeying, and the right of the Commission to enforce it, and the citation and proceedings for contempt were regularly had and conducted.

So far as we are able to discover, the only question of jurisdiction to punish petitioner arises upon the sufficiency of the record to show that petitioner was legally able to comply with the order at the time the citation for contempt was issued. By his verified answer to the affidavit and citation for contempt, petitioner alleged that he had not been the owner of said water system, or the land on which it was situated, since the month of June, 1910. That on that date he had conveyed all of this property to his wife, Margaret P. Van Hoosear, and that she had ever since continued as the sole owner in possession of the same to the 15th day of November, 1919, at which date she sold and transferred said real property, with the springs located thereon, to one F. J. Lewis, who had ever since been the owner thereof.

The Public Utility Act under which the

Railroad Commission obtained control of water service utilities was not in existence at the time of the alleged conveyance of this property to petitioner's wife, and petitioner was not, according to his answer, the owner thereof at the time the water service was discontinued or at the time the order of December 23, 1919, to re-establish such service was made, or during any of the proceedings culminating in the judgment for contempt. In short, if the deeds pleaded in the answer herein are recognized as valid transfers of title, the petitioner at no time covered by the proceedings shown in this record was the owner of this water system.

In this connection it may be said that the evidence produced before the Commission in the contempt proceedings, without dispute, bears out the allegations of the answer as to the transfers of this property, and there seems to be no ground to question that Margaret P. Van Hoosear, and later, F. J. Lewis, and not the petitioner here, were, at all times covered by claim of jurisdiction by the Railroad Commission, the legal owners of the property constituting the alleged water system. So far as the rights of Mrs. Van Hoosear and C. F. Lewis are concerned, it is apparent that they are not affected by any of the proceedings before or on behalf of the Railroad Commission, as neither of them was at any time made a party thereto.

Regarding the effect of the judgment and order of December 23, 1919, as fixing the status of this property as a public utility water system as to petitioner, William S. Van Hoosear, there can be no doubt. He appeared in the proceedings, submitted himself to the jurisdiction of the Commission, and at no time prior to the citation for contempt in any way disclaimed ownership and control of the property.

Nothing has occurred since the judgment of December 23, 1919, so far as disclosed, to alter the situation as regards the petitioner. There was available at that time the same defense to the order requiring him to resume the water service, as that interposed to the judgment in contempt for disobeying that order.

It may be noted, however, that in the judgment directing a resumption of the water service there was no adjudication of the nature and extent of petitioner's interest in or control over the water system. And we know of nothing to estop him from showing as an excuse for failing to obey the commissioner's order that he had no legal rights in the premises that would permit him to resume the operation of the system, which the former decision of the Railroad Commission showed that he had discontinued and abandoned.

As already indicated, it appears beyond dispute that the petitioner at no time covered by the proceedings of the Railroad Com-

mission had any title or ownership of the physical properties constituting the water system. The title was in his wife, and pending the proceedings she conveyed her title to O. F. Lewis. This she could do without permission from the Railroad Commission, as she was at no time a party to the proceedings taken by the Commission. After the sale of the premises to Lewis the record before us shows without controversy that the latter took possession of the land and the springs, and that petitioner no longer had any right, interest, or possession under which he could obey the order to resume the operation of the water system. He testified that upon the transfer of this property by his wife to Lewis there was no reservation of any kind relating to the water, and that he thereafter had or exercised no rights of ownership or control therein. Whatever control he may have reserved or exercised while his wife owned the premises was terminated on the sale to Lewis. This testimony, as well as the presumptions arising from transfer of title, were not disputed. Under this state of facts it is clear that at the time the contempt was charged the petitioner here was without right or power to obey the order of the Railroad Commission to resume the distribution of water.

[1,2] It is essential to the jurisdiction to punish for contempt for disobeying the order of a court that the party charged shall have been able to comply with such order, unless he has voluntarily and contumaciously disabled himself from complying. *Ex parte Cohen*, 6 Cal. 318; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Ex parte Silvia*, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58; *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071. And an order "adjudging one guilty of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of such person to perform the act" (*Bakeman v. Superior Court*, 37 Cal. App. 785, 174 Pac. 911), and a mere recital in the order that obedience thereto is willfully refused is not sufficient. In *re Cowden*, 139 Cal. 244, 73 Pac. 156.

[3] In the present case the petitioner cannot be held to have contumaciously disabled himself to obey the order of the Commission, unless he can be held responsible for the act of his wife in disposing of the property, and there is no evidence to support such a conclusion. It may be true that he did not act with frankness or fairness to the Commission in failing to disclose before the original order was made that this property had been conveyed to Lewis, but that is another matter. He is not charged with having contumaciously put it out of his power to obey the order of the Commission.

In *Egilbert v. Superior Court*, 6 Cal. App.

190, 91 Pac. 748, on petition for writ of review of an order committing for contempt of court, the petitioner had been ordered to produce certain books of a corporation of which he was secretary. He had resigned as such secretary before the order had been served on him. In the absence of a showing that such resignation was brought about to avoid compliance with the order, the court was held without jurisdiction to punish for contempt. As Justice Chipman says in the opinion:

"The fact that Egilbert withheld from the court the fact of his resignation on May 20th, and allowed the court to grant the writ under the impression that Egilbert was then the secretary, is not the ground on which the contempt judgment is based. That judgment rested on his failure and refusal to produce the books of the company."

[4] A more serious question presented on the consideration of this petition is whether prohibition is the proper remedy. Prohibition is directed only to the jurisdiction of the court or tribunal to act in the premises, rather than to the question as to whether it has acted in the proper exercise of its jurisdiction. In the present case the judicial function of the Railroad Commission had terminated. Its judgment of commitment had been made, and it is only sought here to restrain the ministerial act of enforcing the penalty.

Moreover, there is room for contention that the judgment on its face shows jurisdiction. As heretofore stated, the only ground for attacking the judgment of the Commission is on the question of the ability of the petitioner to comply with the order on which the contempt is based. The finding of the Commission in the contempt proceeding is that at all times in said finding specified petitioner was the owner of this water system, and that during said time he operated and managed said system for compensation. If this finding can be construed as including the period covered by the contempt proceedings, as it was apparently intended to do, it is, in effect, a finding that petitioner was at the time able to comply with the order of the Commission. This was one of the facts which the Commission had jurisdiction to try, and it is contended that as against a writ of prohibition its finding is conclusive. The general rule applicable to prohibition is thus stated in *High on Extraordinary Remedies*, § 772:

The writ of prohibition "is never allowed to usurp the functions of a writ of error or certiorari, and it is never employed as a process for the correction of errors of inferior tribunals. And the courts will not permit the writ of prohibition, which proceeds upon the ground of an excess of jurisdiction, to take the place of or be confounded with a writ of error, which proceeds upon the ground of error in the exercise of jurisdiction which is conceded.

"The proper functions of a prohibition being to check the usurpation by inferior tribunals, and to confine them within the limits prescribed for their operation by law, it does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. In all cases, therefore, where the inferior court has jurisdiction of the matter in controversy, the superior court will refuse to interfere by prohibition, and will leave the party aggrieved to pursue the ordinary remedies for the correction of errors, such as the writ of error or certiorari."

This court has sustained this rule in recent decisions in denying prohibition to restrain a superior court from granting letters of administration, upon a proffered showing that the decedent was not a resident of the state, or that there was no property of the decedent within the jurisdiction. *Dungan v. Superior Court*, 149 Cal. 102, 84 Pac. 767, 117 Am. St. Rep. 119. Similar rulings have been made denying prohibition where a complaint fails to state a cause of action, or where the evidence is alleged to be insufficient to sustain a judgment. *Brush v. Smith*, 141 Cal. 469, 75 Pac. 55; *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908. These, however, were cases where there was a remedy by appeal. In a contempt proceeding there is no remedy by appeal, and unless the jurisdiction can be attacked by a showing that there is no evidence to support the judgment it would appear that the defendant is without remedy, unless it can be provided under a writ of review.

There is also the question as to the authority of this court to restrain the action of the Railroad Commission by prohibition, even in the matter of contempt proceedings, in the light of the general limitation by the Public Utilities Act of all review of the rulings of the Commission to the writ of certiorari.

[5] We do not deem it necessary, however, to attempt to solve these doubts as to the application of prohibition to this matter, as we are satisfied that the record before us presents a case for consideration as under application for a writ of review. The petition was made in time, and a complete record has been brought up on this hearing, including a transcript of the evidence. Under these circumstances, although the petition may have demanded the wrong relief, there is no reason why, with the facts before us, this court should not give such relief as the record so presented warrants. *Johnson v. Polhemus*, 99 Cal. 240, 244, 33 Pac. 908; *Zellerbach v. Allenberg*, 99 Cal. 57, 68, 33 Pac. 786; *Code Civ. Proc.* § 580.

That under a writ of review the evidence of facts upon which the lower court or tribunal depended for its jurisdiction may be considered, and its judgment set aside if jurisdic-

diction is without support in the evidence, is beyond dispute.

In *McClatchy v. Superior Court*, 119 Cal. 413, at page 418, 51 Pac. 696, 698 (39 L. R. A. 691) it is said:

"While the writ of certiorari is not a writ of error, 'it is nevertheless,' as suggested in *Schwarz v. Superior Court*, 111 Cal. 112, 'a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact.' If, then, by looking at the evidence we can see that the court exceeded its power, we have a right to examine the evidence for that purpose."

To the same effect: *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Federal Construction Co. v. Graham*, 33 Cal. App. Dec. 698.¹

As already pointed out, the evidence showing petitioner's inability to obey the order of the Commission stands without conflict.

The order convicting petitioner of contempt was therefore in excess of the jurisdiction of the Railroad Commission, and must be annulled. It is so ordered.

We concur: SHAW, C. J.; LENNON, J.; WASTE, J.; WILBUR, J.; SHURTLIFF, J.

(58 Cal. App. 96)

PEOPLE v. SAFASR. (Cr. 628.)

(District Court of Appeal, Third District, California. June 5, 1922.)

Criminal law —1182—No brief being filed, no error appearing in record, and counsel failing to appear for argument, conviction affirmed.

Where no brief was filed on behalf of an appellant, convicted of receiving stolen goods, his counsel failed to appear at the time set for oral argument, and an examination of the record disclosed no error, the case will be affirmed.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

John Safasr was convicted of receiving stolen goods, and he appeals. Affirmed.

S. Luke Howe, James F. Gaffney, and J. R. Connelly, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of receiving stolen property, and appeals from the judgment and from

¹ Hearing granted by Supreme Court, and case later disposed of in that court according to stipulation of parties.

the order denying his motion for a new trial. No brief has been filed in behalf of appellant, and his counsel failed to appear at the time set for oral argument. An examination of the record on appeal discloses no error. The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 646)

PEOPLE v. LAINO. (Cr. 625.)

(District Court of Appeal, Third District, California. May 10, 1922.)

Insurance —31—Amendment penalizing secreting of insured property inapplicable to acts of secreting, committed before amendment's effective date.

Pen. Code, § 548, penalizing the destruction of insured property to defraud the insurer, was amended by St. 1921, p. 99, to penalize also the secreting and disposing of such property with such intent. Held that conviction of secreting and disposing could not be sustained, where the only act committed in the county of prosecution was the removal, before the amendment's effective date, of insured property from accused's dwelling in that county to F. county, and the property thereafter remained in F. county, and, after the destruction by fire of the dwelling, proofs of loss, including the removed property, were made in F. county.

Appeal from Superior Court, Madera County; Stanley J. Murray, Judge.

James L. Laino was convicted of secreting and disposing of insured property with intent to defraud the insurer, and he appeals. Reversed.

Collins & Collins, of Fresno, and H. I. Maxim, and J. J. Coghlan, both of Madera, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of secreting and disposing of insured property with intent to defraud the insurer thereof. From the judgment of conviction and the order denying his motion for a new trial he prosecutes this appeal.

The indictment alleges that the crime was committed on or about July 19, 1921, in Madera county. The evidence shows that, prior to the 19th day of July, 1921, the defendant removed certain insured personal property from his residence in Madera county to the city of Fresno, in Fresno county, where it remained until December 28, 1921, when it was taken into custody by the officers of Madera county. The defendant's dwelling house, from which the property had been removed, together with the contents thereof, was destroyed by fire July 19, 1921. In his

proofs of loss the defendant seems to have included the property which he had removed as stated. These proofs were made in Fresno.

The defendant was prosecuted under section 548 of the Penal Code. At the time of the alleged offense that section made it criminal to burn, injure, or destroy insured property with intent to defraud the insurer thereof. That section was amended in 1921 (Stats. 1921, p. 99), effective July 29, 1921, making it a crime to burn, injure, destroy, secrete, abandon, or dispose of insured property with intent to defraud the insurer. From the foregoing statement it is apparent that no element of the crime charged was committed in Madera county after the amendment went into effect. At the hearing on appeal, the respondent did not contest this proposition, but submitted the matter without argument on behalf of the people. Of whatever crime the defendant may be guilty, it is plain that he did not commit the offense charged in Madera county.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

(44 Cal. App. 69)

CALIFORNIA CANNERIES CO. v. GREAT WESTERN LUMBER CO.

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1919.)

Appeal and error §832(4)—Rehearing confined to matters presented when case was submitted.

A rehearing will not be granted to consider matters omitted from briefs or arguments when the case was submitted.

On petition for rehearing. Petition denied.

For former opinion, see 185 Pac. 1008.

PER CURIAM. In submitting this case for decision, appellant presented and argued but a single point raised by its demurrer to respondent's complaint, to wit, that the complaint was insufficient by failure to allege performance of a condition precedent. We considered that objection and decided it correctly. In its petition for a rehearing, other objections to the complaint and to the sufficiency of the findings are called to our attention for the first time. A rehearing will not be granted to consider points not presented in the briefs or arguments upon which the case was submitted for decision. Kellogg v. Cochran, 87 Cal. 192, 200, 25 Pac. 677, 12 L. R. A. 104; Flores v. Stone, 21 Cal. App. 105, 111, 131 Pac. 348, 351, 352.

A petition to have the cause heard in the

Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on January 2, 1920.

All the Justices concurred.

(58 Cal. App. 103)

PEOPLE v. HEUSERS. (Cr. 619.)

(District Court of Appeal, Third District, California. June 6, 1922.)

1. Criminal law §37—One selling intoxicating liquor to detective by mere request and payment of price not intrapped.

One induced to make an unlawful sale of intoxicating liquor to a detective by the latter's mere request therefor and payment of the price was not intrapped.

2. Criminal law §507(4)—Detectives buying intoxicating liquor not seller's accomplices within rule requiring corroboration of testimony.

Detectives testifying as to the sale and delivery of intoxicating liquor to one of them at his request were not accomplices of the seller so as to require that their testimony be corroborated.

3. Intoxicating liquors §146(3)—Seller securing liquor from his own stock not purchaser's agent.

One securing liquor, which he delivered to another by whom it had been ordered and paid for, not from a third person, but from his own stock, held not the purchaser's agent.

4. Criminal law §37—That sale was made at request of detectives employed by district attorney officials held no defense.

In a prosecution for selling liquor in no-license territory, it is no defense that the purchase was made at the instance or request of persons employed by the district attorney, sheriff, or other officials to discover illegal sellers, if defendant was ready, able, and willing to make the sale.

5. Criminal law §814(3) — Instruction to which there was no applicable evidence properly refused.

In a prosecution for unlawfully selling intoxicating liquor in no-license territory, the court properly refused to instruct that it is not a crime to purchase liquor in such territory, where there was no evidence to which such instruction was applicable.

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

J. H. Heusers was convicted of unlawfully selling liquor in no-license territory, and he appeals. Affirmed.

W. T. Belleu and R. L. Clifton, both of Willows, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of unlawfully selling intoxicating liquor in no-license territory in violation of the Wyllie Law and prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

The principal witnesses against the defendant were two detectives who were in the employ of an organization known as the State Law and Enforcement League. They were operating in Glenn county, at the request of the sheriff and district attorney thereof, for the purpose of securing evidence of violations of law. One of the detectives sought to purchase liquor from the defendant at a point on one of the streets, and defendant agreed to furnish the same. Thereupon the detective paid the defendant the price of the liquor to be furnished, and it was agreed that the liquor would be delivered on the opposite side of the street. The defendant then left, and the other detective shadowed him until the liquor was delivered at the appointed place. The defendant went directly to his home, where he remained from 20 to 30 minutes, and thence to the appointed meeting place and delivered the liquor. Both detectives testified as to the fact of delivery. An analysis of the liquor showed its alcoholic content to be 22 per cent. The defendant denied that he knew the detectives or sold or furnished the liquor.

[1] It is urged that the defendant was intrapped into the commission of the offense. The defendant was in no wise induced to make the unlawful sale except by the mere request for the liquor and payment of the price thereof. This court has decided adversely to appellant's contention in *People v. Barkdoll*, 36 Cal. App. 25, 171 Pac. 440, and *People v. Tomasovich*, 206 Pac. 119.

[2] It is contended that the detectives were accomplices, and that therefore a conviction upon their uncorroborated testimony cannot be sustained. It is clear that they were not accomplices. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 384, 370; *People v. Keseling*, 35 Cal. App. 501, 170 Pac. 627.

[3] It is next contended that the defendant was the mere agent of the detective in securing the liquor. It appears from the evidence that the defendant took the liquor from his own home and delivered it to the purchaser. There is no intimation in the evidence that the defendant secured the liquor from a third person after he had agreed to furnish it and had been paid therefor. He denied that he furnished it at all. Not only is there an entire absence of proof of agency, but the only reasonable inference from the evidence is that the defendant procured the liquor from his own stock.

[4] The defendant requested instructions in accordance with the foregoing contentions here made, but the court refused them, and instructed the jury that "it is no defense for

the defendant to show, if he has shown such, that the purchase was made at the instance or request of persons employed by the district attorney, sheriff, or other officials to find out illegal sellers of intoxicating liquor, if you believe from the evidence that the defendant was ready, able and willing to make the sale." In this there was no error.

[5] The court refused to instruct the jury that it is not a crime to purchase liquor in no-license territory. There was no evidence to which the proposed instruction is applicable.

The court fully and correctly instructed the jury on all questions of law applicable to the case, and the record is free from error. The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 643)

WATKINS v. MCCARTNEY et al.
(Civ. 3903.)

(District Court of Appeal, Second District, Division 1, California. May 10, 1922. Hearing Denied by Supreme Court July 6, 1922.)

1. Landlord and tenant \Leftrightarrow 25(5)—Tenant is not relieved of obligations by his failure to sign lease.

Where a tenant enters into possession under the terms of a written lease, he accepts the instrument, in the absence of other controlling evidence, and his failure to sign does not affect his obligation.

2. Landlord and tenant \Leftrightarrow 115(1), 116(5)—Lease construed as waiving the statutory 30 days' notice while preserving monthly rental.

A lease providing that property is let "at monthly rental," and containing at the end a disconnected clause reading "60 days' notice," is a demise from month to month, but waiving the statutory 30 days' notice and providing for termination upon 60 days' notice, especially as to a lessor, who now contending for 30 days' notice, had, after refusing an amendment to 90 days, proposed the instrument containing the 60-day clause.

Appeal from Superior Court, Los Angeles County; E. A. Luce, Judge.

Action of unlawful detainer by Henry Watkins against Dorothy A. McCartney and E. J. McCartney, her husband. Judgment for plaintiff, and defendants appeal. Reversed.

Hearing denied; WILBUR, J., dissenting.

Howard Prowse, of Los Angeles, for appellants.

Samuel J. Crawford, of Ocean Park, for respondent.

SHAW, J. Action in unlawful detainer. Plaintiff had judgment, from which defendants appeal.

As alleged in the complaint, plaintiff, on September 1, 1920, upon an oral agreement for a monthly tenancy, let the premises in question to defendants at a rental of \$35 a month, under which defendants took possession thereof. On January 11, 1921, plaintiff served upon defendants a notice that said lease would be terminated and defendants required to surrender and quit possession of the premises at the expiration of the month commencing February 1, 1921, and thereafter, on March 3d, served a three-day notice requiring them to vacate the premises.

By their answer defendants alleged that on October 2, 1920, plaintiff executed and delivered to defendant Dorothy A. McCartney a document reading as follows:

"2659 Ocean Front, Ocean Park, Calif.

"10/2/20.

"It is agreed that Dorothy A. McCartney may keep my property, No. 2711 Ocean Front, Ocean Park, at monthly rental of \$35.00 per month, and forty dollars for July and August until a *bona fide* sale is made sixty days' notice.

"Received of Dorothy A. McCartney \$35.00. rent in full to November 1st, 20.

"[Signed] Henry Watkins"

—under which defendant Dorothy A. McCartney entered into possession of the premises and at all times occupied the same, and further alleged that it was understood and agreed that said lease should not be terminated by plaintiff, except upon 60 days' notice thereof given to said lessee.

[1] The court found that plaintiff signed and delivered the above-quoted agreement, but that the same was not signed by defendants or either of them, from which, as a conclusion of law, it found that the tenancy was terminated by the written notice of less than 60 days so served upon defendants by plaintiff. In so doing we think the court erred. Since defendant Dorothy A. McCartney entered into possession under the terms of the instrument, her obligation was not affected by her failure to sign the same. Where a lease recites that the lessee is to pay a certain sum as rent for the premises, his acceptance of the lease makes him a direct obligor or promisor to pay the rent during his occupation thereof, although he has not signed or executed the instrument. *Jones on Landlord and Tenant*, § 77; *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094; 1 *Underhill on Landlord and Tenant*, § 232.

[2] As we construe the instrument, it constituted a lease made by plaintiff to defendant Dorothy A. McCartney from month to month, subject, however, to termination, not by the giving of the statutory notice of 30 days, which plaintiff expressly waived, but, as provided in the agreement, to be terminated upon 60 days' notice thereof given to her; and, as stated, this provision for 60 days'

notice was none the less effectual because of her failure to sign the document. Some effect must be given to the term "sixty days' notice," and we think it could only have reference to notice terminating the lease. Not only does this fact appear from the instrument itself, but it is made apparent from the circumstances under which the instrument was executed, to wit, the fact that she had previously occupied the premises under a like informal instrument that provided for 30 days' notice, and upon plaintiff refusing to sign an instrument providing for 90 days' notice to quit, the one in question was prepared, providing for 60 days' notice, which he executed. Under the terms of the writing, the term of the lease, while from month to month, could only be terminated by a notice of 60 days, which was not given.

Our decision renders it unnecessary to discuss other points made by appellants.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 749)

WRIGHT v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 3845.)

(District Court of Appeal, Second District, Division 2, California. May 22, 1922.)

1. Justices of the peace § 140—Statute as to time of appeal not modified by statute as to notice of rendition of judgment.

Code Civ. Proc. § 974, providing that parties dissatisfied with the judgment rendered in a civil action in justice's court may appeal therefrom to the superior court at any time within 30 days after rendition of judgment, was not affected by section 893, providing that notice of rendition of judgment must be given parties in writing, signed by justice; the judgment being rendered at time it is entered in judgment docket.

2. Justices of the peace § 155(1)—Failure to file moratorium affidavit does not affect question of time of filing appeal.

The fact that no moratorium affidavit was filed in an action in the justice court in no way affects the question of whether the appeal to the superior court was prosecuted in time.

Application for writ of prohibition by Warren E. Wright against the Superior Court of Los Angeles County to prevent further proceedings on appeal from a justice's court. Writ granted.

Holcomb & Holcomb, of Los Angeles, for petitioner.

David R. Faries and John R. Berryman, Jr., both of Los Angeles, for respondent.

WORKS, J. This is an application for a writ of prohibition. Petitioner was plaintiff

in an action pending in the justice court and procured judgment against defendant therein. More than 30 days after the justice had tried the cause, and had made the entry in his docket, "Judgment for plaintiff" for a certain amount and costs, defendant in the action filed his notice of appeal from the judgment. Respondent court denied a motion to dismiss the appeal. Petitioner, contending that the motion should have been granted, seeks now to prohibit respondent from proceeding further with the action. An alternative writ of prohibition was issued upon the filing of the petition, and the present question is whether the writ shall be made peremptory.

[1] Section 974, Code of Civil Procedure, as it stood when the justice made the above-mentioned entry in his docket and when the notice of appeal by the defendant from the judgment of the justice was filed, provided that "any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment," and it was decided in *Thomson v. Superior Court*, 161 Cal. 329, 119 Pac. 98, that a judgment is "rendered" in an action in a justice court when the justice makes entry in his docket of the fact that judgment has gone for one party or the other. Respondent contends, however, that section 893, Code of Civil Procedure, as it was amended after the decision in *Thomson v. Superior Court*, changed the law as before that amendment it had stood in section 974; in other words, that the amended section 893 operated to amend 974. The matter in section 893 which is supposed to have worked this change in the law is embraced in the sentence, "Notice of the rendition of judgment must be given to the parties to the action in writing signed by the justice;" the statement being followed by language directing how the notice is to be given. The contention of respondent is that, under the amended section 893, a judgment is not rendered by a justice until he has given the notice required by the sentence which we have quoted. This contention, surely, finds its refutation in the sentence itself. A justice is required by it to give notice "of the rendition of judgment"; that is, he is to give notice of a past and completed transaction. It is as if the Legislature had required him to give notice "that he has rendered judgment." We are satisfied that the notice of appeal was filed too late.

[2] Respondent alleges in his answer to the petition that no moratorium affidavit was filed in the action in the justice court, and contends in his brief, as if the contention could affect the question now before us, that the justice had no jurisdiction to render

judgment without the filing of such an affidavit. The failure to file the affidavit could in no way affect the question whether the appeal to respondent court was prosecuted in time.

A peremptory writ of prohibition will issue as prayed.

We concur; FINLAYSON, P. J.; CRAIG, J.

(57 Cal. App. 606)

PEOPLE v. CHEW JUEY. (Cr. 1032.)

(District Court of Appeal, First District, Division 2, California. May 5, 1922. Hearing Denied by Supreme Court, July 3, 1922.)

1. Homicide \S 250—Evidence held sufficient to sustain conviction.

In a trial for murder, *held*, the evidence was sufficient to support conviction.

2. Criminal law \S 742(1)—Credibility of witnesses for jury.

In a trial for murder resulting from a Chinese tong war, the credibility of witnesses who belonged to the same tong as deceased, accused belonging to a hostile tong, and whose testimony appeared to be memorized, was for the jury.

3. Criminal law \S 1160—Credibility of witnesses for trial judge in passing on motion for new trial.

In a trial for murder resulting from a Chinese tong war, the credibility of witnesses who belonged to the same tong as deceased, accused belonging to a hostile tong, and whose testimony appeared to be memorized, was for the trial judge, in passing upon a motion for a new trial.

4. Criminal law \S 1156(3)—Denial of motion for new trial not disturbed, where evidence would have warranted granting of motion but was merely cumulative.

Denial by the trial court of a motion for new trial, based on evidence which was not available at the trial, will not be disturbed as an abuse of discretion, where the evidence was merely cumulative but would have warranted the granting of a new trial.

5. Criminal law \S 1172(2)—Instruction to disregard testimony that witness for prosecution had been indicted for criminal conspiracy improper but not prejudicial.

Under Code Civ. Proc. \S 2051, providing that a witness may not be impeached by evidence of particular wrongful acts except that it may be shown that he had been convicted of felony, an instruction that in weighing the testimony of a witness for the prosecution in a trial for murder, evidence tending to show that the witness had been indicted for conspiracy to commit a murder growing out of the same tong war from which the homicide in question resulted should be disregarded was improper although not so prejudicial to accused as to require reversal, this testimony being admissible to show the interest of the witness in the prosecution of accused.

6. Criminal law ¶811(5)—Trial court should not instruct jury as to testimony of particular witness.

The trial court should not single out a particular witness and instruct the jury as to how to weigh his testimony.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Chew Juey, alias Mock Jung Toy, was convicted of murder in the first degree, and he appeals. Affirmed.

Frank J. Hennessy and Thos. A. Keogh, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rior-dan, Deputy Atty. Gen., for the People.

NOURSE, J. Appellant was convicted of the crime of murder in the first degree, and the penalty of life imprisonment was imposed. Thereafter he moved for a new trial and for an arrest of judgment, both of which motions were denied. He appeals from the final judgment of conviction and the order denying his motion for a new trial.

[1] Appellant attacks the judgment upon the ground that the verdict is not sustained by the evidence. The case against appellant rests upon the testimony of the two Chinese witnesses, Yee Young and Wong Kai. From the testimony of these witnesses it appears that three or four Chinese entered a gambling room where the deceased was playing dominoes, one of whom shot the deceased while standing behind him. This assailant then fled from the room. The deceased followed his assailant into the hallway, shooting at him as he ran, and then fell to the floor. Three other Chinese were wounded. The appellant, it was said, approached the deceased as he was lying upon the floor and emptied his revolver into his body. Yee Young testified that he thereupon followed the appellant out into Grant avenue and had him in sight until he pointed him out to the officer who made the arrest.

[2, 3] It is the contention on the part of the appellant that the shooting was the result of a tong war in which the deceased and the two Chinese witnesses who testified against the appellant were members of one tong and the appellant was a member of another tong. For this reason it is argued that the testimony of these two witnesses should not be believed, and particular attention is drawn to the fact that their testimony is so closely identical that it bears evidence of having been memorized by them for the purpose of the trial. But these are matters which, even in a case of this nature, must be left to the judgment of the trial jury and to the discretion of the trial judge, who had this same question before him in passing upon the motion for a new trial.

[4] It is further argued that appellant's motion for a new trial should have been granted upon the showing that Lum Yap Wan, one of the Chinese who had been wounded at the time, was not available at the time of the trial but had thereafter made his affidavit to the effect that he had witnessed the shooting of Go Foin; that two shots were fired into his body by a Chinese wearing an army overcoat who was not the appellant in this case; that thereafter Go Foin started to run after his assailant when he was attacked by another Chinese named Leong Tong, who shoved Go Foin over in the hallway and then fired at least two shots into his body; and that Chew Juey was not either of the men who participated in the shooting. Though the evidence which appellant proposed to present through this witness would have been sufficient to warrant the granting of a new trial if the trial court had made the order, it is merely cumulative and would not justify our saying that the trial court abused its discretion in denying the motion.

[5, 6] Criticism is made of the instruction of the trial court to the effect that, in weighing the testimony given by the witness Yee Young, the jury should disregard any of the testimony tending to show that he had been indicted by the grand jury for criminal conspiracy. The subject-matter of the instruction was the question of impeachment of witnesses. Section 2051 of the Code of Civil Procedure provides that a witness may not be impeached by evidence of particular wrongful acts, except that it may be shown that he had been convicted of felony. The testimony relating to Yee Young's indictment was introduced for the purpose of showing that he was a member of a certain Chinese tong which had been having some trouble with the tong of which appellant was a member and that the witness had been charged with a conspiracy to commit a murder growing out of this tong war. The testimony was admitted without objection from the prosecution and was admissible for the purpose of showing the interest of the witness in the prosecution of the appellant. As a general rule it is not advisable for the trial court to single out a particular witness and to instruct the jury in any manner as to how it may weigh the testimony of that witness, but we do not believe that the instruction under consideration is so prejudicial to the interests of the appellant as to require a reversal of the judgment.

Other points raised do not require consideration.

Judgment affirmed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

(57 Cal. App. 670)

WELLS v. DIAS et al. (Civ. 4213.)

(District Court of Appeal, First District, Division 1, California. May 16, 1922. Hearing Denied by Supreme Court July 13, 1922.)

1. Easements \Leftrightarrow 5—Adverse user, to give title, must be hostile, under claim of right, communicated to the owner of the land.

A right of way by prescription over land can only be created by user, which is neither expressly nor impliedly licensed and permissive, and such user must be adverse and hostile, and under a claim of right communicated to the owner of the land.

2. Easements \Leftrightarrow 36(1)—Twenty years' adverse user without objection held to raise presumption of claim of right.

Where evidence showed a road had been in existence 45 years, and had been used by plaintiff and his predecessors in interest for over 20 years, openly, continuously, and without hindrance from any source, it is presumed that the user was under a claim of right and adverse to the owner, and such presumption, in the absence of evidence to the contrary, is sufficient to establish a prescriptive right of way.

3. Easements \Leftrightarrow 61(9½)—Adverse user under claim of right held for court or jury.

In suit by landowner against another landowner to enjoin defendants from interfering with the use of a right of way over their land, the question as to whether previous use of the way was under claim of right, or as a mere matter of neighborly accommodation, was one for the court or jury to determine.

4. Easements \Leftrightarrow 10(1)—Use of way with public does not prevent presumption of grant arising.

In suit by landowner against another landowner to enjoin interference with the right of way over defendants' land, the fact that the public in general used the same way with plaintiff did not prevent the presumption of a grant arising from more than 10 years' adverse user by plaintiff.

5. Appeal and error \Leftrightarrow 1050(1)—Admission of evidence to show right of way by necessity held, if error, not prejudicial.

In suit by landowner against another landowner to enjoin interference with a right of way over defendants' land, in which plaintiff claimed the right of way by prescription, admitting evidence to show a right of way by necessity, which in no manner could have controlled any finding made in the case, or changed the result, was, if error, not prejudicial.

6. Easements \Leftrightarrow 36(3)—Presence of gate over way held not to affect finding of acquisition of way by prescription.

In action by landowner against another landowner to enjoin interference with a way over defendants' land, in which plaintiff claimed a right of way by prescription, the fact that, when defendants' land was inclosed, gates were placed across the way to prevent cattle from destroying crops, and that such gates did not interfere with plaintiff's use of the way, did not

affect a finding that plaintiff had acquired a way by prescription.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Suit by C. P. Wells against M. A. Dias and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Frank Kauke, of Fresno, and H. R. Crozier, of Sanger, for appellants.

Thomas F. Lopez, of Fresno, for respondent.

TYLER, P. J. This action was brought to enjoin defendants from interfering with the use and enjoyment of an alleged right of way over the lands of defendants. Plaintiff claimed that the right of way has been used openly and adversely by him and his grantor and by others as a means of ingress and egress to his lands for wagons, teams, and vehicles, for more than 10 years prior to the filing of the complaint. Defendant denied that plaintiff had any such right of way or other interest in the lands, and by cross-complaint alleged that he was the sole owner thereof, and prayed that his title be quieted as against the plaintiff, whom he seeks to enjoin from further trespassing upon the property. Trial was had before the court sitting without a jury. Plaintiff had judgment, and defendant appeals.

From the record it appears that one Manuel Valenzuela, some 25 years ago, procured title to the land upon which the easement is claimed, partly by homesteading and partly by purchase. Valenzuela conveyed to one Merz, who in turn sold to defendant about 2 years prior to the filing of this complaint. Situated on the property in question is a road. This road is known as the Jacalitos Creek road, and it runs in a northerly and southerly direction through the lower foothills of the Coast Range mountains some distance out from the city of Coalinga in Fresno county. The road follows Jacalitos creek, which creek flows through and over the property of defendant, and enables plaintiff and others who live in the immediate neighborhood to reach Coalinga and the plains below, which lie east of the Coast Range mountains. Plaintiff's property and residence is located in a southerly direction from, and a short distance above, defendant's lands.

In July, 1920, defendant laid a pipe line across the road, making it more or less impassable, and prevented plaintiff from using the same. The present suit followed. The trial court found that for more than 20 years last past the road in question existed and still exists, and that it has been used during all of said time by plaintiff and his predecessors in interest for the purpose of going to and from their property. It further found that for more than 10 years plaintiff

and his predecessors have used the road uninterruptedly, openly, notoriously, continuously, and adversely to the rights of defendant and his predecessors in interest, and with their full knowledge, and without asking or receiving permission from any one, and without objection, and that plaintiff by such use had acquired a right by prescription to the claimed easement. The sole question here presented is whether or not the evidence supports the finding that plaintiff acquired by prescription a right of way over and through the lands in question.

[1, 2] Such a right can only be created by user, which is neither expressly or impliedly licensed or permissive, and such user must be adverse and hostile and under a claim of right communicated to the owner of the land. Where, however, the user is continuous, or openly and notoriously adverse to the owner, it creates a presumptive knowledge in him that the person using the land is doing so under a claim of right. Here the evidence shows without conflict that the road in question has always been in existence, or at least so since 1877, and has been used by plaintiff and his predecessors in interest for over 20 years, openly, continuously, and without hindrance from any source. In such a case it is to be presumed that the use of the easement was under a claim of right and adverse to the owner, and such presumption, in the absence of evidence to the contrary, is sufficient to establish a prescriptive right of way. *Yuba Consolidated Goldfields v. Hilton*, 16 Cal. App. 228, 116 Pac. 712, 715.

[3] Appellant, while conceding the user, contends that the evidence merely shows that the road was used by plaintiff in common with the public in general by way of neighborly accommodation, and that plaintiff never communicated to defendant any claim of right to travel over the land. The question as to whether the use was under claim of right or as a mere matter of neighborly accommodation is one for the court or jury to determine as a fact in the light of the relations between the parties and all the surrounding circumstances. *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804; *Fleming v. Howard*, 150 Cal. 28, 87 Pac. 908; *Conaway v. Toogood*, 172 Cal. 706, 158 Pac. 200. The findings upon this subject will not, therefore, be disturbed.

[4] Further claim is made that no presumption of grant of right of way could arise where there is evidence to show that the way was used in common with the public. We see no merit in this contention. The user on the part of plaintiff was in no manner impaired by the enjoyment of a like right in others. Whatever may have been the nature of their use, the claimed easement of plaintiff was not based thereon, nor dependent for its enjoyment upon this fact. The evidence

upon this subject shows that the use enjoyed by plaintiff and his predecessors was had under such circumstances as would indicate to the owner of the land that such use was claimed by them as of right, and that it was not regarded by the parties as a mere privilege revocable at the pleasure of the owner of the soil, and it is sufficient to warrant and support the findings. *Tarpey v. Veith*, 22 Cal. App. 239, 292, 134 Pac. 367.

[5, 6] Complaint is made of the admission of evidence on the part of plaintiff tending to show a right of way by necessity rather than by prescription. Conceding the admission of this evidence to have been erroneous, it is without prejudice, as it in no manner could have controlled any finding or changed the result of the case. *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. 804. Nor does the fact that the evidence shows that the road was barred by gates which were required to be opened and closed in passing over the land, affect the finding that plaintiff had acquired a prescriptive use. *Bolger v. Foss*, 65 Cal. 250, 3 Pac. 871; *Jones on Easements*, § 279. The evidence upon this subject merely showed that, when fences were first erected upon the property, gates were placed thereon to prevent cattle from destroying the crops, and that they in no manner interfered with plaintiff's enjoyment of the easement.

From what we have said, it follows that the judgment should be, and it is, hereby affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(57 Cal. App. 611)

DERN v. DEIN. (Civ. 4071.)

(District Court of Appeal, First District, Division 2, California. May 5, 1922. Rehearing Denied May 31, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Appeal and error \S 1024(5)—On conflicting evidence as to entering satisfaction of judgment refusal to set it aside affirmed.

On appeal from an order denying a motion to set aside satisfaction of a judgment, evidence held to present a sufficient conflict to require the appellate court to support the order of the trial court denying the motion to set aside the satisfaction of judgment.

2. Judgment \S 898(1)—That satisfaction is entered without consideration does not require court to set it aside on motion.

Under Code Civ. Proc. § 675, relating to methods of satisfying a judgment, and providing that when a judgment is satisfied in fact otherwise than upon execution a party or attorney must give such acknowledgment or make such indorsement, where a party entered a satisfaction on a judgment without consideration, the court was not required on motion to set the satisfaction aside.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by John Dern against E. A. Dein. From an order denying plaintiff's motion to set aside satisfaction of a judgment for plaintiff, plaintiff appeals. Affirmed.

Hearing denied; WILBUR, J., dissenting.

Geo. D. Collins, Jr., of San Francisco, for appellant.

Goldman, Nye & Surr and Douglas A. Nye, all of San Francisco, and Morgan V. Spicer, of Berkeley, for respondent.

NOURSE, J. This is an appeal from an order of the superior court denying plaintiff's motion to vacate and set aside the satisfaction of judgment which had theretofore been duly executed and filed in the action. The appeal is presented upon a bill of exceptions, which contains merely the affidavits which were presented to the trial court at the hearing upon the motion, a copy of the original judgment in the action, and a copy of the satisfaction of that judgment. There is also added to the transcript a copy of the judgment roll made up after the trial of the original action in 1914, a copy of the minute order denying plaintiff's motion to vacate the satisfaction of said judgment, and a copy of the notice of appeal from said order. The record does not contain either the motion which was the basis of this order or the notice thereof, and we are unable to ascertain from the record the grounds upon which the motion was made. We are informed in the briefs that the motion was based upon the grounds that satisfaction was made without consideration, that it was untrue in point of fact and that it was made merely for the purpose of releasing a certain lien of the judgment to assist the respondent in procuring a renewal of a loan which he had upon a piece of property covered by the judgment lien. If these were the grounds and the only grounds upon which the motion was made, they all present questions of fact which the trial court was called upon to determine. From the affidavits which are included in the bill of exceptions it appears that to some extent at least there was a conflict between the parties as to these facts. In support of the judgment, of course, we are bound to conclude that the trial court resolved these questions of fact against the appellant.

[1] It is urged by appellant, however, that there is no conflict on the fact that the satisfaction was executed without consideration, and that no part of the judgment was paid at the time when the satisfaction was executed. The facts are that appellant, who is the uncle of respondent, had recovered a judgment on default, and that this judgment had become a lien upon a piece of property

which the respondent owned. This property was subject to a prior lien evidenced by a deed of trust to a bank for a loan of money advanced to respondent. The time had come when this deed must either be renewed or foreclosed. If renewed it would become a second lien to the lien of appellant's judgment. When confronted with this situation the respondent sought his uncle, and persuaded him to file and record a satisfaction of the judgment in order that he might renew the lien due the bank. The satisfaction was executed by the appellant, and personally recorded by him upon the promise of respondent that notwithstanding the entry of the satisfaction of judgment he would make payments on the judgment when he was able to do so. It is not alleged that the satisfaction was procured by fraud, misrepresentation, or undue influence on the part of respondent. So far as appears, it was executed willingly, and the affidavits submitted by respondent allege that it was executed after appellant had been fully and fairly advised of its true legal effect. It also appears that some time after the satisfaction was executed the respondent paid the sum of \$65 upon the judgment.

[2] In view of these facts, we cannot say that there is no conflict in the evidence presented; but, even if it were true that the satisfaction was entered without consideration, we do not understand that that fact alone requires the court on motion to set the satisfaction aside. The law does not invite litigation or encourage it to be continued, and a judgment creditor may terminate it by filing a satisfaction in the manner prescribed in section 675, Code of Civil Procedure.

Order affirmed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

(58 Cal. App. 19.)

BOGMUDA v. YOUNG, Superior Court Judge.
(Civ. 2495.)

(District Court of Appeal, Third District, California. May 27, 1922. Hearing Denied by Supreme Court July 24, 1922.)

1. Courts \S 12(5)—Jurisdictional fact of defendant's residence need not appear in records.

Proof that defendant resides in the judicial township of suit is jurisdictional, but it is not required that the fact of such residence shall appear in the complaint or judgment or any records in the case.

2. Certiorari \S 66—Presumption of sufficiency of evidence to support decision of superior court on jurisdictional question indulged.

Upon appeal from the decision of the justice's court upon the question of jurisdiction of the person, the superior court has jurisdiction of that question, and, upon application for cer-

tiorari to review the superior court, it must be presumed there was evidence to support its judgment, even if the sufficiency of the evidence could be questioned in such proceeding.

3. Justices of the peace §=84(4), 161(3)—
Statutory grounds for dismissal for lack of jurisdiction not available after general appearance.

By entering general appearance in the justice's or superior court, defendant waives his right to question jurisdiction, under Code Civ. Proc. § 890, subd. 4, as amended in 1906, providing for a dismissal "when the action is brought in the wrong county, or township, or city."

4. Certiorari §=28(2)—Does not lie to review decision of superior court on appeal from justice's court on jurisdictional question.

The decision of the superior court upon the question of jurisdiction of the person, brought up on appeal from the justice's court, given in regular pursuance of its authority, is final, and will not be reviewed by certiorari, notwithstanding Code Civ. Proc. § 832, providing that certain actions must be tried "in the township or city in which the defendant resides."

Petition by Pete Bogmuda for certiorari, against D. M. Young, as Judge of the Superior Court of the County of San Joaquin, State of California, respondent, to review the proceedings of the superior court, wherein F. D. Hart was plaintiff and petitioner was defendant on an appeal from justice's court, in an action for services rendered. Writ denied.

G. C. Allen and A. H. Carpenter, both of Stockton, for petitioner.

FINCH, P. J. Petitioner asks this court to review the proceedings in the superior court of San Joaquin county in a cause wherein F. D. Hart was plaintiff and petitioner was defendant.

It is alleged that Hart brought an action against petitioner in Stockton township, and in the complaint therein averred:

"That within two years last past said plaintiff rendered labor to said defendant, at the latter's special instance and request, in the agreed value of \$325; that upon said amount the sum of \$100 has been paid, leaving due the sum of \$225, no part of which has been paid"; that summons was duly issued and served upon petitioner; "that thereafter, in obedience to said summons, and not voluntarily," the petitioner demurred to the complaint on the grounds "that the court has no jurisdiction either of the person of the defendant or the subject-matter of the action," and that the "complaint does not state facts sufficient to constitute a cause of action"; that the court overruled the demurrer, and the defendant answered, alleging "that the court has no jurisdiction of the person of the defendant or of the subject-matter of the action for the reason that the defendant is not, and never was, a resident of the said Stockton

township, and the alleged contract to pay for the said pretended work and labor specified in said complaint, was not made in said Stockton township nor to be performed therein," denying the allegations of the complaint, and pleading a settlement and payment of the alleged indebtedness; that "at the trial of said cause in the justice's court the defendant called the attention of the justice to the fact that it had no jurisdiction of the subject-matter of the action or of the person of the defendant, and objected to the justice's court determining any question but that of jurisdiction; the justice's court then and there overruled the defendant's objection * * * and rendered judgment against the defendant"; that the defendant appealed from such judgment "upon questions of both law and fact"; that in the superior court "the defendant * * * called the attention of said court to the fact that neither the justice's court nor the said superior court had jurisdiction of the subject-matter of the action or of the person of the defendant, and then and there objected to the court determining any question but that of jurisdiction, but the defendant, as the judge of the said superior court, overruled the defendant's said objection and rendered judgment against said defendant"; that "neither the said justice's court nor the said superior court had jurisdiction in said case of the subject-matter of the action or of the person of the defendant, for the reason that it does not appear on the face of the complaint, or in the judgments entered therein, or in any of the records of said case, that either the said justice's court * * * or the said superior court * * * had jurisdiction of the subject-matter of the action * * * or jurisdiction of the person of the defendant."

[1, 2] Proof that a defendant resides in the judicial township in which he is sued is jurisdictional, but it is not required that the fact of such residence shall "appear on the face of the complaint, or in the judgment entered therein, or in any of the records" in the case. *Jolley v. Foltz*, 84 Cal. 321. See, also, *In re Williams*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163. By his answer the defendant tendered the issue that his residence was not in Stockton township. By his appeal he asked the superior court to decide that issue. The court certainly had jurisdiction to determine the question thus raised. It does not appear from the petition that the court decided the question against petitioner's contention on insufficient evidence or without an opportunity to prove his place of residence. It must be presumed that there was evidence to support the judgment, even if the sufficiency of the evidence could be inquired into in this proceeding.

[3] Petitioner relies on the case of *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936, in support of his contention that the defense of want of jurisdiction can be raised by answer. At the time that case was decided section 890, subd. 4, of the Code of Civil Procedure provided for the dismissal

of an action "when it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city." In 1905 subdivision 4 was amended to provide for a dismissal "when the action is brought in the wrong county, or township, or city," and it is silent as to the manner in which the question may be raised. In *Vance v. Superior Court* (Cal. App.) 191 Pac. 945, where the facts were similar to those here, the court said:

"By his general appearance in the justice's and superior court petitioner waived his right to raise the question of jurisdiction"—citing *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317, and *American Law Book Co. v. Superior Court*, 164 Cal. 327.

[4] See, also, *Roberts v. Police Court of City and County of San Francisco* (Cal. Sup.) 195 Pac. 1053. The provision of section 832 of the Code of Civil Procedure to the effect that actions such as that here involved must be commenced and tried "in the township or city in which the defendant resides" relates to the jurisdiction over the person of the defendant. *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701. This proceeding is sought to review the action of the superior court, not that of the justice's court.

"This court has never recognized the right of a petitioner to a writ of certiorari to review the judgment of a justice's court after appeal taken and determined in the superior court." *Olcese v. Justice's Court*, supra.

"By its appeal to the superior court the petitioner submitted the question of want of jurisdiction of its person to the superior court and . . . the tribunal to which the appeal was thus prosecuted had the right to decide that question incorrectly as well as correctly." *American Law Book Co. v. Superior Court*, supra.

"If such tribunal has regularly pursued its authority, our inquiry stops." *Matter of Hughes*, 159 Cal. 360, 383, 113 Pac. 684, 686.

It does not appear from the petition herein that the superior court did not regularly pursue its authority.

The petition is denied.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 651)

GOEBEL v. GREGG et al. (Civ. 3884.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1922.)

1. Fraudulent conveyances §57(1)—Deed of gift valid if grantor not indebted.

A deed of gift is valid if the grantor was not indebted at the time he made it, or if he had other means outside of the property conveyed with which to pay his indebtedness.

2. Fraudulent conveyances §69(1)—With intent to defraud subsequent creditor is void as to such creditor.

A deed of gift, which is fraudulent in its inception and made with intent of grantor to defraud a future creditor, is as to such person void.

3. Fraudulent conveyances §69(1)—Conveyance by debtor knowing creditor dealt with him relying on ownership of property, annulled.

Where a debtor secretly and without knowledge of one with whom he contracts indebtedness transfers his property without consideration, knowing that the creditor in dealing with him relied upon his ownership, it constitutes actual fraud, and upon showing such facts the transfer may be annulled.

4. Fraudulent conveyances §263(1)—Creditor's not negating creditor's notice of debtor's gift of his property, before extending credit, held insufficient.

Where a deed of gift of realty from a father to his daughter was made on October 3d, in an action to set aside the deed as in fraud of creditor who provided necessities to the donor's wife, a complaint, not alleging that plaintiff was without knowledge of the transfer of October 3d, or that he was induced to furnish the goods in reliance on the fact and belief that the donor was still the owner of the property, and not alleging that the deed was not duly filed for record, etc., was insufficient, as it did not show that plaintiff was defrauded by the donor's act in giving the property to his daughter prior to the time the indebtedness was contracted.

5. Pleading §254 — After second amended complaint filed, no abuse of discretion in sustaining demurrer without leave to further plead.

Where the plaintiff failed after filing three complaints in an effort to state a cause of action, there was no abuse of discretion in sustaining the demurrer to the second amended complaint without leave to file a further complaint.

Appeal from Superior Court, Los Angeles County, Charles S. Burnell, Judge.

Action to annul certain debts on the ground of fraud, by Henry O. Goebel against Chenle Lee Gregg and others. From judgment for defendants, plaintiff appeals. Affirmed.

Rohe, Yakey & Devin, of Los Angeles, for appellant.

Ticknor & Carter & Webster, of Pasadena, and S. L. Carpenter, of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from a judgment entered for defendants following an order of court sustaining a general demurrer to the second amended complaint, without leave to further amend.

The purpose of the action was, upon the ground of fraud, to obtain a decree setting aside and annulling certain deeds of conveyance whereby defendant Boswell transferred to his daughter, Chenie Lee Gregg, certain real estate, which by her was conveyed to defendant Smith, and have the same adjudged to be subject to execution upon a judgment theretofore rendered in favor of plaintiff and against Boswell.

As appears from the complaint, the wife of defendant Boswell, owing to his cruel treatment of her, was, on the 12th day of October, 1918, compelled to leave the home which they jointly occupied, and commencing on said October 12, 1918, and continuing up to the time of her death, which occurred on January 26, 1920, plaintiff, at the special instance and request of Boswell, provided her with food, shelter, and other necessities of life, for which on May 25, 1920, he obtained a judgment against Boswell in the sum of \$2,234.60. An execution issued thereon was returned nulla bona. It further appears that nine days before the making of the contract upon which the judgment was founded, to wit, on October 3, 1918, Boswell, without money consideration, conveyed the property in question to his daughter, who, on May 29, 1920, with her husband, and likewise without consideration, conveyed the same to defendant Smith. The material allegations upon which plaintiff relies in pleading the facts constituting the fraud are that the conveyance so made by Boswell, and that of the Greggs to Smith, was "made for the purpose of cheating and defrauding the creditors of the defendant Boswell, particularly the plaintiff, and preventing the plaintiff from recovering for the necessities of life" furnished by plaintiff to the wife of Boswell at the latter's request; that at the time of making said transfers and up to the time of filing the complaint, Boswell was and is insolvent, and the "transfers were made by the defendant Boswell in contemplation of such insolvency, and with the express intention of depriving the plaintiff of recovering from defendant Boswell on account of the agreement which he proposed making with the plaintiff on said 12th day of October, 1918."

[1-3] The chief question in the case is as to whether the transfer was void as to plaintiff, who was a subsequent creditor of Boswell. It is a general rule that a deed of gift is valid if the grantor was not indebted at the time he made it, or if he had other means outside of the property conveyed with which to pay his indebtedness. A man's property is his own, and he has a right to give it away if he so desires, and this right cannot be questioned by other than creditors existing at the time, and not then if he has other means with which to meet his obligations. To this rule, however, there is the

well-recognized exception that a deed of gift which is fraudulent in its inception and made with intent to enable the grantor to defraud a future creditor, is as to such person void. *Bush & Mallett Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967. This exception is based upon the fact that if the debtor secretly and without the knowledge of one with whom he contracts an indebtedness transfers his property without consideration, knowing that the creditor in dealing with him relies upon his ownership thereof, it constitutes actual fraud, and upon a showing of such facts such transfer may be annulled. On the contrary, if the deed of transfer so made is placed of record so as to constitute constructive notice, or the subsequent creditor has actual knowledge of the transfer, it cannot be said that in extending the credit he was deceived or in any way misled by the act of which he complains.

[4] Measured by the rule so stated, and disregarding objections upon the ground that the allegations hereinbefore quoted are mere conclusions, the complaint is barren of facts showing that plaintiff, when he made the contract with Boswell on October 12th, was without knowledge of the transfer so made on October 3d, or that he was induced so to do in reliance upon the fact or belief that Boswell was owner of the property. It is not alleged in the complaint that the transfer was secretly made, nor that the deed was not immediately upon its execution filed for record; nor is it alleged that plaintiff was without knowledge of the making thereof, nor that in making his contract he believed or had any reason to believe that Boswell was owner of the property. Indeed, from aught that appears to the contrary, the deed to defendant Chenie Lee Gregg was duly filed for record immediately upon its execution, of which fact and the fact of the transfer so made by Boswell, plaintiff was fully advised, and with actual knowledge thereof, and knowing that Boswell, as he had a right to do, had given the property to his daughter, deliberately made the contract out of which the indebtedness arose. Hence it cannot be said that he was defrauded by the act of Boswell in giving the property to his daughter prior to the time when the indebtedness was incurred. *Schell v. Gamble*, 153 Cal. 448, 95 Pac. 870; *Marple v. Jackson*, 184 Cal. 411, 193 Pac. 940; 12 R. O. L. p. 497.

[5] Having failed after filing three complaints in an effort to state a cause of action, it was no abuse of discretion on the part of the court to sustain the demurrer to the second amended complaint without leave to file a further complaint. Moreover, plaintiff did not apply to the court for leave to file a third amended complaint, or offer any amendment covering the particulars wherein the complaint was held insufficient (*Burling v. Newlands*, 112 Cal. 476, 44 Pac.

810), for the reason that presumably he could not do so.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(68 Cal. App. 66)

FOWLER v. LANE MORTGAGE CO.
(Civ. 3816.)

(District Court of Appeal, Second District, Division 1, California. June 1, 1922.)

1. Execution §272(2)—Possession of tenant is notice to purchaser of unrecorded lease.

A purchaser at a sale under execution, who knew that at the time the lands were occupied by a person other than the record owner, is charged with knowledge of facts sufficient to put him on inquiry which, if pursued, would have revealed that the person in possession was the tenant of the lessee under an unrecorded lease, the rent on which had been paid in advance, so that the purchaser is not entitled to recover the rents during the time for redemption from the lessee under Code Civ. Proc. § 700, which protects only purchasers in good faith; that is, under Civ. Code § 1214, those without notice, actual or constructive, of the rights of the lessee.

2. Execution §272(1)—Purchaser with notice not entitled to rent paid debtor before lien attached to land.

Though the purchaser at sale under foreclosure of a recorded mortgage can recover from the lessee rent during the period for redemption, though such rent had been paid in advance because the lessee was charged with notice of the lien of the mortgage, the purchaser at a sale under execution has not such right, where the lease and advance payment were made before the judgment became a lien upon the land.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by George J. Fowler against the Lane Mortgage Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

E. A. Lane, of Los Angeles, for appellant. Burton E. Hales, of Redlands, for respondent.

SHAW, J. Basing his right so to do upon the provisions of section 707, Code of Civil Procedure, plaintiff as the purchaser of a tract of land at judicial sale, brought this action to recover from defendant as tenant for the use and occupation of the same during the period fixed for the redemption thereof. He had judgment, from which defendant has appealed.

The complaint contains two counts, in one of which it is alleged that defendant as tenant was in possession and control of the

land; and in the other, that O. T. Sutton farmed the same under an agreement to pay defendant for the use thereof a part of the crop, the value of which so paid was \$1,965.47.

It appears from the pleadings, stipulation of facts and meager evidence offered that on April 1, 1917, and at all times thereafter referred to, George L. Cooper was the owner of record of tract 58, township 13 south, range 15 east, S. B. M., in Imperial county, subject to a deed of trust whereby the same was conveyed to Los Angeles Trust & Savings Bank to secure the payment of a loan made to him by Lane Mortgage Company; that on said date he executed a lease of said property to defendant, the term of which, as expressed therein, was to continue until such loan should be paid, and for which the lessee in good faith paid a full and adequate rental in advance for the entire term. The lease was not recorded. On January 22, 1918, George J. Fowler and his coplaintiffs, in an action based upon a demand that arose after the execution of the lease and brought in the superior court of San Bernardino county, obtained a money judgment against Cooper upon which an execution was issued to the sheriff of Imperial county under and by virtue of which he levied upon all interest of Cooper in the land in question, and on the 4th day of June, 1918, sold the same to plaintiff, George J. Fowler, to whom on said date he issued a certificate of purchase, a duplicate of which was filed for record on August 7, 1918. No redemption was made of the property within the year allowed therefor, during all of which time and prior thereto it was in the open and actual possession and occupancy of one O. T. Sutton as a subtenant of defendant to whom, between June 4 and August 1, 1919, he paid as rent for the use thereof, for the year immediately following date of sale to plaintiff, the sum of \$1,965.47.

If plaintiff is entitled to recover the value of the use and occupation of the property, then, upon the allegations of the complaint, it is immaterial whether defendant was in the actual occupation thereof, or farmed it through its subtenant, from whom it received the rents and profits.

[1] Section 700, Code of Civil Procedure, provides that—

"Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property."

In this case the judgment was not a lien upon the property and, under the section quoted, the right, title, and interest of Cooper was such only as he had in the property

upon the date of the levy, which rights were subject to the lease for which he had in advance received adequate payment. Defendant's lease, however, as found by the court, was for a term exceeding one year, and not recorded, by reason of which facts it was void as to plaintiff, whose certificate of purchase was recorded on August 7th, provided the purchase was made in good faith; that is, without notice, actual or constructive, of the rights of defendant under the unrecorded lease. Section 1214, Civ. Code. The court so found. Appellant challenges the finding for want of sufficient evidence to support it. Whether or not the contention is warranted depends upon the circumstances the existence of which as stipulated are:

"That Sutton was openly in the actual, exclusive possession as subtenant of defendant of all the land at and for more than one month prior to all times referred to in the amended complaint as and claiming as tenant under the lease from defendant referred to in the answer, and farming said land and paying the rent therefor to the defendant."

That an unrecorded deed is valid as between the parties and as against subsequent purchasers having notice thereof, and that the possession of the grantee of such unrecorded deed is notice of his title and claim to a subsequent purchaser, admits of no controversy. *Beattie v. Crewdson*, 124 Cal. 577, 57 Pac. 463. As clearly stated in *Pell v. McElroy*, 36 Cal. 268, and quoted with approval in *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. 713:

"The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such a vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights, and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable right * * * in behalf of the party in possession."

[2] We think the same principle is applicable to the possession of land under an unrecorded lease for a term of years. *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765. The admitted actual and open possession of the land by Sutton, as tenant of defendant, was sufficient to put plaintiff, in dealing with the property, upon inquiry as to the rights of his landlord, and he is chargeable with notice of all facts which he might have ascertained had he pursued the inquiry with proper diligence. *O'Rourke v. O'Connor*, 89 Cal. 442. There is neither pleading nor evidence tending to show an excuse for failure to make the inquiry, or that if made it would have been unavailing, and hence plaintiff is presumed to have had knowledge, at the time of the purchase, of the fact of defendant's leasehold interest in the property covering the period of redemption from the sale so made. Since prior to the levy of the execution defendant had paid Cooper for the use and occupation of the property, of which fact plaintiff, under the circumstances, must be deemed to have had notice, he could not be a purchaser in good faith. Upon no equitable principle could defendant's property be subjected to the payment of Cooper's debt. *Webster v. Cook*, 38 Cal. 423. Where a leasehold is acquired subsequent to the execution and record of a mortgage, the lessee, since chargeable with constructive notice thereof, takes the property subject to the same, and if a sale is had under a decree of foreclosure the purchaser, as provided by section 707, Code of Civil Procedure, is, as against the lessee, entitled to the rents during the period of redemption, even though paid in advance to the owner. This for the reason that the rights of the mortgagee, of which both the lessee and lessor have notice, could not be impaired by the subsequent acts of the parties. *U. S. Mortg. Co. v. Willis*, 41 Or. 481, 69 Pac. 266; *Harris v. Foster*, 97 Cal. 292, 32 Pac. 246, 83 Am. St. Rep. 187. Such facts, however, are not involved in this case.

Our conclusion renders it unnecessary to discuss other grounds upon which a reversal is urged.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 788)

DABNEY et al. v. KEY et al. (Civ. 4222.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Pleading \S 364(5)—Allegation payment was made through agent is probative fact properly stricken.

In an action for specific performance, an allegation in the complaint that the consideration paid for the execution of the contract was paid to defendants through an agent of plaintiffs was an allegation of a probative fact, not necessary to the sufficiency of the pleading, and was properly stricken out.

2. Pleading \S 364(3)—Allegation held properly stricken as redundant.

In a complaint for specific performance of a contract to give an oil lease, which alleged that defendants refused to perform their agreement, and ever since have failed and refused to do so, an allegation, immediately following, that defendants repudiated their agreement and declared they were not bound by it and would not perform it, was clearly redundant, and it was not error to strike it out.

3. Specific performance \S 32(3)—Agreement to execute oil lease which lessee could surrender will not be enforced.

An agreement by defendants to give plaintiffs an oil lease by the terms of which plaintiffs were required to drill a well on the premises and to make certain payments to defendant, but which gave plaintiffs the right to surrender the lease without liability for failure to drill the well, did not create a mutual obligation, so that the agreement of defendants to execute the lease will not be specifically enforced at the suit of the plaintiffs.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action for specific performance by Joseph B. Dabney and others against Thomas B. Key and others. Judgment for defendants, when plaintiffs declined to amend after demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

Robert M. Pease, of Los Angeles, for appellants.

Adolph B. Rosenfield, of Long Beach, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to enforce a specific contract to make a lease of certain lands for the purpose of developing oil wells thereon. To the amended complaint the defendants interposed a demurrer and a motion to strike. The motion was granted in part and denied in part. On July 14, 1921, the demurrer was sustained, and the plaintiffs were given 10 days to amend. They did not amend, and on August 16 an order was made awarding judgment in favor of the defendants for their costs. The plain-

tiffs have appealed from the judgment and have brought up the judgment roll.

[1] The motion to strike contained eight different assignments. It was granted as to assignments 5 and 7 and was denied as to the others. The whole of the amended complaint clearly shows that it was the theory of the plaintiffs that if a lease were made the same would run to J. P. Dabney as lessee, and that the negotiations were carried on, at least in part, by Clifford R. Dabney acting as the agent for J. B. Dabney. Paragraph III alleged:

"That at the time of the execution of said agreement to lease said J. B. Dabney, by and through said Clifford R. Dabney, paid to the defendants, and they still retain the sum of twenty-five (\$25) dollars as consideration for the said agreement to lease."

Acting on assignment No. 5 the court struck out the words, "by and through said Clifford R. Dabney." The expression was but a probative fact, not necessary to the sufficiency of the pleading, and was properly stricken out.

[2] In paragraph IV, among other things, the plaintiffs had pleaded:

"That the defendants then failed and refused to perform their said agreement to lease, and refused to execute to the plaintiffs, or either of them, any lease of said premises, and ever since have so failed and refused. [That defendants then repudiated their said agreement to lease, and declared to plaintiffs that the defendants were not bound by the same and would not perform.] That the plaintiffs and each of them duly performed all the conditions of said agreement to lease on the part of them or either of them to be performed, and that the plaintiffs and either of them since the time of said tender and offer always have and has been ready and willing to execute the said lease." (Brackets ours.)

Under assignment No. 7 the court struck out the sentence inclosed in brackets. The sentence was clearly redundant, and the court committed no error in striking it out. In the amended complaint the plaintiffs pleaded:

That the defendants are the owners of a certain tract of land in Los Angeles county. That on the 14th day of February, 1921, the defendants agreed in writing to execute a lease, "to contain the following terms and conditions: (1) Drilling to be started on or before six months from and after the date thereof; (2) rent to be \$10 per acre per month payable monthly in advance during said term of six months unless drilling is started sooner, in which event, rent is to cease; (3) royalty to be the one-sixth part of all oil or gas obtained, saved and sold on or from said lands; (4) the said lease to be in other particulars the same as any usual and customary oil lease."

That plaintiffs paid \$25 for the option. That on the 16th day of March, 1921, they

tendered to the defendants a written lease which is set forth as an exhibit; that the defendants refused and now refuse to execute the lease so tendered and presented. They also plead:

"That as to the defendants the consideration for said lease (namely, the sum of \$25 cash and of \$10 per acre per month, rental therein specified and the royalties, to be paid by the lessee therein to the lessor, and the other terms and covenants of said lease), was and is just, reasonable and adequate."

They further allege that the defendants threaten to develop or cause to be developed said lands for oil and gas to the injury of the plaintiffs, etc. The respondents interposed a demurrer which, among other things, pleaded that the amended complaint did not state facts sufficient to constitute a cause of action. The respondents support the order sustaining the demurrer on several different grounds. Because of the view which we take of the case it will not be necessary to consider but one of those grounds.

[3] The respondents contend that the form of lease which was presented to the defendants and which the defendants declined to execute was not a mutual obligation; that in the lease as so drawn the plaintiffs did not bind themselves to drill, but on the other hand reserved the right to surrender the lease at such time as they might see fit, whereas, the same paper purported to bind the owners of the land "for the term of twenty years from date hereof and as long thereafter as oil, gas, asphaltum or kindred substances are produced in paying quantities thereon, unless sooner terminated as herein provided." The obligation resting on the appellants is quoted and set forth by the appellants in their brief as follows:

"4. The drilling requirements of this lease shall be as follows:

"4a. Within six (6) months from date of this lease, lessee is to commence drilling operations on said premises, and will diligently prosecute the same with reasonable diligence and without interruption for a period of more than thirty (30) consecutive days at any time, Sundays, and holidays excepted, unless such delays are excused as hereinafter provided, to a depth of 8,000 feet, unless oil is found in paying quantities at a lesser depth."

"4e. Lessee may surrender this lease before or after the commencement of drilling, without liability for failure to commence or continue operations; but upon such surrender lessee shall execute to lessors and record a quitclaim deed to said premises. Cancellation and termination of lease shall be the only remedy for failure to commence or continue operations."

In the case of *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239, the Supreme Court was considering a case in specific performance. The instrument before the court purported to

be a contract of sale of lands supposed to be valuable as a coal mine. The purported contract contained a surrender clause as follows:

If defendant's assignors "should at any time before the expiration of the time hereinbefore fixed for the completion of this contract, to wit, the 14th day of December, A. D. 1867, become satisfied that it was useless to further prospect said lands agreed to be conveyed for coal, then upon giving thirty days' notice to said party of the first part, in writing, of their intention to abandon said contract, then and thereafter this agreement shall be void, and of no binding force or effect between the said parties or either of them."

The trial court had entered a judgment specifically enforcing the contract. The Supreme Court reversed that judgment and in doing so said:

"It is, moreover, perfectly clear that a specific performance of the contract could not have been performed at the suit of Pacheco; for besides the difficulty of enforcing the performance of personal services, the agreement contained the express stipulation that if, at any time prior to the period fixed for the completion of the contract, Bromley and Jones should become satisfied that it was useless further to prospect the land, they should have the right, upon giving thirty days' notice to Pacheco of their intention so to do, to abandon the contract. 'It is a general principle,' says Mr. Fry at section 286 of his work on Specific Performance, 'that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from difficulty attending its execution in the former.'"

It is not claimed by the appellants that the *Sturgis* Case has been overruled, but the appellants ask this court at this time to lay down a different rule so far as oil leases are concerned. In their brief they contend as follows:

"Anomalous as it may seem at first, this apparent one-sidedness is the only fair structure for such a contract. And, the oil lease being the basis of the California oil world, it follows that if this oil industry, if this tremendous young industry which has been the very life and salvation of our great Southwest these past three strenuous years, if this industry is to survive and is to continue to function and expand, it must be granted or confirmed the power to enforce and protect with all the vigor of our laws and judicial system these contracts which are its very foundation and strength and its only opportunity for service in fields as yet undiscovered."

However desirable some other rule might be as applicable to this specific line of cases it would seem that such an argument should

be addressed to the Legislature and not to the courts.

We find no error in the record. The judgment is affirmed.

We concur; LANGDON, P. J.; NOURSE, J.

(58 Cal. App. 100)

DAVIS v. DAVIS. (Civ. 4266.)

(District Court of Appeal, First District, Division 1, California. June 5, 1922. Hearing Denied by Supreme Court Aug. 3, 1922.)

1. Divorce \Leftrightarrow 184(10)—Trial court's determination of issue of guilt of acts producing grievous mental suffering not disturbed except for abuse of discretion.

The trial court's finding upon the issue of defendant's guilt of acts producing grievous mental suffering will not be disturbed unless the evidence is so slight as to indicate abuse of discretion.

2. Divorce \Leftrightarrow 150(2) — Findings that allegations are untrue not too general to support judgment for defendant.

Findings in a divorce suit that plaintiff's allegations are untrue are not too general on allegations of specific instances of cruelty to support a judgment for defendant.

3. Divorce \Leftrightarrow 150(2)—Findings as to property rights unnecessary where divorce denied.

Where plaintiff wife was denied a divorce, no findings on the existence or character of the parties' property rights were necessary.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Lulu S. Davis against M. William Davis. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas R. White and William P. Hubbard, both of San Francisco, for appellant.

Bert Schlesinger and Timothy Healy, both of San Francisco, for respondent.

TYLER, P. J. This is an appeal by plaintiff from a judgment in an action for divorce brought by her on the ground of extreme cruelty.

Plaintiff, in support of her appeal, claims that the findings are insufficient to support the judgment, and that they are not justified by the evidence, which, she claims, is more than ample and sufficient to entitle her to a decree of divorce on the ground of defendant's extreme cruelty.

Complaint is also made that the trial court erred in refusing to permit plaintiff to introduce evidence as to the value and extent of property held by defendant, or to make a finding as to its community or separate character.

Plaintiff, by her complaint, alleges that she and defendant intermarried in the year 1907, and that there is issue of said marriage two minor children.

The extreme cruelty alleged is infliction upon plaintiff of grievous mental suffering due to the acts of defendant from time to time during the marriage relation, and particularly during the years 1918 and 1919. In this behalf it is in substance charged that defendant, without cause, complained of years of misery in consequence of his marital relation with plaintiff; that he threatened her with divorce proceedings, absented himself from home without plaintiff's consent, and frequently exhibited a violent display of temper, and without justification or excuse and in the presence of others abused, belittled and annoyed her. Other allegations are to the effect that defendant at different times struck plaintiff. The sum of \$500 per month is alleged to be a reasonable amount for the support of herself and children, and \$2,500 a reasonable attorney's fee. These sums are prayed for, together with the dissolution of the marriage.

Defendant by answer denied all the allegations of plaintiff's complaint. The record consists of 700 or more pages, and the evidence shows many acts of alleged cruelty on the part of defendant, most all of which were denied by him, and he on his own behalf introduced evidence to prove his kindness and solicitude for plaintiff during their married life. Defendant also introduced evidence of acts of cruelty on the part of plaintiff. The record also shows that subsequent to the acts complained of by plaintiff as causing her grievous mental suffering she requested defendant to return to her and resume their marital relations.

The trial court found plaintiff's allegations to be untrue and denied her a divorce, but granted her an allowance of the sum of \$350 per month for the support of herself and minor children and \$1,250 as attorney's fees.

[1] The case presents a sharp conflict of evidence, and is one clearly falling within the so-called "conflict of evidence" rule, and this court cannot disturb the finding of the trial court. Whether or not one has been guilty of acts producing grievous mental suffering upon an innocent party is a question of fact to be determined from all the circumstances, keeping in view the intelligence, refinement, and delicacy of sentiment of the complaining party, and no inflexible rule as to what probative facts shall exist in order to justify a finding of the ultimate fact of its existence can be laid down. This is a question for the trial court to determine from all the circumstances, and its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion on the part of the trial court. No such abuse here appears. MacDonald v. Mac-

Donald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Avery v. Avery, 148 Cal. 239, 244, 82 Pac. 967; Lewis v. Lewis, 167 Cal. 733, 141 Pac. 367, 52 L. R. A. (N. S.) 675; Dee v. Dee, 34 Cal. App. 659, 168 Pac. 588.

[2] The contention that the findings are so general upon the allegations of specific instances of cruelty alleged as to be insufficient to support the judgment is without merit. Had more specific findings been asked for or had, they would of necessity have been in plaintiff's favor. *Gale v. Bradbury*, 116 Cal. 39, 40, 47 Pac. 778.

[3] Equally untenable is the objection that the court committed error in failing to make findings upon the existence of the property rights of the parties or of its character. Plaintiff having been denied a divorce, this issue became immaterial, and a finding upon the question was therefore unnecessary. *Smith v. Dubost*, 148 Cal. 622, 624, 84 Pac. 38.

For the reasons given, the judgment is affirmed.

We concur: PREWETT, Justice pro tem.; RICHARDS, J.

(57 Cal. App. 703)

McCARTY v. WILSON. (Civ. 4217.)

(District Court of Appeal, First District, Division 2, California. May 19, 1922.)

Appeal and error \Leftrightarrow 1099(4)—**Decision on prior appeal that contract of purchase was enforceable against defendant held law of the case.**

In an action by an executor against one who purchased land from the deceased, a decision in a prior appeal that a contract between the deceased and the purchaser was enforceable regardless of an oral agreement that deceased would sell and deliver to defendant a good and sufficient title, free and clear of all incumbrances, and that the purchaser should pay a certain sum in cash, and should be given certain credit for the balance of the purchase price, is conclusive on subsequent appeal as to purchaser's claim that under the oral agreement attending the execution of the contract of sale the executor was not entitled to specific performance.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Alva R. McCarty, executor of the last will and testament of Anna R. McCarty, deceased, against Philip L. Wilson. From a judgment for plaintiff, defendant appeals. Affirmed.

Lloyd Miller and Philip Wilson, both of Los Angeles, for appellant.

Charles L. Allison, of San Bernardino, and Meserve & Meserve, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for

\$33,023, together with interest from February 10, 1912. This amount represents the balance due upon the purchase price of land belonging to the estate of Anna E. McCarty, deceased, and which had been sold to defendant upon an order of court made and entered in the course of probate proceedings.

The record presented upon appeal is lengthy, and it would serve no useful purpose to discuss the facts in detail, because the matter has been considered twice by our Supreme Court. Upon the first trial of the cause, judgment was given for the defendant, and this judgment was affirmed by the District Court of Appeal. A hearing was granted by our Supreme Court, and said judgment in favor of defendant was reversed. Thereupon the defendant and present appellant petitioned the Supreme Court for a rehearing of said matter, and a supplemental opinion was filed in answer to this petition, which did not, however, change the effect of the opinion. *McCarty v. Wilson*, 184 Cal. 194, 193 Pac. 578. Thereafter a second trial was had, resulting in a judgment for the plaintiff from which this appeal is taken. The facts found by the trial court upon the present record present precisely the same questions of law as those passed upon by the Supreme Court upon the former appeal.

Appellant concedes that many of the matters relied upon by him for a defense in the first trial are settled against him by the opinion of the Supreme Court upon the former appeal. One point, however, he contends was not passed upon in the former appeal, and upon that point he relies for a reversal of the judgment. His position is stated by him as follows:

"The only question involved on this appeal is whether respondent under the circumstances attending the execution of the contract of sale is entitled to the aid of a court of equity."

Upon the former appeal the Supreme Court passed upon the order of sale made by the probate court and held it to be valid; it also passed upon the right of the executor, as such, to enforce a specific performance of the contract for the sale and purchase of the land.

The record contains a finding as follows:

"It is also orally understood and agreed by and between the said parties that the said plaintiff, as such executor, would sell and deliver to the defendant, a good and sufficient title to the said premises free and clear of all incumbrances, and that the defendant would buy the said premises from the said plaintiff and should pay to the said plaintiff the sum of \$11,000 in cash, and should be extended certain credit for the balance of the purchase price."

It is upon this finding that appellant's contention upon this appeal is based. He maintains that, as the executor did not disclose to

the probate court the terms of this oral agreement, he was guilty of a fraud upon the court and upon the defendant. He calls attention to the finding that the defendant relied upon this oral contract as a consideration for entering into the contract for the purchase of the land, and that defendant relied upon the promise of plaintiff that he would present to the probate court a true and correct return and account of the said sale, showing all the terms and conditions thereof, and would procure a confirmation thereof, and it was because of this reliance that the defendant failed to be present at the hearing when the order of sale was made and failed to make objection to the confirmation of such sale as a sale for cash. These various matters, he contends, raise such inequity in the conduct of the plaintiff that he should be denied relief by a court of equity.

This contract, made between the parties outside of court and not embodied in the order of court for a sale of the property, was considered by the Supreme Court in reaching its conclusion upon the former appeal. The opinion filed therein (184 Cal. at page 199 thereof, 193 Pac. 578) refers to the same, stating that, even though the court were to assume that such contract was with McCarty, as executor, instead of individually, nevertheless its provisions regarding good and sufficient title are not violated by the facts appearing in the record, and such provisions do not furnish a ground for a refusal on the part of the defendant to perform his contract to purchase the land. Other provisions of said agreement are discussed in said opinion of the Supreme Court, indicating that the same was fully considered, and its effect, if any, upon the rights of the parties hereto, under the facts in evidence, could not have been overlooked.

Appellant contends that the opinion of the Supreme Court does not indicate that that court had in mind, specifically, the objection now made by appellant; i. e., that this contract between the parties raised certain inequitable features in the case which would defeat specific performance, and therefore that question is open for discussion upon this appeal. We think the entire matter is foreclosed by the decision of the Supreme Court. That decision held that this contract relied upon by appellant, and the facts surrounding it, constitute no bar to a decree against defendant for specific performance. This defeats appellant's claim, regardless of the nature of the argument upon which he may proceed. This is a sufficient answer to the point made upon appeal, but, if it is any satisfaction to the appellant to know beyond a doubt that the Supreme Court of this state has considered the precise argument he now makes in support of his general contention, it may not be amiss for us to add that an examination of the record presented to the

Supreme Court upon the former appeal reveals that the attorney who at that time represented the present appellant contended in an elaborate brief that this unfulfilled agreement between the parties raised an insurmountable obstacle to affording to plaintiff the remedy of specific performance of the contract for the sale and purchase of the land.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

(57 Cal. App. 636)

**McGUIRE v. ALUMINUM PRODUCTS CO.
OF THE PACIFIC COAST. (Civ. 4199.)**

(District Court of Appeal, First District, Division 1, California. May 8, 1922.)

1. Appeal and error §1010(1)—Finding supported by sufficient evidence not disturbed.

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, *held*, there being sufficient evidence to support a finding of the amount of unfilled orders which was less than claimed by plaintiff, the finding could not be disturbed on appeal.

2. Factors §66—In action by factor for breach of contract, proof of amounts paid as commissions warranted under plea of payment.

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, *held* that under a plea of payment, proof and a finding as to the amounts paid plaintiff by defendant on commissions due him under the contract were warranted.

3. Factors §66—Evidence sufficient to support finding of amount of commissions paid factor under contract.

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, *held* the evidence was sufficient to support a finding of the amounts paid plaintiff by defendant as commissions due him under the contract.

4. Factors §45—Cannot recover payments to salesmen or traveling or stationery expenses under contract to pay commission on sales.

Under a contract whereby a manufacturer agreed to pay a factor a commission of 25 per cent. on sales made by him, the factor may not recover sums paid by him to his salesmen or for his traveling expenses and stationery.

5. Factors §45—Cannot recover expenses incurred in trying to persuade principal not to breach contract.

Under a contract whereby a manufacturer agreed to fill orders solicited by a factor and to pay him 25 per cent. on his sales, the factor cannot recover expenses incurred in trying to persuade the manufacturer not to breach the agreement to fill orders, as such expenses are not the natural and proximate result of such breach.

6. Factors —44—May not recover commission on goods returned through no fault of principal.

Under a contract agreeing to pay a factor a commission for goods sold, he was not entitled to a commission on goods sold which were returned to his principal, where their return was not caused by any act or omission of the latter.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Elmer E. McGuire against the Aluminum Products Company of the Pacific Coast, a corporation. From a judgment for plaintiff for less than demanded, he appeals. Affirmed.

Charles L. Brown, of El Centro, and Albert E. Carter, of Oakland, for appellant. Breed & Burpee, of Oakland, for respondent.

TYLER, P. J. This is an action to recover damages for breach of contract. In substance the complaint alleges that on the 5th day of March, 1919, plaintiff and defendants entered into an agreement in writing by which the Aluminum Products Company agreed to manufacture and ship certain articles of aluminum ware and cause the same to be transported for the purpose of filling orders to be solicited by plaintiff; that by the terms of said contract plaintiff was to receive a commission of 25 per cent. on sales effected through his personal efforts. It is recited that the parties entered upon the performance of their agreement, and that plaintiff thereafter secured orders in the sum of \$17,871.01, which defendant, in violation of its contract, failed to fill, thereby depriving plaintiff of his commission, amounting to the sum of \$4,467.50. As flowing from this alleged breach of contract plaintiff claims special damages in the sum of \$3,809.22. In support of his claim for special damages plaintiff alleges:

(1) That he was in Chicago, engaged in the fulfillment of his contract when he discovered defendant's neglect and failure to perform its contract, and that in consequence he was required to return to Oakland, where the factory of defendant company is situate, where he was compelled to remain from June 20, 1919, to July 10, 1919, in an effort to induce defendant to make deliveries, and by reason thereof was required to expend for railroad fare, hotel bills, and other expense the sum of \$756.10.

(2) That during this period plaintiff had a number of salesmen working for him in different parts of the country, selling goods under the contract; that in consequence of defendant's breach in not filling such orders, plaintiff was required to lose the time of four

salesmen for the period of two weeks, thereby causing plaintiff to suffer a loss of \$2,442.24.

(3) That on September 15, 1919, because of defendant's breach, plaintiff was again required to go to Oakland and incur additional expense and suffer additional loss occasioned by the delay of defendant in making deliveries, in the sum of \$240.

(4) That certain post cards, order blanks, booklets, etc., prepared by plaintiff and furnished to defendant, were not used, thereby damaging plaintiff in the further sum of \$216.

(5) That on account of such breach of contract certain goods shipped were returned to the factory, and the commission thereon was by defendant charged back to plaintiff, and this item of damages is alleged to amount to the sum of \$154.98.

Defendant denied the securing of the orders as alleged by plaintiff, and also denied all special damage, and set up payment on account of demands of plaintiff, in the sum of \$1,818.30.

[1-4] After trial the court found against plaintiff on every item claimed as special damage, but found that defendant had failed to fill accepted orders in the sum of \$8,662.95, upon which plaintiff was entitled to a commission of 25 per cent., or the sum of \$2,165.73; that defendant had paid on account thereof, as alleged in its answer, the sum of \$1,818.30, leaving a balance due to plaintiff in the sum of \$347.42, for which sum plaintiff was given judgment. Plaintiff appeals from such judgment, and as grounds for reversal contends that the evidence does not support the finding that the unfilled orders were limited to the sum of \$8,662.95, it being claimed that the evidence establishes plaintiff's allegation that the total amount of orders procured and not filled amounted to the sum of \$17,870.01. The only evidence to support the issue of the total amount of orders taken and not filled is found in the testimony of plaintiff himself. A bill of particulars was demanded by defendant, which was ordered furnished by the court. In conformity therewith a statement was produced by plaintiff of the amount of his alleged sales, but there was testimony showing that many of the items contained therein were erroneous. Upon this subject there was a conflict of testimony. There was, however, sufficient evidence to support the finding of the trial court as to the amount of orders procured, and under the well-established rule this determination cannot be disturbed on appeal. Appellant further claims that there is no pleading to justify or evidence to support the finding as to the portion of the amount found by the trial court to have been paid to him on account. The record does not support

this contention. Defendant, by amended answer, pleaded payment, and there is testimony to show that plaintiff was paid all the commissions to which the court found him to be entitled. Upon the question of special damage the finding of the court as to the first four claims above enumerated is as follows:

"The court makes no finding thereon for the reason that such averments, and each of them, are immaterial and surplus averments in said complaint and any finding thereon would be a finding upon an immaterial issue, and for the further reason that no evidence was introduced at the trial in support of such averments."

[5] These alleged claims for special damages are all based upon the one breach of the contract. The contract, however, nowhere provides that defendant was to pay any sums by way of commissions or expenses, in excess of the 25 per cent. on the price list. This was the sole compensation which plaintiff was to receive. Whatever arrangements he made with his salesmen or whatever sums he expended for his traveling expenses and stationery was a matter that concerned him alone. Under such circumstances expenses incurred in an endeavor to persuade a defendant to perform his contract are not the natural and proximate result of the act complained of. We are of the opinion, therefore, that the trial court rightfully concluded that these items were duplicated claims, as the commission provided for covered them.

[6] Upon the fifth item of special damage, which is based upon the alleged fact that certain goods were delivered, then shipped back to the factory and the commission thereon originally credited was charged back against plaintiff's account, the court found upon sufficient evidence that the return of the goods was not caused by any act or omission upon the part of the defendant, for which reason plaintiff was entitled to no commission thereon.

No other questions are presented.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(57 Cal. App. 656)

TITLE INS. & TRUST CO. v. PFENNING-HAUSEN et al. (Civ. 3707.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1922.)

1. Mortgages \S 549 — Notice of foreclosure sale to tenant of mortgaged property is necessary to render him liable for rent to purchaser at sale.

Under Code Civ. Proc. \S 707, by which purchaser on a judicial sale of mortgaged property is entitled to the rents and profits thereof until redemption, and Civ. Code, \S 1111, provid-

ing that no tenant who, before notice of the grant, has paid rent to grantor, shall suffer damage thereby, notice of the sale must have been had by the tenant of the mortgaged property to render him liable to such purchaser for the rent.

2. Evidence, \S 89—Presumption that sheriff recorded certificate of judicial sale is overcome by proof that tenants were without notice of sale.

The presumption under Code Civ. Proc. \S 1963, subd. 15, that the sheriff on selling real estate at a judicial sale has not only issued a certificate of sale to the purchaser, but has filed a duplicate thereof for record in the county recorder's office as required by section 700a, so as to constitute constructive notice to tenants of the property of the transfer of the title, is disputable, and is overcome by evidence that such tenants were without notice of the sale, in which case they are justified under Civ. Code, \S 1111, in paying the rent to their lessor for the remainder of the term.

3. Mortgages \S 548—Recordation of deed is constructive notice to tenants of purchaser's acquisition of title.

The filing of a sheriff's deed to property for record is constructive notice to tenants of sale of land under mortgage foreclosure, and the acquisition of title by the purchaser so that they are liable to such purchaser for use and occupation for the remainder of their term.

4. Appeal and error \S 931(1)—Findings construed most strongly in support of judgment.

Findings must be construed most strongly in support of the judgment.

5. Appeal and error \S 417(2)—Inclusion of party for whom plaintiff bid in the property at foreclosure sale as appellant in notice of appeal held erroneous as against defendants in action for rent.

On appeal from a judgment for defendants in an action for rent by the purchasers at a foreclosure sale, one not a party to the action for whom the court found that plaintiff bid in the property and held it for his use and benefit was improperly included as appellant in the notice of appeal; plaintiff being the real party in interest entitled to maintain the action so far as defendants were concerned.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by the Title Insurance & Trust Company against A. Pfennighausen and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Edw. F. Wehrle and Asa V. Call, both of Los Angeles, and O. K. Morton and Hayden L. Hewes, both of Riverside, for appellant.

Walter C. Davison, of Riverside, for respondents.

SHAW, J. This is an appeal by plaintiff upon the judgment roll from a judgment entered in favor of defendants.

As appears from the complaint, the cause

of action stated therein was to recover for the use and occupation of certain lands of which plaintiff alleged it was at all times mentioned the owner and which defendants, with its consent, held and occupied for a period of two years from and after January 1, 1917.

Appellants' contention is that the findings are insufficient to support the judgment. The material facts appearing therefrom are that on January 13, 1917, at a sale on mortgage foreclosure proceedings, the plaintiff bought in and became the owner and holder of a certificate of sale to the land in question, upon the surrender of which certificate it, on January 21, 1918, received a deed to the property, and ever since said date plaintiff had been the owner of the property; that Rogers Development Company was, prior to the sale upon foreclosure of the mortgage thereon, in which proceedings the title thereto was acquired by plaintiff, the owner thereof, and on October 1, 1918, leased the same to defendants for the term of one year for one-fourth of the crop produced thereon, and thereafter, without demand for possession or notice to quit, defendants continued in possession for the year, which expired on October 1, 1918, the effect of which, as provided in section 1161, Code of Civil Procedure, was to renew the lease upon the same terms; "that on October 1, 1917, defendants not having received or been given any notice of the claim or claims, if any, of said Title Insurance & Trust Company to the rent or any portion thereof, * * * for the year ending October 1, 1917," thereupon paid the same to Rogers Development Company; that in payment of the rent due for the year ending October 1, 1918, they set aside one-fourth of the crop grown upon the land and left the same thereon as rental of said premises, of which fact they notified one Thomas F. Joyce, who was the duly authorized agent of plaintiff.

From these facts the court, as a matter of law, concluded that defendants were not indebted to plaintiff in any sum whatsoever.

That defendants had the use and occupation of the land from the time of the issuance of the certificate of sale of the mortgaged property, to wit, from January 13, 1917, to October 1, 1918, clearly appears. It likewise appears that for the use thereof for the year expiring October 1, 1917, defendants paid the rental, not to plaintiff as holder of the certificate of purchase in the foreclosure proceedings, but to Rogers Development Company, who up to the time of the sale was the owner of the property.

[1] The right on the part of the purchaser upon a judicial sale of mortgaged property to receive the rents and profits thereof, or the value of the use and occupation, based upon the provisions of section 707, Code of Civil Procedure, has been repeatedly sustained. *Page v. Rogers*, 31 Cal. 294; *Walk-*

er v. McCusker, 71 Cal. 595, 12 Pac. 723; *Clarke and Cain v. Cobb*, 121 Cal. 595, 54 Pac. 74. The provisions of the section, however, must be read in connection with section 1111, Civil Code, which provides that grants of rents are good and effective without attornment of the tenants, but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby. In the cases cited it was made to appear that the tenant had either actual or constructive notice of the sale under which he was required to pay the rental of the property to the purchaser holding the certificate.

[2] Indeed, appellant in its argument seems to concede that notice is necessary, but insists that since, under section 700a, Code of Civil Procedure, it is made the duty of the sheriff when selling real estate at a judicial sale not only to issue to the purchaser a certificate of sale, but to file a duplicate thereof for record in the office of the county recorder, we must indulge in the presumption that such official duty was regularly and duly performed (subdivision 15, § 1963, Code Civ. Proc.); in other words, that the certificate of sale was filed for record, which if done, such act constituted constructive notice at least to defendants of the transfer of title. Since, however, the presumption invoked by appellant is a disputable one, it is deemed to have been overcome by the evidence upon which the court based the finding hereinabove quoted, to the effect that defendants were without notice of the sale and purchase by plaintiff. Hence, since at the time of the payment of the rent to Rogers Development Company defendants had no notice of the sale under foreclosure, or of the fact that plaintiff was the purchaser of the property in such proceedings, they were, as provided in section 1111, Civil Code, justified in paying the rent to their lessor in discharge of any liability for the use and occupation of the property for the year ending October 1, 1917.

[3] As stated, the deed of the property to plaintiff was filed for record on January 21, 1918, of which fact and the acquisition of title to the property by plaintiff defendants must be deemed to have had constructive notice and were liable to plaintiff for the use and occupation of the property thence on to October 1, 1918, when they surrendered possession.

[4] It appears from the findings that they recognized plaintiff as entitled to the rent for the entire year and delivered to plaintiff upon the premises one-fourth of the crop grown and harvested during said year, of which fact plaintiff was repeatedly notified, and made no objection to the tender. Applying the rule that findings must be construed most strongly in support of the judgment, we think they are sufficient to support the same.

[5] For some reason not appearing by the record, Thomas F. Joyce was included as appellant in the notice of appeal. He was not a party to the action, and although the court finds that plaintiff bid in the property at the foreclosure sale for his use and benefit and at all times held it for his use and benefit, such fact, if true, was no concern of defendants. As to them, plaintiff was the real party in interest and was entitled to maintain the action. *Walker v. McCusker*, 71 Cal. 595, 12 Pac. 723; *Cortelyou v. Jones*, 182 Cal. 131, 64 Pac. 119.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(57 Cal. App. 462)

KOBLOCK v. LARSON et al. (Civ. 4208; S. F. 9955.)

(District Court of Appeal, First District, Division 1, California. April 27, 1922. Hearing Denied by Supreme Court June 26, 1922.)

1. Vendor and purchaser \S 37(1)—Purchaser may rely upon false representations although he has means of knowledge.

A purchaser of real estate may rely on false representations although he has means of knowledge, and is under no duty in such a case to employ his means of knowledge.

2. Vendor and purchaser \S 37(1)—Independent investigation of real estate not made by purchaser where under control of vendor.

An independent investigation by a purchaser of real estate, such as to preclude his reliance on vendor's statements, was not made where an inexperienced purchaser visited the land, accompanied by vendor, in whom he had full confidence, and at all times controlled by his suggestions.

3. Appeal and error \S 1071(1)—Failure to make specific finding held not prejudicial.

Where vendor claims that purchaser investigated the land, a finding that purchaser had no knowledge would ordinarily include the element of want of investigation, and this general finding is not prejudicial where a correct specific finding would be adverse to the objecting party.

On Hearing in Supreme Court.

4. Judgment \S 194—Specific performance \S 49(2), 51—Judgment supported notwithstanding failure to find on all issues; remedy denied if contract was inequitable as to defendant, or consideration was inadequate.

Plaintiff, to enforce specific performance of a sale of land, must show that the contract as to defendant was just and reasonable, and upon adequate consideration, and a finding against plaintiff upon this issue is sufficient to sustain judgment for defendants notwithstanding failure to find on other issues.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Nison Koblick against Otto A. Larson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. A. Meyer, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellant.

W. F. Cowan, of Santa Rosa, and F. J. Burke, of Petaluma, for respondents.

TYLER, P. J. This is an action brought to enforce specific performance of a contract relating to certain real property. The action was the result of a real estate transaction involving some 66 acres of land situated near Windsor in the county of Sonoma, which appellant, as an agent of the owners, sold to respondent Larson. The facts are substantially without conflict, and are in substance as follows:

One James E. Dowd and his wife, Sarah, were the owners of the land, and in January, 1920, appellant procured an option entitling him to either purchase or sell the same. This option was never exercised by him, and was canceled, but Dowd and his wife verbally authorized plaintiff to buy or sell the ranch for \$16,500 net to the owners. Respondents Horovitz and Noreen were real estate brokers who associated themselves with appellant for the sale of the property, and they procured a purchaser for the same in respondent Larson. According to the agreement of sale Larson was to pay the sum of \$22,000 for the property. This sum was made up by a cash payment of \$9,800, a note for \$8,000 secured by a mortgage and the balance of the consideration was to be paid by a conveyance to appellant of the land in dispute, which consisted of a house and lot in Petaluma valued at \$4,200. After the transfer of the land was made to Larson, in accordance with the terms of the agreement of sale, he refused to execute a deed of the Petaluma property to appellant, but conveyed the same to respondents Horovitz and Noreen, the associates of appellant. Thereupon this action was brought, and Horovitz and Noreen are joined as parties defendant. All respondents joined in common cause against appellant. They appeared by answer and cross-complaint alleging fraudulent representations on the part of plaintiff with reference to the sale of the property. These alleged fraudulent representations were to the effect that plaintiff owned the land, and had paid \$19,000 therefor, and that it was worth \$25,000; that the trees and vines growing thereon were in a good and healthy condition and that the land produced an income of \$6,000 a year. Defendants sought damages under their cross-complaint to the extent of \$5,500, together with a prayer that it be decreed that respondents Horovitz and Noreen were entitled to an undivided

one-third interest in the house and lot in Petaluma. Appellant, answering the cross-complaint, denied that plaintiff or his associates had made any false representations, and alleged that respondent Larson purchased the property after full, fair, and complete examination of the same.

The trial court found in substance that the representations as to ownership, income, and productiveness of the lands were false; that the land was not suitable for raising fruit trees or grape vines, and that the vines or trees growing thereon were not sound and healthy as represented, but, on the contrary, were unsound, decayed, and unhealthy, and were dying out, and that trees would not grow on the land on account of the poor quality of the soil. The court further found that the property was reasonably worth the sum of \$16,500, and no more. Transfer of the Petaluma property was refused, and ownership thereof was decreed to be in defendant Larson, in addition to which a money judgment for the sum of \$1,300 was entered in his favor. Appellant appeals from the judgment, and contends that the trial court failed to find on a material issue, which, it is claimed, justifies a reversal of the judgment. The issue referred to is that defendant Larson made an independent investigation of the property, and had the means of ascertaining the truth of the character of the land, and that he completed the purchase after such investigation had been made by him.

[1] In response to this issue the findings of the trial court are to the effect that Larson had no knowledge or any means of ascertaining the truth or falsity of the representations, but that he had full and implicit confidence in defendants, and relied upon their statements, and was induced thereby to make the purchase and transfer. The principle is well established that a purchaser is justified in relying upon false representations, and his rights are not destroyed because means of knowledge are open to him, and no duty in law is devolved upon him in such a case to employ such means of knowledge. *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304; *Gratz v. Schuler*, 25 Cal. App. 117, 120, 142 Pac. 899.

[2] Appellant concedes this to be the rule, but he claims that the principle has no application where an independent investigation is made by a purchaser, and he contends that, as the pleadings raised this issue and there is evidence upon the subject, the findings are incomplete, and do not conclude the issue. It would seem that a finding that one has no knowledge of the subject includes the elements of want of investigation and lack of consequent information following upon such investigation. This reasoning seems to be conceded by appellant, but it is argued that it cannot avail respondents in the face of positive evidence that an investigation was

made. It is true that the record discloses that Larson did at different times attempt to make an investigation, but it further shows that upon all these occasions he was accompanied by the agents, and was controlled entirely by their suggestions, and that such investigations were, in consequence, unsuccessful. True, he was requested by them to dig upon the land to ascertain the depth of the soil, and in so doing discovered hardpan, but the evidence further shows that this meant nothing to him, as he was inexperienced in and knew nothing about farm lands, or what the presence of hardpan might indicate. The evidence upon this subject fully supports the finding that Larson relied implicitly and solely upon the representations of the agents, whom he considered and believed to be his friends. Under such circumstances the court was justified in finding that Larson had no knowledge or means of ascertaining the truth or falsity of the representations.

[3] Even if we concede the findings to be subject to the criticism here made, still we cannot see how this can avail plaintiff, for, in view of the conclusion reached by the trial court, a direct and specific finding, if made, would of necessity have been adverse to him. As before stated, the evidence shows conclusively that no real investigation was ever made by Larson, but that he depended entirely upon the representations of plaintiff and his associates. Under such circumstances, failure to find specifically on this subject is not ground for reversal. *Estate of Connors*, 110 Cal. 408, 42 Pac. 906; *Senter v. Senter*, 70 Cal. 619, 628, 11 Pac. 782; *Haight v. Costanich*, 184 Cal. 426, 194 Pac. 26.

We are therefore of the opinion that the findings are sufficient to support the judgment. For the reasons given it is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The action in this case was for specific performance of a contract for the sale of real estate. In such an action it is necessary for the plaintiff to show that, as to the defendant, the contract was just and reasonable, and that the defendant received an adequate consideration. The pleadings put in issue the question whether or not the contract was just and reasonable and the consideration adequate as to the defendant Larson. The findings, omitting all consideration of the finding on the question whether or not the defendant Larson made an independent investigation of the property or had the means of ascertaining the truth as to the character of the land, show beyond question that the consideration received by Larson was not adequate, and that as to him the contract was not just and reasonable. The judg-

ment, therefore, should have been in favor of Larson, as it was, and the District Court properly affirmed it, regardless of the question whether the finding covered all other issues or not.

The petition for rehearing is denied.

SHAW, C. J., RICHARDS, Justice pro tem., and LAWLOR, WILBUR, LENNON, SLOANE, and WASTE, JJ., concur.

(57 Cal. App. 751)

LUITWIELER v. LUITWIELER.
(Civ. 4231.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Divorce ☞87 — Order excluding husband from home pending action improper.

An order excluding defendant husband from his residence pending hearing of the divorce action, was not within the trial court's sound discretion, where there was no showing that he had been guilty of or threatened physical injury to his wife.

2. Divorce ☞1 — Provisional remedies are matters of statutory regulation.

In view of Civ. Code, §§ 136-148, provisional remedies in divorce cases are the matter of statutory regulation.

3. Appeal and error ☞277—Certain exceptions written into bill of exceptions by statute.

Though a bill of exceptions does not expressly contain an exception, certain exceptions are written into it by Code Civ. Proc. § 647, declaring that certain matters are deemed to have been excepted to.

Appeal from Superior Court, Los Angeles County; Thomas O. Toland, Judge.

Action by Sophia C. Luitwieler against Samuel W. Luitwieler. From an order or orders, defendant appeals. Reversed in part. See, also, 202 Pac. 165.

Taylor & Forgy, of Los Angeles, for appellant.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

STURTEVANT, J. This is an appeal from an order restraining the defendant. The order was issued pending the hearing of a divorce case. What cause of action is pleaded in the divorce case does not appear. The appellant has brought up the order, his notice of appeal therefrom, and the bill of exceptions. The order appealed from might more properly be termed five several orders all contained in one paper. We have inserted our own numbering, but otherwise the charging part of the orders is as follows:

"(1) It is hereby ordered, adjudged, and decreed that said defendant, until the further order of this court, be, and he is hereby, ordered to forthwith vacate the residence of plaintiff, known and designated by number and street as No. 2114 South Crenshaw boulevard, Los Angeles, Cal.

"(2) It is further hereby ordered that defendant refrain from either directly or indirectly disturbing, speaking to, or writing to, or in any other manner communicating with, plaintiff until the further order of this court.

"(3) And it is further hereby ordered that defendant may lock the room in said premises wherein his personal belongings are contained, and retain the key to said room.

"(4) And it is further hereby ordered that said defendant shall forthwith deliver to counsel for plaintiff the key to the front door of said premises, and any other keys that will give defendant ingress to said premises, or any part or portion thereof.

"(5) It is further hereby ordered that C. A. Rees, as receiver, appointed by this court in action No. B83955, in interlocutory decree entered therein be, and he is hereby, required to pay to the defendant herein the sum of \$100 per month upon the 1st day of each and every month until the further order of this court, and charge the same to said defendant in said action, relating back to and commencing with the 1st day of September, 1921."

[1] The appellant concedes that the second order was within the power of the trial court. Therefore it is eliminated from attack. The third order appears on its face to be a permission granted to the defendant, and was not adverse to him. The fifth order may also be said to be a permission granted to the defendant, and not an order adverse to him. Therefore we will address ourselves to orders 1 and 4. Those two orders are, in legal effect, a direction that the defendant forthwith deliver the outside door keys to the plaintiff, and thereafter to remain away from the residence of the plaintiff until the further order of the court. From the bill of exceptions it appears that the residence mentioned is the residence of both parties; indeed, that it is the homestead of said parties; that the plaintiff and defendant are husband and wife; that both of them are 74 years of age or thereabouts; and that an unmarried daughter and at least one son are members of the same household. It also appears that the plaintiff was, on the 14th day of September, 1921, confined to her bed; that she had suffered from two strokes of paralysis, and was in a nervous condition; that she occupied a room upstairs in a roomy house, and defendant's room is downstairs. In his affidavit the defendant claimed that his properties were being withheld from him by his wife, and that he had commenced an action against her to recover the same, and had progressed to a point where a receiver had been appointed and the receiver had obtained possession of

certain of the properties, but the defendant had not obtained physical possession thereof. The daughter, Adelaide, acted as secretary for her mother.

In the affidavit of the daughter it is stated:

"That on the 14th day of September, 1921, said defendant stated in the hearing of plaintiff that, if he did not receive from her the sum of \$1,000 immediately, he would sell the household furniture and furnishings of plaintiff; that defendant accused one of his sons of stealing his (defendant's) shoes; that the conduct and statements of defendant caused plaintiff to become extremely nervous and ill, and caused plaintiff to cry; * * * that defendant called in the police; * * * that defendant conducted himself in a loud, angry, and belligerent manner; that plaintiff heard the altercation between defendant and his said son, and the conversation between the police officers and the defendant and said Dr. Wilson; that the conduct of said defendant resulted in plaintiff crying, and caused her to become extremely nervous and ill; that affiant fears that, if said defendant is not removed from said residence, his conduct may result in the death of the plaintiff herein, affiant's mother."

Some of the foregoing facts are corroborated in the affidavit of Dr. L. E. Wilson. The doctor also states:

"That it is absolutely necessary that the plaintiff herein be kept quiet and undisturbed, and that the presence of the defendant in the house with plaintiff excites her to such a degree that it is highly dangerous."

There is no statement in the evidence that the defendant has threatened physical injury, or that he has been guilty of physical injury to the plaintiff. Under these circumstances it may not be said that the trial court was acting within a sound discretion in making the order excluding the defendant from his residence pending the hearing of the divorce case. In so ruling we are not to be understood as holding that the order is proper or can be made under other circumstances.

[2] Provisional remedies in divorce cases are the matter of statutory regulation. *Grannis v. Superior Court*, 146 Cal. 245, 256, 79 Pac. 891, 106 Am. St. Rep. 23; Civ. Code, §§ 136-148. Counsel have not called to our attention and we find no statute in California authorizing the making of such an order. In *Iowa* the Supreme Court recently held in *Moir v. Moir*, 182 Iowa, 370, 165 N. W. 1001, that an injunction would not be issued in a divorce case to prevent a wife from killing her husband, the court saying:

"According to the plaintiff, one who has made it clear that she has murderous intentions, and has given probable cause to believe that she will carry them out, will be adequately restrain-

ed by an injunctive order. This means that, while the punishment for murder will be no deterrent, the danger of comparatively very mild punishment for contempt of court will insure safety from murderous attack. Another differentiation from the usual is that the husband will suffer great impairment in health and may even suffer death because the wife uses profane and abusive epithets. The claim first adverted to will receive no serious consideration here. There is no imminent danger of murder on the part of one who will desist because a restraining order issues. It might be added that such order is not supposed to be usually available to restrain the commission of a crime."

In *Chapman v. Chapman*, 25 N. J. Eq. 394, the wife alleged the adultery of her husband. By an interlocutory motion she asked that he be excluded, pending the litigation, from the house, which she alleged was her own property. The court said:

"The question here is, whether this court will exclude the defendant from the house in which he and his wife reside with their family, and where as yet he has a right to dwell, merely because his wife has filed her bill for divorce on the ground of adultery. To do so would, to say the least of it, be to prejudice him. Certainly, the proposition that a husband against whom his wife files a bill for divorce on the ground of adultery, is, in case she claims to be the owner of the house in which they dwell, to be banished from his home until it shall have been determined by the result of the litigation whether his wife's charges are well or ill founded, is novel and extraordinary. It cannot be maintained. The prayer of the petition is denied, and the petition dismissed."

[3] The respondent objects to the bill of exceptions being used by appellant because it does not contain an exception. It does not expressly contain an exception, but the statute writes into such a bill certain exceptions. Code Civ. Proc. § 647.

The respondent objects to a consideration of the appellant's main point to the effect that orders 1 and 4 were improperly made. In making this objection respondent claims that the appellant is resting his case on the proposition that certain findings are not supported by the evidence. But, as we understand the appellant, he is not making such a claim, nor is he claiming that the trial court should have made findings in ruling on a mere motion. *Waller v. Weston*, 125 Cal. 201, 204, 57 Pac. 892. We understand him to be claiming that the evidence received did not warrant injunctive relief either mandatory or prohibitory in so far as orders 1 and 4 are concerned.

For the reasons herein set forth, orders hereinabove numbered 1 and 4 are reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(58 Cal. App. 31)

PEOPLE v. ROMERO. (Cr. 863.)(District Court of Appeal, Second District,
Division 2, California. May 29, 1922.)**1. Criminal law §377—Accused cannot introduce evidence of good reputation for veracity.**

It was not error for the court to restrict the testimony of witnesses as to the character of accused in a prosecution for homicide with reference to the reputation of accused for truth, honesty, and integrity.

2. Criminal law §1170½(5)—Cross-examination as to matter otherwise testified to without objection by same witness is not prejudicial.

Error, if any, in permitting cross-examination of a witness for defendant as to whether the mother of witness did not state defendant took a knife was not prejudicial to accused where substantially the identical question was asked in another part of the cross-examination, and an answer permitted by the defendant without objection.

3. Criminal law §1110(6)—Court can correct record as to matters within own knowledge without calling witnesses.

The omission from the transcript of testimony of some language of the witness was a matter entirely within the court's own knowledge, the evidence having been received in its presence, and it was therefore not necessary to call any witnesses to testify concerning it before an order incorporating the omitted language in the record was made.

4. Criminal law §1110(2)—Court can correct stenographic transcript of testimony.

Under Code Civ. Proc. § 273, the notes of the shorthand reporter and his transcript made from them are only prima facie evidence of the testimony, and it is the duty of the judge to make the record contain the language used by the witness by allowing an amendment of the record to supply omitted testimony.

5. Criminal law §683(1)—Shirt worn by accused held admissible in rebuttal of testimony he was wounded.

In a prosecution for homicide, where accused testified that he was wounded in several places, and bled profusely, it was proper rebuttal for a witness for the state to produce the shirt worn by accused when he was arrested shortly after the homicide to show there was no blood on it.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Jose Romero was convicted of murder in the second degree, and he appeals from the judgment, and from the order denying his motion for a new trial. Affirmed.

A. Orfila, Ernest R. Orfila, and Robert J. Adcock, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. Defendant appeals from a judgment upon a verdict of guilty of murder in the second degree and from an order denying his motion for a new trial. The evidence substantially establishes the following, among other facts: On a Saturday night and Sunday morning a dance was given at the house of Emilio Duran, at Lankershim. The members of the party consumed a considerable amount of intoxicating liquor, and on Sunday morning, as the dancers were leaving, a dispute arose between one Reza and one Dalgado. During the difficulty, which appears to have been more or less of a free-for-all fight, Emilio Duran received a knife wound from which he shortly afterward died. The defendant was observed by witnesses brandishing a knife at the door of the Duran home, at which time he made the statement that he would permit no one to leave the house. This was shortly preceding the time that the deceased was stabbed. It was testified also that the defendant stabbed Juan Duran, the father of the deceased, and another party named Escarziga.

[1] It is not contended that the evidence was insufficient to sustain the verdict, but the appeal is based upon several alleged errors, first of which is that the court restricted the testimony of character witnesses, refusing to permit them to state the defendant's reputation for truth, honesty, and integrity. This ruling by the court was a proper one. *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228, and *People v. Fair*, 43 Cal. 137.

[2] Maria Salisado was called as a witness on behalf of the defendant. On cross-examination she was asked whether or not upon a certain occasion subsequent to the killing, her mother did not tell her that Jose Romero took a large knife with which he used to kill hogs to the dance. This was objected to upon cross-examination, and the objection was overruled. The witness answered the question. It cannot be said that the court's ruling upon this was prejudicial, even though erroneous, because almost the identical question was asked in another part of the cross-examination, and an answer permitted by the defendant without objection. This question was as follows:

"Did not your mother state, in your presence, on the 23d of August, 1921, the time which I have mentioned, that Jose Romero took the knife which he had in the house and used to kill hogs, to the dance with him that night?"

[3, 4] It is urged that the court erred in allowing an amendment of the record of the daily transcript of testimony to supply some language which the reporter had omitted. The matter was one entirely within the court's own knowledge, the evidence having been received in its presence, and it was not necessary to call any witnesses to testify concerning the matter before the order was

made. The notes of the shorthand reporter and his transcript made from them are only prima facie evidence of the testimony. Section 273, Code Civ. Proc. It is the duty of the judge to make the record contain the language used. This was directly decided in *People v. Cox*, 76 Cal. 281, 18 Pac. 332, concerning the instructions and the same principle applies to the testimony.

[5] Objection is made to several rulings of the court on the taking of the testimony of the witness Krause. As to those pertaining to questions on direct examination, the objections urged upon appeal were not stated when the questions were asked and the court's ruling made. The same witness was called by the prosecution in rebuttal, and was shown a shirt. This he testified was the one which defendant was wearing when he was arrested soon after the homicide. To this evidence objection was made that it was not proper as rebuttal. The defendant had testified that during the fight he had been wounded in several places, and had bled a great deal. The shirt was offered to rebut this testimony. For that purpose it was competent and relevant. The fact, if it were one, that there were no bloodstains on it would be a matter to be weighed by the jury in determining whether or not the defendant's statements about having been injured were true. However, if it had such stains, this would, of course, corroborate his testimony.

We find no error in the record, and the judgment is therefore affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

(57 Cal. App. 759)

WALL v. HUNTER et al. (Civ. 4218.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Costs §112(2)—Demand for security from nonresident plaintiff sufficient, though not filed and though after demurrer and answer.

Demand for security for costs from a nonresident plaintiff is sufficient, though not filed in the action and though made after demurrer and answer, there being no requirement to the contrary in Code Civ. Proc. §§ 1036, 1037.

2. Appeal and error §1024(3)—Finding on question of fact of nonresidence for purpose of security for costs not disturbed.

The finding by the trial court on the question of fact of nonresidence of plaintiff for purpose of security of costs cannot be disturbed on appeal.

Appeal from Superior Court, Riverside County; Wm. H. Dehy, Judge.

Action by Sarah J. Wall against J. George Hunter and others. From judgment of dismissal, plaintiff appeals. Affirmed.

See, also, 199 Pac. 775; 200 Pac. 929.

D. B. Chapin, Lee R. Taylor, and James L. King, all of Los Angeles, for appellant.

A. Aird Adair, of Riverside, for respondents.

NOURSE, J. This is an appeal by plaintiff from a judgment dismissing her action as to the defendant John J. Wall, upon the ground that she had failed to comply with a demand for security for costs in the action, she being a nonresident of the state. The action was commenced on August 19, 1919, by plaintiff against three defendants, Hunter, Wall, and Winder, charging them with alienating the affections of her husband and in procuring him to make a will disinheriting her. Summons was served upon the defendant Wall while he was in attendance upon the superior court in Riverside county during the progress of plaintiff's contest of the will of her husband. On May 5, 1920, the defendant, Wall, served and filed his special appearance in this action and at the same time gave notice of motion to quash the service of summons, upon the ground that he was a resident of the state of Nevada and was served while in attendance upon the court as a suitor and party interested in said proceedings and as a witness thereat. On the same day the defendant Wall served and filed a demurrer to plaintiff's complaint, upon the sole ground that the trial court had no jurisdiction of the defendant. The motion to quash was granted and the demurrer sustained. The plaintiff thereupon sued out a writ of certiorari to review these orders, and, on July 19, 1920, the District Court of Appeal of the Second district, Division 2, ruled that, by the filing of the demurrer to the complaint, the defendant, Wall, had submitted his person to the jurisdiction of the court and that it was error to grant the motion and sustain his demurrer. It was held, however, that, as plaintiff had an adequate remedy by appeal, certiorari would not lie, and accordingly the writ was discharged. Thereafter the matter was again brought before the superior court, and, on January 13, 1921, the court made an order setting aside its previous ruling and overruled the demurrer and granted this defendant 20 days in which to answer the complaint. On January 22, 1921, this defendant served on the plaintiff a demand for security for costs, in accordance with the provisions of section 1036, Code of Civil Procedure, based upon the ground that she was a nonresident of the state. As the plaintiff failed to comply with the demand in the 30 days allowed by section 1037, this defendant, on February 25, 1921, served and filed his notice of motion to dismiss the action. This motion was granted some four months later, on June 29, 1921, and judgment followed dismissing the action as to defend-

ant, Wall. In this judgment the trial court found as a matter of fact that the plaintiff had failed and neglected to file an undertaking within the time allowed by the statute and that none had been filed at the time of the judgment, and that the plaintiff was in fact a nonresident of the state at the time of the institution of the action. It is from this judgment that the appeal is prosecuted.

The points urged by appellant are (1) that the defendant, Wall, having answered the complaint by filing a general demurrer and afterwards an answer thereto, waived his right to make a demand for security for costs; (2) that the court erred in dismissing the action because the plaintiff was in fact a resident of the state of California; and (3) that the court erred in dismissing the action because the demand for costs was not "filed" in the action.

[1, 2] As to points 1 and 3, it is sufficient to refer to the statute, sections 1036 and 1037, Code of Civil Procedure. These sections do not require that the demand for costs be filed or that it be made and served upon the plaintiff before demurrer or answer. As to the second point urged, it is sufficient to say that the question whether the plaintiff was in fact a nonresident of the state was the very question which the trial court was called upon to decide and, having found that she was a nonresident, the judgment cannot be disturbed.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(57 Cal. App. 631)

MARTIN v. GOING. (Civ. 3768.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1922.)

1. Assignments \Leftrightarrow 134—On denial of assignment in action on labor claims, burden on assignee to show assignment in writing.

Where, in an action by the assignee of labor claims, the answer denied the allegations made in the complaint as to the assignments, the effect of such denial was to place the burden upon plaintiff to show assignments made in accordance with the requirements of Civ. Code, § 955, providing that no assignment of wages should be valid unless made in writing by the person by whom the wages were earned.

2. Master and servant \Leftrightarrow 83—Penalty wages stopped by action.

Under St. 1919, p. 294 (Deering's Gen. Laws Supp. 1921, Act No. 2142b), "penalty wages" stopped running upon the commencement of an action to collect.

3. Assignments \Leftrightarrow 80—Penalty wages not preserved after assignment of claim.

An assignment of a labor claim does not carry with it and preserve in favor of the as-

signee the right to penalty accruing subsequent to the date of assignment, under St. 1919, p. 294 (Deering's Gen. Laws Supp. 1921, Act No. 2142b).

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. C. Martin against J. S. Going. From judgment for plaintiff, defendant appeals. Reversed.

Nowell & Moran, of Tulare, and Lamberson & Lamberson, of Visalia, for appellant.

A. P. Harris and Burns & Watkins, all of Fresno, for respondent.

JAMES, J. The appeal in this case was taken from a judgment for the sum of \$485.30 entered against appellant.

Plaintiff alleged in his complaint that he had acquired by assignment three claims for farm labor performed by individuals upon the ranch of appellant. He alleged that one Martin performed labor from July 11 to August 5, 1920, at the reasonable value of \$81.40; that one Clark performed labor from July 4 to August 5, 1920, at the value of \$68; and one Long performed labor from the 31st of May to August 5, 1920, at the reasonable value of \$115.40. These claims totaled the sum of \$264.80. The difference between this amount and the amount for which judgment was awarded is made up of sums which the court assessed as penalties because of the failure of appellant to pay the wages on demand. Preliminarily it is worth while to state that, upon the face of the record, a fair inference is indicated that the plaintiff here acquired these claims for the purpose of making collection of them. The transaction in that light would be a perfectly legitimate and legal one, but it is somewhat remarkable that, as these claims in their several original amounts, and including any penalty that might be imposed were each within the jurisdiction of the justice's court, they were lumped together so that the alleged assignee's demand brought the amount within the jurisdiction of the superior court. Instead of trying the actions in the justice's court, where a speedy trial could be had, and a prompt disposition of the matters be made in the superior court in the event of an appeal thereto, the claimants have chosen to put the controversy in a position where it has necessarily been attended by largely increased expenses for printing and other costs, and added delay before final determination is reached. However, the controversy has been brought here, and the questions presented will be fully considered.

[1] Among other contentions made appellant insists that no right is shown in the plaintiff to recover because no valid assign-

ment was proved to have been executed by the three original claimants. In this connection section 955 of the Civil Code is cited, which expressly provides that—

"No assignment of, or order for, wages or salary shall be valid unless made in writing by the person by whom the said wages or salary are earned. * * *"

The defendant in his answer specifically denied the allegations made in the complaint as to the assignments, and the effect of such denial was to place the burden upon the plaintiff to show, by legal evidence, assignments made in accordance with the requirements of the Code provision. That such a denial in the answer was sufficient to put in issue the sufficiency of the assignments is established by the cases of *Wakefield v. Greenhood*, 29 Cal. 597, and *Feeney v. Howard*, 79 Cal. 525, at page 535, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. These decisions also hold that, where the issue of the statute of frauds is made, plaintiff must prove a sufficient contract, and it is declared that this can "be done only by the production of proof of the execution and contents of the written agreement, or some note or memorandum thereof executed according to the provisions of the statute of frauds." See, also, *Jonas v. Field*, 83 Ala. 445, 3 South. 893; *Brown on Statute of Frauds* (5th Ed.) § 535; *Gard v. Ramos*, 23 Cal. App. 303, 138 Pac. 108. Respondent replies to this contention with the argument that, as the assignors were permitted without objection to answer general questions in the affirmative as to whether they had assigned their claims to the plaintiff, it is now too late to question the sufficiency of the proof. Defendant was entitled to rest upon his answer raising the issue, and to require that the plaintiff establish the assignments by legal evidence, and that, as the authorities cited hold, could only be done by the production of a writing properly executed, or at least proof that one had been so made. Respondent's argument would be sound were the situation one where witnesses had testified without objection that written assignments had been made; in that case the opposite party could not be afterwards heard to complain because the writings had not been produced. The mere statement of the witnesses that each had assigned his claim, without stating the manner in which that assignment was made, fell short of establishing the fact in the required manner.

While the conclusion expressed on the contention just discussed is determinative of this appeal, in view of the fact that further proceedings may be had it will be advisable to consider other objections which have been urged.

Appellant argues that the evidence was in-

sufficient to show that any contractual relation existed between the defendant and the alleged assignors of the plaintiff. This contention must be considered in the light of the evidence which is most favorable to plaintiff's case.

It appears that two men, Bunch and Barnes, on the 1st of April, 1920, entered into a contract with the defendant, who was the owner of a ranch, whereby they agreed to crop the ground and receive one-half of the proceeds as compensation. Under that contract they were to pay all expenses except for "power." Barnes and Bunch did not work harmoniously, and on the 4th day of May, Barnes having retired from the contract with the consent of the owner of the ranch, Bunch arranged with the defendant to proceed with the growing and harvesting of the crop of hay. Bunch testified that the original agreement was entirely abrogated and that the defendant agreed from then on to pay all expenses incident to the growing and harvesting of the crop, and that for his services Bunch was to have one-half of that crop less the cost of producing the whole. He stated that he was under the direction of the defendant as to the manner in which the crop was to be grown and that he performed his part of the agreement and remained on the ranch until the hay was harvested, baled and stacked; he testified that he gave written orders on the defendant for the payment of claims of laborers, which were honored up to the time that the three assignors of the plaintiff who had been employed by Bunch on defendant's ranch, asked to be paid. It appeared by his testimony that he had received no part of the hay, and that the matter of adjusting his own claim remained open. Without making any further statement of the evidence, it has already appeared that there was some substantial evidence upon which the trial court might properly conclude that, after the making of the agreement between Bunch and the defendant, and after Barnes left the ranch, Bunch became the agent of the defendant in the matter of hiring men to care for and harvest the hay crop. The testimony of the defendant, from which it would appear that Bunch did not act as his agent, but that he (the defendant) advanced to Bunch as a loan various sums of money, created a conflict which it was the trial court's duty to resolve, and as to which this court has no concern.

[2, 3] Another contention made by appellant is that the court erred in allowing recovery for additional sums as penalties for nonpayment of the alleged wages. In the Statutes of 1919, p. 294 (*Deering's General Laws*, 1921 Supplement, p. 1552), it is provided that, as to an employee not working under a written contract for a definite period, his wages shall become due and payable

not later than 72 hours after termination of the employment, and that (section 5), where an employer willfully fails to pay such wages, "as a penalty for such nonpayment the wages or compensation of such employees shall continue from the due date thereof at the same rate until paid, or until an action therefor shall be commenced; provided, that in no case shall such wages continue for more than thirty days. * * *"

To this point appellant's argument consists mainly of the assertion that the penalty could not be collected because appellant was not shown to have employed plaintiff's alleged assignors. That question is necessarily determined by what has been last stated in the foregoing. However, attention should be called to the fact that, while the court allowed as a penalty on each claim a sum equal to 30 days' wages, it appeared that the original complaint herein was filed on August 24, 1920, and all of the amounts alleged to be owing were alleged to have accrued on August 5, 1920. Furthermore, the court, referring to the assignment, found only that such assignment had been made "prior to the commencement of the action." These facts suggest two questions, which may be thus answered: (1) Under the terms of the statute the "penalty wages" would stop running upon the commencement of an action to collect the same, where the action is brought by an original claimant. But 19 days elapsed between the cessation of labor and the commencement of the action; hence in no event could there be a thirty-day penalty allowed. (2) An assignment of a labor claim cannot carry with it and preserve in favor of the assignee the right to a penalty accruing subsequent to the date of the assignment. For aught that appears in the findings of the court, the assignment may have been made on any day subsequent to the cessation of work. For the various reasons expressed it is clear that the judgment cannot be sustained.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 756)

SANDOVAL v. SALAZAR. (Civ. 4219.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922. Hearing Denied by Supreme Court July 20, 1922.)

1. Appeal and error ⇨933(1)—Order denying motion for new trial presumed correct.

Where the record showed that a notice of intention to move for a new trial was served and filed, but did not show that the motion was ever made, or, if made, what evidence was introduced to support it, an order denying the motion is presumed to be correct.

2. Reference ⇨103(1)—Statutory modes of attacking referee's report and subsequent judgment referred to.

The only statutory modes of attack on the report of the referee and a judgment entered pursuant to such a report is that provided under Code Civ. Proc. §§ 473, 663-663a, or 656-660.

3. Appeal and error ⇨1044—Stipulation for reference not indorsed, filed until after entry of judgment, held not to warrant reversal.

The fact that a referee was appointed by the court on a stipulation of the attorneys which was not indorsed, filed by the clerk until after the referee had made his report and the court had entered judgment, did not warrant a reversal of the judgment.

4. Reference ⇨2, 99(1)—Statute relating to trial by referees held constitutional.

Code Civ. Proc. §§ 638-645, relating to trials by referees, is not violative of Const. art. 6, § 14, as the referee's report may be accepted or rejected by the trial court which renders the judgment.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. Sandoval against L. M. Salazar. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Chatterson, of Los Angeles, for appellant.

Schmidt & Riggins, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff brought an action in conversion against the defendant, he obtained a judgment, and thereafter he moved for a new trial and the motion was denied, and he also made a motion to vacate the judgment and that motion was denied. After the judgment was entered and before the motion for a new trial was ruled on the trial court made an order that a certain stipulation and the report of a referee should be filed as of May 18, 1921, one week before the judgment was ordered. The defendant served a paper purporting to be a notice of appeal from each and all of said determinations, including the judgment and each of said orders. The appeal was taken under the provisions of section 953a of the Code of Civil Procedure. The appellant has brought up the clerk's transcript, but has not brought up a transcript of the reporter's notes or any paper purporting to be a bill of exceptions. On the 5th day of January, 1921, Carroll Allen, Esq., as attorney for plaintiff, and Frank P. Jenal, Esq., as attorney for defendant, entered into a stipulation:

"Whereas the issues of fact raised by the complaint and answer in this case requires the examination of long accounts on both sides; and whereas, the parties hereto desire a reference made to enable the court to determine

said action as provided for in sections 638 and 639 of the Code of Civil Procedure of the state of California: Now, therefore, it is hereby stipulated that an order may be entered herein appointing W. J. Palethorpe as referee to hear and report upon the facts involving such accounting so raised by the complaint and answer herein."

On that date there was indorsed on the foot of said stipulation the following:

"So ordered. John W. Shenk, Judge. January 5, 1921."

The paper was filed May 18, 1921. On June 27, 1921, an order was made as follows:

"It appearing to the court that the stipulation for the order of reference herein and the order of reference based thereon, together with a report and findings of the referee were filed with the clerk of this court on May 18, 1921, and that by an oversight the same bear no filing date or mark of said clerk, and that the same have not been formally filed: It is hereby ordered that the clerk is, be, and is hereby directed to file said stipulation, order of reference and said report and findings of the referee as of date May 18, 1921."

A report of a referee is set forth in the transcript, and is marked filed May 18, 1921. On May 3, 1921, the same attorneys entered into a stipulation filed on that day, which provided, among other things:

"That each of said parties waives his right to appeal from the findings of the said referee and the judgment entered herein."

The judgment entered May 25, 1921, contains the following recitals:

"The issues of fact in this case having been referred to W. J. Palethorpe and said referee having heard evidence thereon and having filed his report herein, and it having been stipulated by the parties to this action that the same should be accepted as final, and findings having been waived by stipulation and said matter coming on regularly to be heard this day upon motion of Carroll Allen, Esq., attorney for plaintiff," etc.

[1, 2] The appellant vigorously attacks the above stipulations. In making his attacks he has not followed any rule of practice that authorizes him to have a hearing in this court. Secondly, even though he had done so as a matter of substantive law his attack is without merit. Addressing ourselves to the former proposition first, it is clear that by reason of a recital in the judgment this court must assume that the judgment was based, at least in part, on a report of W. J. Palethorpe as referee but whether such reference was made by any stipulation or by the above stipulation does not appear. The record before us shows that a notice of intention to move for a new trial was served and filed, but the record does not show, excepting by

inference, that the motion was ever made, or, if made, on what grounds it was made or what evidence was introduced in support of the motion. The only additional material contained in the record regarding that motion is that an order was made July 7, 1921, denying a motion for a new trial. We must presume that the motion was improperly made or improperly supported, and that the order denying the same was properly made. The nunc pro tunc order above set forth is regular on its face, and there is nothing in the record before us to show that the recitals contained in it are not true and correct, and we must presume that they are what they purport to be. On July 1, 1921, the defendant gave notice that he would move the court to vacate the order of June 27, 1921. The transcript contains the defendant's affidavit made on the 30th day of June, 1921. Assuming for the purposes of argument that said affidavit was used to support the motion noticed for hearing, there is nothing in the affidavit showing or tending to show that the recitals contained in the nunc pro tunc order are not true and correct. The same notice and affidavit purport to make an attack on the report of the referee and on the judgment. Such practice is not authorized in this state. The appellant did not make his attack under sections 473, 663-663a, or 656-660 of the Code of Civil Procedure. No other modes of attack are provided by our statutes.

[3] Assuming that the judgment was based on the report of W. J. Palethorpe as referee; that the referee was appointed by the trial court on a stipulation of the attorneys; that the stipulation of the attorneys was not indorsed filed by the clerk until the referee had made his report and until the trial court had entered its judgment; and that the judgment of the trial court was entered before the report of the referee had been indorsed by the clerk with the filing mark—said facts, taken singly or collectively, are of such a nature as not to warrant a reversal of the judgment by this court. *Coonan v. Loe-wenthal*, 129 Cal. 197, 200, 61 Pac. 940.

[4] Assuming that sections 638-645, inclusive, of the Code of Civil Procedure provide that a referee may render a judgment, the appellant contends that such provisions of the statute are unconstitutional as being in violation of section 14, article 6, of the state Constitution. The vice in this contention rests in the assumption on which it is based. A referee is appointed to make a report. The report may be accepted or rejected. In any event the trial court renders the judgment.

No error is made to appear by the record presented to this court. The judgment of the trial court is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(58 Cal. App. 83)

PEOPLE v. NAVARETTE. (Cr. 611.)(District Court of Appeal, Third District,
California. June 2, 1922.)**Homicide** \S 234(1)—Evidence held sufficient to show defendant fired the shot which killed deceased.

In a prosecution for the murder of a railroad brakeman while he was attempting to eject several Mexicans from a car in which they were riding, evidence held sufficient to sustain the jury's finding that it was defendant who fired the shot which killed the brakeman.

Appeal from Superior Court, Sacramento County; C. P. Vicini, Judge.

Ygnasio Navarette was convicted of murder in the second degree, and he appeals from the judgment and from the order denying his motion for a new trial. Affirmed.

P. H. Johnson and M. A. Thomas, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from the judgment of conviction of the crime of murder of the second degree and the order denying his motion for a new trial.

The defendant and four other Mexicans and three white men were riding at night, without authority or permission, in an open freight car, known as a gondola car, attached to a Southern Pacific train. A brakeman ordered the Mexicans to leave the train, saying the white men might remain. The train was moving at a speed of about six miles an hour in a southerly direction. The white men and one of the Mexicans were at the west side of the car and the other Mexicans at the front. At the time of the shooting the brakeman was standing in the center of the car. Two of the white men testified that when the brakeman ordered the Mexicans to leave, those in the front of the car moved towards the rear past the brakeman, but that the one on the west side with the white men did not change his position; that the brakeman then fired a shot over the head of the Mexican who had refused to move, whereupon one of the Mexicans who were moving towards the rear shot the brakeman from a distance of four to six feet away, and that at the time the brakeman was facing the rear end of the car. The bullet entered the right side three inches above the hip bone and ranged slightly backward to the left side, causing death. Alexander Verdugo, one of the Mexicans, testified that the Mexicans were in the front of the car at the time of the shooting; that the brakeman shot twice over the head of the Mexican who was at the west side of the car, and that thereupon the

defendant shot the brakeman; that he saw the defendant fire the shot which killed the brakeman; that the witness and the defendant immediately jumped off the car and left together; that as they were walking away the defendant said he had shot the brakeman and hoped he would die; that the defendant said: "I wish I had some Mexican to give the gun to," and then threw the gun away. The defendant testified that he did not shoot the brakeman and did not know who shot him.

The only ground urged for a reversal is that the evidence is insufficient to show that the defendant fired the fatal shot. The evidence is so clearly sufficient that any further discussion of the matter would be superfluous.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(57 Cal. App. 766)

ESPONDA v. KELLY et al. (Civ. 4230.)

(District Court of Appeal, First District, Division 2, California. May 22, 1922.)

1. Animals \S 22—Substitution of bailee held a "novation."

There is a novation within Civ. Code, \S 1531, whereby one becomes a substitute for bailee of cattle for pasturage where he receives the animals from the original bailee, and in consideration thereof agrees with him to return them to the bailor upon the latter's demand in consideration of bailor's cancellation of original bailee's obligation and bailor's acceptance of the substituted bailee's promise to redeliver in lieu of such obligation of the original bailee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

2. Adverse possession \S 64—Limitations do not run in favor of substitute bailee holding property in recognition of bailor's right.

Where a person holds property as substitute bailee by novation, his assertion of an adverse claim of which bailor has notice may set in motion the statute of limitations (Code Civ. Proc. \S 338, subd. 3, and section 339, subd. 1), but so long as he holds in recognition of bailor's right the statute will not run; and the rule is not altered merely because bailor assigns the property after the substitution.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Mary Esponda against J. J. Kelly and Ione Kelly. From a judgment for plaintiff, defendants appeal. Affirmed.

W. B. Beazley, of Bakersfield, for appellants.

Dorris & Henderson and Kaye & Siemon, all of Bakersfield, for respondent.

NOURSE, J. Action for damages for conversion. Plaintiff recovered judgment, and defendants appeal. The case comes before this court on the judgment roll alone; no transcript of evidence or bill of exceptions having been filed. The facts as found by the trial court are that at all times prior to September 5, 1917, plaintiff's husband, Bernardo Esponda, was the owner of and entitled to the possession of certain personal property, to wit, nine head of cattle, which was the community property of plaintiff and her husband; that on that date he assigned to plaintiff as her separate property all of his right, title, and interest therein, together with all rights, claims, and demands growing out of his previous ownership thereof; that on or about September 22, 1914, plaintiff's assignor placed said cattle, which were then calves of approximately one year of age, in the care, custody, and keeping of one Ansolabehere as a bailee for hire for the purpose of pasturing them, and Ansolabehere then and there agreed to return the cattle to plaintiff's assignor upon demand. Five days later "defendant J. J. Kelly took and received the said cattle from the possession of the said Ansolabehere, and in consideration thereof the said J. J. Kelly then and there promised, undertook, and agreed to and with the said Ansolabehere to return and redeliver said cattle to the said Bernardo Esponda upon demand of said Bernardo Esponda in consideration of the cancellation by said Bernardo Esponda of the obligation of said Ansolabehere to redeliver said cattle on demand and the acceptance by said Esponda of the promise and agreement of the defendant J. J. Kelly in lieu of and as a substitute for such obligation of said Ansolabehere; and thereafter, on or about January 1, 1915, said Esponda approved and ratified the agreement so made by the defendant J. J. Kelly with the said Ansolabehere and accepted the same as a substitute for and released the said Ansolabehere from and canceled the obligation of said Ansolabehere to redeliver said cattle to said Esponda on demand"; that thereafter, and on or about September 27, 1917, after receiving the assignment referred to, plaintiff made demand upon defendant J. J. Kelly for the return of said property, but the said defendant then and there failed, refused, and neglected, and at all times since has continued to fail, refuse, and neglect to return or redeliver said property or any part thereof to the plaintiff or to the plaintiff's husband, and said Kelly thereupon converted said property and the whole thereof to his own use and benefit. Defendants pleaded that the action was barred by the provisions of section 338, subd. 3, and section 339, subd. 1, of the Code of Civil Procedure, prescribing respectively three and two years as the period of limitation.

[1, 2] The only point made by appellant is that demand for the return of the property was not made within time; that the time within which it should have been made was coincident with the period provided in the statute of limitations for barring the action. There is no merit in this contention. J. J. Kelly's possession of the property was with the consent of plaintiff's assignor and under an express agreement to return it upon demand. The facts shown constitute a novation (Civ. Code, § 1531; *Molera v. Cooper*, 173 Cal. 259, 180 Pac. 231) by which he was substituted for the original bailee. Any assertion of an adverse claim by appellant J. J. Kelly of which respondent or her assignor had either actual or constructive notice may have set the statute in motion, but so long as he held the property as bailee for respondent or her assignor and recognized that relation the statute would not run in his favor. *Estate of Rathgeb*, 125 Cal. 302, 57 Pac. 1010. The refusal to comply with respondent's demand amounted to a conversion of the property and a cause of action then arose.

Judgment affirmed.

STURTEVANT, J., concurs.

(57 Cal. App. 640)

ALVARADO v. SUNSET SUPPER CLUB
et al. (Civ. 3894.)

(District Court of Appeal, Second District, Division 1, California. May 9, 1922.)

1. Judgment \Leftrightarrow 155—Notice of motion to open default need not allege particular facts to be relied on.

Notice of motion to open default under Code Civ. Proc. § 473, need not set forth a statement of the particular facts on which defendants will rely, but it is enough to allege that motion will be made on the ground that judgment had been entered through the mistake, inadvertence, surprise, and excusable neglect of defendants, and each of them, and on the affidavits and verified answer of defendants.

2. Judgment \Leftrightarrow 159—Affidavits for opening default held to authorize conclusion of excusable neglect.

Affidavits of M., secretary, and O., president, of defendant corporation, for opening default against the three—that of M. stating that immediately after service of summons and complaint he took them to an attorney and requested him to represent him, and that it was understood that he would represent all defendants, and that of O. that when summons and complaint were served it was agreed that M. should consult the corporation's attorney, and request him to conduct the defense, and that he was informed by M. that he had so consulted the attorney and that he had agreed to conduct the defense—entitled the court to conclude that a case of excusable neglect was made out.

3. Judgment ¶160—Affidavit of merits for opening default sufficient.

The affidavit of merits for opening default that affiant had stated all the facts of the case to his attorney, and had been advised by him that he had a good and meritorious defense, is sufficient in form and substance.

4. Judgment ¶160—Affidavit of merits for opening default aided by answer.

Affidavit of merits for opening default is aided by verified answer tendered at the hearing and raising material issues.

5. Appeal and error ¶957(1)—Judgment ¶139—Opening default judgment interfered with only for abuse of discretion.

Motions to vacate defaults and default judgments are peculiarly addressed to the trial judge's discretion, and in view of the policy of the law to allow trial on the merits, orders of vacation will be interfered with only where a clear and unmistakable abuse of that discretion is shown.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Aileen Alvarado against the Sunset Supper Club and others. From an order granting motion to set aside default judgment against certain defendants, plaintiff appeals. Affirmed.

M. M. Gordon, of San Diego, for appellant.

Leonard Wright, of San Diego, for respondents.

JAMES, J. This action was brought to recover from defendants an amount of money as damages. Defendants Sunset Supper Club (a corporation), Tony Matowich, and George Morris failed to answer within the time fixed by law after service of summons, and their default was duly entered and judgment taken on May 18, 1921. On the 13th of June, 1921, after notice to the plaintiff, said defendants presented to the superior court their motion to set aside the default and the judgment entered thereon and to be allowed to file an answer. The court made an order granting the motion, conditioned upon said defendants paying to the plaintiff the sum of \$33.30 costs, which costs were paid. The plaintiff has appealed from the order.

[1-4] In support of the appeal it is argued by counsel for the plaintiff that the showing made by the defendants was insufficient to authorize the trial court to grant the motion. It is contended that the notice of motion was insufficient in its statement of grounds, that the facts shown by the affidavits did not establish that the neglect on the part of the defendants in failing to appear and answer was excusable, and that no sufficient affidavit of merits was presented. The notice of motion did state that it would be made upon

the grounds that the default judgment had been entered through the "mistake, inadvertence, surprise, and excusable neglect of these defendants, and each of them," and that the motion would be made upon the affidavits of the individual defendants and upon the verified answer of said defendants, including the Sunset Supper Club. The notice of motion contained all of the statements requisite under the provisions of section 473, Code of Civil Procedure, and it was neither necessary nor proper that there should be set forth therein a statement of the particular facts upon which the defendants would rely. By the affidavits of the defendants facts were shown which entitled the court to conclude that a case of excusable neglect was made out. These affidavits showed that defendant Tony Matowich, immediately after service thereof, took a copy of the summons and complaint to an attorney, and requested said attorney to represent him; he set forth in the affidavit that it was understood that said attorney would represent all defendants. It appeared by Matowich's affidavit that he was secretary of the defendant corporation. In the affidavit of defendant Morris it was stated that said defendant was president of defendant corporation; that when the summons and complaint were served it was agreed that Matowich should consult the attorney of defendant corporation and request him to conduct the defense of the action, and that said defendant was informed by Matowich that he had so consulted the attorney, and that the latter had agreed to attend to the defense of the action. These two affidavits were made on behalf of the individual defendants and also on behalf of the corporation. Each one contained the statement that the affiant had "stated all the facts of said case to his said attorney, and has been advised by him that he has a good and meritorious defense to the plaintiff's cause of action." The affidavit of merits was sufficient in form and substance; moreover, it was aided by a verified answer, which was tendered at the hearing of the motion, and which raised material issues. *Savage v. Smith*, 170 Cal. 472, 150 Pac. 353.

[5] The attorney to whom Matowich had taken the summonses in the first instance testified orally on the hearing of the motion that Matowich came to his office with one of the defendants Topuzes, and that he was requested to secure a dismissal of the action as to Topuzes, but he did not understand that he had been employed to represent the other defendants, although he testified that it was "entirely possible that Matowich may have believed so." He testified further: "They are Greek; they speak rather imperfect English, and may not have fully understood all that occurred." This attorney was

at that time representing defendant Matowich in another proceeding, and had also, at a prior time, been the attorney for defendant corporation. It has been declared over and over again in the appellate decisions of this state that it is the policy of the law to allow causes to be tried upon their merits; that motions to vacate defaults and default judgments are peculiarly addressed to the discretion of the trial judge, and that only in cases where a clear and unmistakable abuse of that discretion is shown will an appellate court interfere with such orders. *Berri v. Rogero*, 168 Cal. 736, 740, 145 Pac. 95; *Savage v. Smith*, supra; *Lynch v. De Boom*, 26 Cal. App. 311, 146 Pac. 908; *Morton v. Shannon*, 26 Cal. App. 689, 147 Pac. 1179; *McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(57 Cal. App. 655)

BLANCHARD v. HAIG. (Civ. 4054.)

(District Court of Appeal, First District, Division 1, California. May 12, 1922. Rehearing Denied June 9, 1922. Hearing Denied by Supreme Court July 10, 1922.)

Principal and agent — 78(1)—Parties held not entitled to accounting where accounts were loosely kept.

Where plaintiff and defendant operated a jewelry and repair shop with defendant as manager, plaintiff furnishing the stock and agreeing to pay defendant a part of the profits from sales as salary, and plaintiff and defendant at different times operated the store alone and made sales which were not entered in the books, neither party was entitled to an accounting.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by Marcus Blanchard against Samuel M. Haig, in which defendant interposed a counterclaim. Relief was denied both parties, and plaintiff appeals. Affirmed.

H. A. Blanchard, of San Jose, for appellant.

W. H. Johnson, of San Jose, from respondent.

TYLER, P. J. This action was one brought to recover certain sums of money and other personal property of the value of \$1,789.67, which it is alleged defendant received as agent of the plaintiff. Defendant, by answer, denied plaintiff's allegations, and by way of counterclaim alleged that plaintiff was indebted to him in the sum of \$858.75.

Relief was refused both parties, and plaintiff appeals.

It appears from the record that on or about November 1, 1917, the parties hereto entered into an agreement whereby they undertook to operate a jewelry and repair shop with defendant as manager. Plaintiff agreed to furnish the stock in trade and the store where the business was to be conducted, and to pay defendant for his services one-half of all the profits derived from sales. The trial court found, among other facts, that the total cost of merchandise purchased by plaintiff and furnished to defendant as manager for the purposes of sale amounted to the sum of \$5,603.64. It further found that the total cost price of certain goods sold amounted to \$1,584.86, and that an inventory of the merchandise on hand at the close of defendant's employment showed goods to the value of \$2,229.61. Other findings are to the effect that the books kept by defendant did not show all of the sales made, and that both plaintiff and defendant sold merchandise not accounted for, and that in fact the books kept by the parties were inaccurate, for which reason the court found it was impossible to ascertain the amount of goods sold, the prices obtained therefor, or in any manner to arrive at a true account thereof, and accordingly judgment was denied both parties.

Appellant contends that the conclusion of the trial court that plaintiff was not entitled to recover from defendant is against law and contrary to the facts and findings, for the reason that the effect of the findings is that defendant converted to his own use merchandise or cash to the extent of at least \$1,789.67. We see no force in this contention. It appeared in evidence that both plaintiff and defendant at different times operated the store alone. It also was shown, by the testimony of defendant, that he was instructed by plaintiff not to make entries of all sales for the reason that he did not desire to pay an income tax to the government, as he was not responsible for the war. True, plaintiff denied that he made any such request, but, however this may be, both plaintiff and defendant admit the making of sales which were not entered in the books. Under these circumstances the trial court could have come to no other conclusion than it did in finding that it was impossible to determine the true amount of goods sold, and what sum, if any, plaintiff was entitled to recover.

It is true that the trial court did find that the plaintiff sold \$1,500 worth of merchandise, but other findings show that this amount did not indicate the full amount of sales. The findings are therefore not conflicting. So far as the record shows, both parties were in a position to bring about the

claimed shortage of merchandise, and either or both of the parties may have been responsible for it. The evidence throws no light upon this subject. Under such circumstances relief was properly denied both parties.

The judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT, Justice pro tem.

(57 Cal. App. 568)

MCCORMICK v. WOODMEN OF THE WORLD. (Civ. 4135.)

(District Court of Appeal, First District, Division 1, California. May 4, 1922. Hearing Denied by Supreme Court July 3, 1922.)

1. Contracts ⇨127(3)—Insurance ⇨722—Provision of death benefit certificate that member's disappearance for any length of time should not be evidence of death held void.

A condition in a death benefit certificate that absence or disappearance of insured member for any length of time should not be sufficient evidence of his death held void as unreasonable and as an agreement to oust the courts of jurisdiction, in view of Code Civ. Proc. § 1963, subd. 26.

2. Contracts ⇨127(1)—Stipulation restricting admissibility of evidence void.

A stipulation in a contract that certain evidence only shall be admissible in case of litigation subsequently arising under such contract cannot be allowed to control the action of the court in the admission or in the effect to be given to the evidence.

3. Stipulations ⇨3—Stipulation not permitted to control course of justice upon trials.

Courts will not permit the course of justice upon trials before them to be stipulated and controlled in such a manner as to defeat the ends to be subserved by such trials.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Mary O. McCormick against the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

M. T. Moses, of San Francisco, for appellant.

Heidelberg & Murasky, of San Francisco, for respondent.

TYLER, P. J. This action was brought to recover upon a benefit certificate issued by defendant company. Plaintiff is the wife and sole beneficiary of one Fasty M. McCormick, a member of defendant society, an unincorporated fraternal organization.

The action was commenced on the 20th day of November, 1920, and is one of the so-called

"disappearance" cases. It appears from the record that Fasty McCormick became a member of the society on the 31st day of December, 1911. At that time the benefit certificate here sued upon was issued to him. He expressly and in writing accepted the same subject to the conditions and terms therein specified. Among these conditions was one which provided that the absence or disappearance of a member holding the certificate from his last-known place of residence for any length of time should not be sufficient evidence of his death, and that no right should accrue under such a certificate to a beneficiary or beneficiaries, nor any benefits be paid until proof had been made of the death of said member, while in good standing. Another condition provided that the beneficiary was entitled to the sum of \$1,500 if the insured died within one year from the date thereof, \$2,250 if death occurred within two years, and \$3,000 if death occurred two years thereafter.

McCormick disappeared on the 2d day of July, 1913, and has not been seen nor heard of for more than seven years, though diligent search was made to ascertain his whereabouts, and plaintiff claims that he is dead. Judgment was rendered in her favor for \$3,000, the full amount of the certificate, and defendant appeals. Appellant contended below, and does here, that the disappearance clause in the certificate bars recovery, and also that respondent is not entitled to the full amount of the policy, but is only entitled in any event to partial recovery.

[1] The record contains no direct proof that McCormick is dead, and in fact no such claim is made; plaintiff relying solely on the circumstance that the insured has been absent and neither seen nor heard from for more than seven years, and is therefore presumed to be dead. Subdivision 26, § 1963, Code Civ. Proc. It is conceded, as indeed it must be, that if the disappearance clause in the contract is valid and binding, it is conclusive against plaintiff, and no recovery can be had thereon. Respondent claims in support of the judgment, however, that the clause is against public policy and is violative of the laws of the state and contrary to the terms of the policy itself. The attempt of beneficial societies to adopt a by-law or contract relating to disappearance cases, and to control the rule of evidence with respect to the presumption of death, has been fully considered and discussed by the courts of various jurisdictions. There is considerable variance in the views of those courts upon the question. In some of the cases the assailed provision was in the by-laws at the time the contract of insurance was made; in others it appeared in after-enacted by-laws. It would be a matter of supererogation to review the authorities in detail, for we are of the opinion that the appellate courts of

this state have arrayed themselves on the side of those jurisdictions which hold similar provisions to be unreasonable and against public policy. In the case of *Bennett v. Modern Woodmen of America* (Cal. App.) 199 Pac. 343, where a disappearance clause was considered, it was said:

"But it is a rule of common law and of the statutory enactment of this state that a person not heard from in seven years is presumed to be dead (Code Civ. Proc. 1963, subd. 26), and appellant's by-law is not only unreasonable and violative of statutory enactment, but is against the weight of public policy. It has been repeatedly so held. *Reynolds v. North America Union*, 204 Ill. App. 316, 827; *Samberg v. Knights of Modern Macabees*, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396; *National Union v. Sawyer*, 42 App. D. C. 475; *Supreme Lodge, Knights of Pythias, v. Wilson* (Tex. Civ. App.) 204 S. W. 891, 894. Its enforcement would not only have the effect to render nugatory a salutary statute, but the further result of making it practically impossible to make proofs of death in cases within the recognized experience of man, and thereby work a substantial injustice to the beneficiary. *Sovereign Camp, W. O. W., v. Robinson* (Tex. Civ. App.) 187 S. W. 215, 219; *Reynolds v. North American Union*, supra. In *Olson v. Modern Woodmen of America*, 182 Ia. 1018, 164 N. W. 346, L. R. A. 1918F, 1164, this same appellant invoked the defense of this same by-law. The court refused to countenance the plea, holding that its application would impose on a beneficiary the burden of paying all dues and assessments during the whole period of expectancy of the assured, thereby making the certificate practically worthless."

A transfer was denied by the Supreme Court in this case.

Counsel for appellant seeks to distinguish this authority from the instant case and claims that no question there arose as to the validity of the original contract between the member and the society, the terms upon which he was admitted to membership, and that the case involved an after-enacted by-law. We cannot distinguish this case in principle from the *Bennett Case*. The reasons assigned for holding the by-law in that case invalid are not less apparent or persuasive because of the fact that it was not part of the original contract of the insurer.

[2] The law implies that in every contract of insurance upon human life the insurer will pay the indemnity upon proof by competent evidence judicially tested and weighed by the law of the land, and such contracts ought to be immune from material impairment of this right. A stipulation in a contract that certain evidence only shall be admissible in case of litigation subsequently arising under such contract cannot be allowed to control the action of the court in

the admission of or in the effect to be given to the evidence.

[3] Courts will not permit the course of justice upon trials before them to be stipulated and controlled in such a manner as to defeat the ends to be subserved by such trials. Parties to a contract cannot agree to oust courts of jurisdiction over such contracts. Such acts transcend their power. *Utter v. Travelers' Insurance Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; *Travelers' Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308.

As shown in the *Bennett Case*, such a stipulation in a contract is unreasonable and against public policy, as it nullifies the contract of insurance in the event of the disappearance of the insured. It is further objectionable, as above indicated, as being an attempt to contract as to the effect of evidence, and to thus control the action of the court in the determination of what shall be considered sufficient evidence to prove a given fact. Its enforcement would therefore deprive a court of its ordinary functions. Deceased had the right to have his insurance paid upon the occasion of his death. If such a clause in a contract of insurance is enforceable in controlling the involved rule of evidence, it would be impossible for a beneficiary to prove the death of the insured under these circumstances, even though the fact of death would be presumed to exist under established legal principles. Such an agreement clearly impairs the vested right of the insured to have the amount of his policy paid to his beneficiary upon his death. *Olson v. Modern Woodmen of America*, 182 Iowa, 1018, 164 N. W. 346, L. R. A. 1918F, 1164; *National Union v. Sawyer*, 42 App. D. C. 479; *Samberg v. Knights of Modern Macabees*, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396; *Supreme Lodge, K. of P., v. Wilson* (Tex. Civ. App.) 204 S. W. 891.

We are of the opinion, therefore, that the doctrine announced in the *Bennett Case* to the effect that such a clause is void as against public policy is controlling here. We see no merit in the further contention that plaintiff is only entitled to a partial recovery. The presumption being that the insured was dead at the expiration of seven years from his disappearance would make him a member for a period approximating nine years, and it appears that during this time plaintiff paid and defendant accepted all dues and assessments which became payable by reason of the benefit certificate. Plaintiff was therefore entitled to the maximum value of the policy.

For the reasons given the judgment is affirmed.

We concur: KERRIGAN, J.; KNIGHT. Justice pro tem.

(57 Cal. App. 683)

MILLER v. POWELL. (Civ. 3546.)

(District Court of Appeal, Second District, Division 2, California. May 18, 1922. Hearing Denied by Supreme Court July 17, 1922.)

1. Ejectment §111(6)—Finding held sufficient as disposing of claim that court failed to rule on an allegation of ouster.

In ejectment the claim of plaintiff that the court failed to make any finding upon his allegation that defendant entered and ousted him from his premises and has ever since unlawfully withheld possession was disposed of by the court's finding that defendant was not nor at any time had been in the possession of any real property belonging to plaintiff.

2. Ejectment §111(3)—Where complaint described land by government survey, court's failure to locate land by metes and bounds not error.

Where in ejectment plaintiff's complaint described the lands according to government survey, he could not complain where court failed to define or locate the land in its findings with reference to physical monuments.

3. Appeal and error §1071(1)—Findings of ownership of land and object of action not raised by pleadings not prejudicial.

In an action in ejectment, where the answer contained no allegation of ownership of land, held, that plaintiff was not prejudiced by findings that defendant was owner of the land, and that the only controversy involved was the determination of the ownership of a certain strip of land.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Edwin S. Miller against F. L. Powell. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 199 Pac. 857.

C. E. Burch, of San Diego, E. J. Henning, of Washington, D. C., and W. H. Wylie, of San Diego, for appellant.

Heskett & Sample, of San Diego, for respondent.

CRAIG, J. This action is one in ejectment. By finding No. 1 the court found the plaintiff to be the owner of the property claimed by him and described in his complaint. It is to be noted that this description is only a legal one and does not locate the property of the plaintiff by metes and bounds or any physical objects upon the ground. It is as follows:

"The southeast quarter (S. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$); of the southwest quarter (S. W. $\frac{1}{4}$); also the north half (N. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$); also the northwest quarter (N. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$); also west half (W. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the

northwest quarter (N. W. $\frac{1}{4}$); also the south half (S. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section twenty-two (22), township fifteen (15) south, range four (4) east of the San Bernardino meridian, San Diego County, California."

In finding No. 4 the court further found:

"And the court finds that the defendant herein is not now, and has not been at any time, in the possession of any of the real property owned by the plaintiff, or of which plaintiff is entitled to possession, and that as a consequence thereof the plaintiff has sustained no injury or damage whatever from the defendant."

If the finding last quoted is justified by the evidence, the appellant cannot be entitled to the judgment prayed for (for restitution of the property and damages), and this finding, as all others, must be accepted as true, for the appeal is taken upon the judgment roll alone.

[1] The appellant claims that the court failed to make any finding upon the issue presented by the following allegation of the complaint:

"The defendant entered into and upon said premises and ousted the plaintiff therefrom. That the defendant has ever since unlawfully withheld from the plaintiff the possession thereof to plaintiff's damage," etc.

We think it clear that the part of finding No. 4 above quoted disposes of this issue and against the contention of appellant.

[2] Appellant further criticizes the findings and judgment of the court because it is said that no attempt has been made to define or locate the land described in the complaint upon the ground with reference to physical monuments. In this regard the findings fully cover the issues presented by appellant's complaint. The judgment being predicated upon the findings, they properly keep within their scope in describing the appellant's property. Having made no allegation that his property is bounded by particular physical objects or lines between monuments, appellant cannot complain of a lack of a finding concerning such a matter.

[3] Lastly, appellant complains because the court found that the respondent is the owner of certain property. The answer contains no allegation to that effect. Conceding, without deciding, that such a finding is without the issues presented by the pleadings, it cannot have prejudiced plaintiff. The same is true of another finding, to which objection is made, in which the court asserts that the only controversy involved is the determination of the ownership of a certain strip of land.

Findings Nos. 1 and 4 preclude the plaintiff from recovering. They are not contradicted by the other findings. In view of them all,

the judgment was properly rendered against the plaintiff and appellant.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

(58 Cal. App. 90)

MOSES v. PACIFIC BLDG. CO. (Civ. 3892.)

(District Court of Appeal, Second District, Division 1. California. June 5, 1922.)

1. Appeal and error \S 842(1) — Mechanics' liens \S 290(4)—Whether materials were so applied to building as to become part thereof is a question of fact for the trial court.

Whether the materials furnished by plaintiff at the request of a lessee had been so attached to the building as to become a part thereof was a question of fact for the trial court, which was determined adversely to plaintiff by finding that plaintiff's only contract was for temporary installation of materials, not to become a part of the building.

2. Appeal and error \S 907(3)—On appeal on judgment roll, evidence is presumed to justify findings.

Where the record on appeal consists of the judgment roll, the appellate court is bound to assume that the evidence justifies the findings.

3. Mechanics' liens \S 78—Owner, without knowledge particular work was being done, need not disclaim responsibility.

Code Civ. Proc. \S 1192, permitting the enforcement of a mechanic's lien if the work was of a lienable character and if the owner had knowledge of the work which was ordered by the lessee, unless the owner gives notice disclaiming responsibility, does not apply where the owner consented that the lessee should install certain equipment and machinery, but did not have actual notice of the furnishing of the materials or the performance of the labor in question.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action to foreclose a lien for labor and materials by R. P. Moses, against the Pacific Building Company, a corporation, in which Nettle C. Moses, as administratrix, was substituted as plaintiff after the death of the original plaintiff. Judgment for defendant, and plaintiff appeals. Affirmed.

Luce, Sloane & Lee, of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondent.

CONREY, P. J. This action was commenced by R. P. Moses for the foreclosure of a lien claimed by him for labor and materials furnished and used in the making of certain improvements and alterations in a building

of the defendant. He appealed from the judgment entered in favor of the defendant. Pending the appeal, R. P. Moses died, and the administratrix of his estate was substituted as plaintiff and appellant.

The record on appeal consists of the judgment roll. From the findings we ascertain the following facts: The defendant, as owner of a storeroom building located on the lots described in the complaint, leased those premises to the San Diego Manufacturing Association, which afterwards became the Inorganic Products Company, a corporation. Thereafter the products company, "with the knowledge and consent of the said defendant," caused to be installed in the building "certain equipment and machinery for the manufacture of paint." On or about the 24th day of May, 1920, the San Diego Manufacturing Association entered into a contract with the plaintiff whereby the plaintiff agreed to furnish certain materials and to do and perform labor in installing in said building electric wiring, conduits, switches, and switchboards. The labor performed and materials furnished by the plaintiff were of the value of \$871.90, which sum the products company agreed to pay.

The court found:

"That all of the said materials which were furnished by said plaintiff and all of the labor performed by him were furnished and performed in putting into said building certain electrical wiring, conduits, and equipment, none of which ever became a part of said building or a fixture, or constituted or formed any improvement or alteration of or in said building, or any addition thereto; but that all of the said wiring, conduits and equipment were installed by the said plaintiff in the following manner: Said conduits were fastened to the studding and rafters of said buildings by metal clamps and eightpenny wire nails, and as a part of said equipment switchboards were fastened to the studding of said building by nailing one-inch boards across said studding and fastening the switch boxes on to said boards by screws and nails; that no nails were used of a smaller size than eightpenny wire nails, and some twentypenny wire nails were used in attaching said conduits and switchboards; that said conduits ran along and upon the studding and rafters of said building, which building was an open framework building, the outside walls of which were corrugated iron, and which had no inside walls other than the studding, sills, and rafters, and that said building had originally been used by the defendant as a storehouse and a place within which to manufacture doors and windows, etc., for the houses and buildings being erected by said defendant, and that said building was leased to the San Diego Manufacturing Association, for the purpose of manufacturing paint therein, and that said lease provided that the lessee might make such alterations and improvements as might be necessary for the carrying on of their said manufacturing business; that the electric wires and conduits placed in said building by the said plaintiff were by the

plaintiff connected to certain motors installed by the lessee to operate the machinery for manufacturing paint, and also connected to the lighting system of said building, plaintiff installing droplights in the office room and main portion of said buildings, but that said conduits, electric wiring, and switchboards were not so installed as to become permanently attached to said building or to become any part thereof, or to become fixtures therein; that all of the materials and equipment which the said plaintiff placed in said building were placed therein temporarily for a lessee of the said building, and that there was no understanding by said plaintiff or any lessee of said building, or the persons with whom plaintiff made the contract referred to in said complaint and for whom said plaintiff placed or installed certain electrical wiring and equipment in said building, that any of the said wiring, wires, conduits, switchboards, equipment, or other materials placed in said building by said plaintiff should become a fixture or be or become permanently attached to said building, or form a part thereof, or constitute or form any improvement or alteration in or of said building or any addition thereto, or repair thereof, or constitute or form any improvement or alteration in or of said building or any addition thereto or repair thereof, and that the said plaintiff never made any repairs in, of, or to the said building; that when plaintiff made his said contract with said manufacturing association and at all times thereafter he knew that said association did not own said real property, and it only had a lease thereof, and that its only interest therein was a leasehold, and he did said work and furnished said materials for said association with said knowledge."

The court further found:

"That said plaintiff completed furnishing the materials and performing the labor which he did furnish and perform as aforesaid, on or about the 10th day of June, 1920, and that he performed all the conditions of his contract, but that said contract was not a contract for the furnishing of any materials or the performance of any labor in or about the making of any improvements or alterations of or in, or any additions to or repairs of the building referred to in said complaint, to wit, the building standing on said lots and belonging to said defendant; and that said plaintiff never had any contract with the said San Diego Manufacturing Association or San Diego Manufacturing Company, or said San Diego Inorganic Products Company, for the furnishing of any materials or the performance of any labor in or upon any improvements or alterations or for the making of any improvements or alterations in or additions to or repairs of said building; but that the only contract which plaintiff had with any of the said concerns, associations, or companies was for the temporary installation and placing in said building, and so as not to become a fixture or a part of said building, or any improvement or alteration or repair thereof, or addition thereto, certain materials, to wit, certain electrical wiring, switchboards, and equipment."

The court further found:

"That said defendant, Pacific Building Company, on the 4th day of March, 1920, leased the front 100 feet of said land and building to the said San Diego Manufacturing Association, an unincorporated association, for the term of one year from the 4th day of February, 1920, but that on or about the time of making said lease, said defendant was informed by said lessee that it would use said building for the manufacture of paints, and would install therein certain machinery and appliances for said manufacturing purposes, but that the defendant did not have actual notice of the furnishing of the materials or the performance of the labor in placing and installing the wires, conduits, switchboards, and other equipment in said building hereinbefore found by the court to have been put therein by plaintiff, and that the said defendant did not post any notice in or about said building that it would not be liable for the installing of said electrical equipment or of the performance of said labor."

The first question of fact upon which the plaintiff's right to a lien depends is the question whether or not the work and materials furnished by the plaintiff contributed to the "construction, alteration, addition to or repair" of the building. If they did so contribute, the lienable quality of the work is established. Code Civ. Proc. § 1183. The findings affirm that none of the labor performed and materials furnished by the plaintiff and put into the building ever became a part of the said building or fixtures, or constituted or formed any improvement or alteration of or in said building, or any addition thereto, and that conduits, electric wiring, and switchboards were not so installed as to become permanently attached to said building, or to become fixtures therein. According to the finding describing the method of installation of said wiring, conduits, and equipment, the conduits were fastened to the studding and rafters of the building by metal clamps and nails, and the switchboards were fastened to the studding of the building by nailing boards across the studding and fastening the switch boxes to the boards by screws and nails. It may be that the physical facts thus described were such that these materials should be regarded as fixtures attached to and which became a part of the building if such had been the intention of the contracting parties. *Pac. Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230, 41 L. R. A. (N. S.) 296; *Cal. P. C. Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 711, 712, 118 Pac. 103, 113; *Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 725, 127 Pac. 805.

[1, 2] But the court found the facts to be that the plaintiff never made any repairs in, of, or to the building, and that the materials furnished did not become a part of any improvement or alteration in the building, or any addition thereto; also that there was no understanding by the plaintiff or the lessee,

that any of said materials should become permanently attached to the building. In effect, the court determined that the plaintiff never intended to attach the equipment permanently to the building, but only intended to install the same temporarily for the use of the lessee, with whom his contract was made, and that the only contract of the plaintiff with the lessee was for the temporary installation of materials, not to become a part of the building. Whether materials are so applied to a building as to become a part thereof is a question of fact "to be determined by the court upon the evidence before it." *Bianchi v. Hughes*, 124 Cal. 24, 56 Pac. 610. In the case at bar, since we are bound to assume that the evidence justifies the findings, we conclude that the materials installed by the plaintiff did not constitute any alteration or addition to the building, or repair thereof.

[3] The defendant owner having failed to give notice disclaiming responsibility for the work, as provided by section 1192, Code of Civil Procedure, the plaintiff would be entitled to enforce his claim of lien, if the work had been of a lienable character, and if the defendant had "knowledge of such construction, alteration or repair or work or labor." In the first finding the court said that the products company, with the knowledge and consent of the defendant, caused to be installed in the building "certain equipment and machinery for the manufacture of paint." There is no identification of this equipment and machinery with the work done by the plaintiff. On the contrary, the court, in its seventh finding, said that the defendant did not have actual notice of the furnishing of the materials or the performance of the labor in question.

Construing the finding as one intended to mean that the defendant was without knowledge of the fact that the work was being done, the provisions of section 1192 do not apply to the established circumstances of the case.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(57 Cal. App. 719)

KUBISTA v. DANIELS et al. (Civ. 3394.)

(District Court of Appeal, Second District, Division 2, California. Feb. 11, 1922. On the Merits May 19, 1922, after Grant of Rehearing March 8, 1922. Rehearing Denied June 16, 1922.)

On Motion to Dismiss.

I. Appeal and error \S 880(3)—Appeal not filed until 100 days after judgment must be dismissed.

Where the notice of appeal was served and filed more than 100 days after the entry of the

judgment from which the appeal was taken, the appeal must be dismissed under Code Civ. Proc. \S 939, requiring the appeal to be taken within 60 days.

On the Merits.

2. Appeal and error \S 880(3)—Guarantor of notes cannot complain of failure to render judgment against maker.

The guarantor of four notes, who conceded that judgment was properly rendered against him for all four of the notes, cannot complain on appeal that judgment was not rendered against the maker on two of the notes.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Frank Kubista against A. J. Daniels and another. Judgment for plaintiff, and named defendant appeals. Motion to dismiss appeal granted, rehearing granted, and judgment affirmed.

T. C. Gould, of Los Angeles, for appellant.
Woodruff & Shoemaker, of Los Angeles, for respondent.

On Motion to Dismiss.

WORKS, J. [1] This is an appeal from a final judgment. Respondent asks for a dismissal of the appeal. The notice of appeal was served and filed more than a hundred days after the entry of the judgment. An appeal from a final judgment may be taken only within 60 days from the entry of the judgment (Code Civ. Proc. \S 939).

Appeal dismissed.

We concur: FINLAYSON, P. J.; CRAIG, J.

On the Merits after Grant of Rehearing.

WORKS, J. Defendant Colkins executed her four certain promissory notes to one Brunken, the payment of all of the paper having been guaranteed by defendant, Daniels. Brunken transferred the notes to plaintiff, two of them by indorsement in due course, two by delivery without indorsement, and plaintiff brought the present suit against both Daniels and Colkins on all four of the instruments. Defendant Colkins interposed defense as to all of the notes on the grounds that they had been obtained by the payee by means of fraud and deceit, that they had been given without consideration, and that, if there was a consideration, it had failed. The trial court found against defendant Colkins on each of these issues and rendered judgment against both defendants on the two notes which had been transferred to plaintiff by indorsement. Judgment on the other notes, the title to which had been passed to plaintiff by delivery only, went against defendant Daniels alone. That defendant alone appeals.

[2] The opening brief of appellant is short, fragmentary, and unsatisfactory, no closing

brief having been filed by him. After conceding that judgment against both defendants was proper on the two notes which were transferred by indorsement, and after stating the findings of the trial court on the issues presented by the answer of respondent Colkins, the writer of the brief proceeds:

"But, after finding against every one of defendant Colkins' special defenses, the court nevertheless rendered judgment in favor of defendant Colkins as maker of the notes and against defendant Daniels as guarantor. The court finds that defendant Colkins has no defense to the payment of the notes, and then excuses her from payment, placing the entire burden on the guarantor. The only possible judgment under the findings is one holding defendant Colkins for payment of all four notes. The present judgment is not supported by the findings, and therefore must be set aside."

This language is somewhat cryptic, but we gather from it, and from the whole tenor of the brief, that the only point made by appellant is that judgment on the two notes which respondent Kubista took without indorsement should have gone against both defendants. It is to be observed that no claim is made in the brief that Kubista was not entitled to judgment against appellant, if, at least, the maker of the notes were caught in the net with him. His position appears to be that the judgment against him is a righteous judgment, but that the trial court erred in not rendering judgment against the maker of the two unindorsed notes also. We cannot see what difference it makes to appellant whether or not the maker of the notes was included in the judgment. Undoubtedly, if the judgment had gone against both maker and guarantor the liability of the latter to pay would have been as great as it now is, for in that event he could have been required to pay the entire debt, as he is compellable to do under the judgment now standing against him. It appears to us that appellant has shown no reason why either the judgment against him or the judgment in favor of his codefendant should be disturbed.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(121 Wash. 700)

WARREN v. LEBAM MILL & TIMBER CO.
(No. 16998.)

(Supreme Court of Washington. July 31, 1922.)

Appeal and error ⚡979(2)—Granting of new trial for insufficient evidence disturbed only in case of clear error.

The granting of a new trial on the ground that the evidence did not sustain the verdict

will be disturbed only if the evidence presents a clear case of error.

Department 2.

Appeal from Superior Court, Pacific County; H. W. B. Hewen, Judge.

Action by George W. Warren against the Lebam Mill & Timber Company. Defendant was granted a new trial, and plaintiff appeals. Affirmed.

Fred M. Bond, of South Bend, for appellant.

Herman Murray, of South Bend, for respondent.

PER CURIAM. Appellant recovered a judgment against respondent for personal services, and the trial court granted a new trial on the ground that the evidence did not sustain the verdict.

No useful purpose will be served by reciting the facts. In our opinion an examination of the testimony shows that the trial court was fully warranted in its action, and it is certain that the evidence does not present a clear case of error on the part of the trial judge which must exist before this court will interfere. *Getty v. Hutton*, 110 Wash. 429, 188 Pac. 497, and cases cited.

The judgment is affirmed.

(120 Wash. 545)

STATE v. BRAVIN. (No. 17083.)

(Supreme Court of Washington. June 26, 1922.)

1. Criminal law ⚡369(6)—Admission of evidence of another crime held error.

Where defendant was indicted for selling intoxicating liquor, the admission of evidence that just prior to the alleged sale defendant purchased from witness a stolen phonograph was error, as it tended to prove defendant was guilty of another offense, and had no connection with the issues on trial.

2. Criminal law ⚡419, 420(10)—Hearsay testimony held inadmissible.

Where witness testified that he acted on the suggestion of a named person in testifying before the grand jury, the exclusion of what that person said to witness was proper.

3. Criminal law ⚡430—In prosecution for selling, certified copy of defendant's license to conduct soft drink establishment admissible.

In a prosecution for selling intoxicating liquors, a certified copy of defendant's license to conduct a soft drink establishment was admissible.

4. Witnesses ⚡277(2)—Allowing examination as to defendant's citizenship and residence held within court's discretion.

In a prosecution for selling intoxicating liquors, it was within the discretion of the trial

court to allow examination of defendant as to his citizenship and length of residence in the United States.

5. Intoxicating liquors \S 223(1)—**Testimony as to sales made four months prior to date charged held inadmissible.**

Testimony as to sales of intoxicating liquors made by defendant four months prior to the date charged in the indictment was inadmissible, though some other charge had been based on such sales.

Department 1.

Appeal from Superior Court, Pierce County; Wm. D. Askren, Judge.

Dan Bravin was convicted of maintaining a place for the unlawful sale of intoxicating liquor, and he appeals. Reversed and remanded.

S. A. Gagliarde and Bates & Peterson, all of Tacoma, for appellant.

James W. Selden and Thos. F. Ray, both of Tacoma, for the State.

TOLMAN, J. Appellant was indicted, tried, convicted, and sentenced to serve a term in the state penitentiary upon the charge of maintaining a place for the unlawful sale of intoxicating liquor. Appealing, he relies upon 21 assignments of error for a reversal, all of which have been considered, but not all of which need be here discussed.

[1] It is first urged that the trial court erred in permitting witness Cunningham, and some of his companions, to testify in detail to going to the place appellant is charged with conducting, not finding him there, going thence and stealing a phonograph, taking it to appellant's home, there partaking of intoxicating liquor then furnished by appellant, and receiving from appellant \$35 in money for the stolen phonograph, all of which occurred before the witnesses, or any member of their party, purchased or drank liquor in the place charged with being unlawfully maintained. It is true that the trial court admitted this line of testimony on the theory that it was preliminary, and undoubtedly in some cases certain preliminary testimony is necessary to a complete understanding of what afterwards occurred; but in the light of the testimony as to the sale of liquor at the place charged in the indictment later in the evening, it is at once apparent that these so-called preliminary matters had no connection with the charge, and had no tendency whatever to prove or to ex-

plain the testimony tending to prove the charge upon which appellant was being tried. They were as separate and distinct from the matter charged as though they had occurred at a time weeks or months remote, and had no tendency whatever to prove the issues then on trial. Their tendency was to prove that appellant was guilty of other offenses with which he was not then charged, and to prejudice him in the eyes of the jury. This line of testimony, and the instructions to the jury based thereon, constitute reversible error.

[2] In the matter of what occurred before the grand jury, and the relations of the witness Cunningham with one M. J. Sullivan, we find no error. The trial court permitted appellant, on cross-examination, to bring out the testimony that Cunningham, in testifying before the grand jury, acted upon the suggestions of Sullivan, and properly refused to go further, and permit the hearsay testimony as to what Sullivan said to the witness at that time.

[3] Nor do we find error in receiving in evidence the certified copy of a license to conduct a soft drink establishment issued to appellant. True, the clerk's certificate was informal in some particulars; but it was formal as to every material fact sought to be established thereby, and moreover, before receiving the certified copy, the court required the clerk to be called as a witness, and the testimony thus produced cured the informalities.

[4] Nor can we say that there was error in permitting the prosecuting attorney to interrogate appellant as to his citizenship and the length of his residence in the United States. Such matters are within the discretion of the trial court, and we cannot interfere until a manifest abuse of discretion is made to appear.

[5] Testimony as to sales made some four months prior to the date charged were not too remote, and the mere fact that some other charge had been based upon such sales did not tend to make the testimony as to the sales inadmissible.

Other assignments of error are based upon matters not likely to occur in another trial, or are without merit.

Because of the errors pointed out, the judgment is reversed, and the cause remanded for a new trial.

PARKER, O. J., and MITCHELL and BRIDGES, JJ., concur.

(120 Wash. 684)

POWELL v. ALASKA JUNK CO. (No. 16845.)

(Supreme Court of Washington. July 11, 1922.)

1. Corporations \S 519(3)—Finding that corporation ratified employment of attorney by partnership prior to its incorporation sustained.

In an action to recover attorney's fees by plaintiff, who had been employed by a partnership prior to the partnership's incorporation, and continued to act as attorney for the corporation, evidence held to sustain a finding that plaintiff's previous employment by the partnership had been ratified by the corporation, notwithstanding the fact that plaintiff's claim was not among those expressly assumed by the corporation.

2. Corporations \S 519(2)—In action by an attorney for fees against corporation succeeding a partnership which employed him, evidence of services for a branch office held admissible.

Where an attorney was employed by a partnership which was later incorporated, and there was evidence in a suit for fees that this employment was ratified by the corporation, evidence that parties in charge of a branch office consulted with him and were advised by him on matters pertaining to the corporation after it took over the business was admissible.

Department 2.

Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge.

Action by Ed B. Powell against the Alaska Junk Company. From a refusal to enter judgment for defendant, notwithstanding a verdict for plaintiff, defendant appeals. Affirmed.

Charles A. Reynolds, of Seattle, and Charles P. Lund, of Spokane, for appellant.
F. M. O'Leary, of Spokane, for respondent.

MAIN, J. The purpose of this action was to recover a sum claimed to be due as attorney's fees. The cause was tried to the court and a jury and resulted in a verdict in favor of the plaintiff. Motion for judgment notwithstanding the verdict being made and overruled, judgment was entered, and the defendant appeals.

[1] The appellant is a corporation engaged in the junk business both at Seattle and Spokane. The respondent is an attorney at law located at Spokane, and brought this action to recover for services for which he had not been paid. Prior to the year 1918 Bernard Kahn and Isador E. Faulk, as copartners, under the firm name of Kahn & Faulk, had been engaged in the junk business in Spokane. Early in February of this year the respondent was employed by the firm to attend to all of its legal matters for the agreed

compensation of \$600 for that year, to wit, 1918. This contract did not cover services rendered in litigation in which the firm might be engaged, but for such services a reasonable fee was to be paid. Some time during the month of June, the Kahn and Faulk business at Spokane was consolidated with a like business in the city of Seattle, and the appellant corporation was formed for that purpose. After the corporation was formed Kahn and Faulk by bill of sale transferred the assets of the firm to the corporation, and gave a list of their creditors for the purpose of satisfying the bulk sales law (Rem. Code 1915, §§ 5296-5300), all of which were assumed by the corporation. The corporation began business on July 1, 1918; it having been organized some time during the previous month of June. After the corporation was organized one Frank Swartz was made president thereof and Kahn treasurer, the latter moving to Seattle, but being the manager of the Spokane branch. After the corporation was organized the respondent continued to act as attorney for the corporation just as he had for the partnership prior to that time. He claims, and there was evidence to sustain this contention, that after the corporation was organized he was authorized by Kahn to continue to serve the corporation the same as he had the partnership. There is also evidence that Swartz, the president of the corporation, knew of the employment and acquiesced in it. At least there was direct evidence that in October Swartz in a conversation with respondent approved the employment. There was evidence from which the jury might infer that prior to this time Swartz knew of the employment. The business was an extensive one from the time the corporation was organized until approximately the 1st of March, 1919; the respondent's advice was sought by those in charge of the Spokane branch, and he rendered the same service to the corporation that he had previously rendered to the partnership. During this time there were certain matters in litigation for which he had charged a fee and had been paid, and these items are not here involved. There is little in this case except questions of fact. While the evidence was in dispute upon vital matters, there was sufficient evidence to sustain a finding of the jury that the respondent's previous employment by the partnership had been ratified by the corporation. It is true, as claimed by the appellant, that in the list of creditors made at the time of the transfer there was no mention of the respondent's claim, but, notwithstanding this fact, under the evidence as it was offered upon the trial, the question was for the jury. This covers only the \$600 item which was due at the end of the year 1918.

[2] There is another item of \$200 claimed to have been earned during January and

February, 1919. The evidence with reference to this item is directly in conflict as to whether the president of the corporation employed and authorized the respondent to act for the company during these two months; it presented plainly a question for the jury. The appellant objected to certain evidence which was offered and admitted, one item being that the parties in charge of the Spokane branch consulted with the respondent and were advised by him on matters pertaining to the corporation after it took over the business. Without reviewing these objections to testimony in detail, it may be said that there was no error in this regard. The cases of *Lee v. Steinhart Lumber Co.*, 66 Wash. 572, 119 Pac. 1117, and *Hart Pioneer Nursery Co. v. Coryell*, 8 Kan. App. 496, 55 Pac. 514, relied on by the appellant, are distinguishable. In neither of those cases was there evidence showing ratification by the corporation of the contract of the prior partnership.

The judgment will be affirmed.

PARKER, C. J., and MACKINTOSH, HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 557)

STATE v. CASTO. (No. 17232.)

(Supreme Court of Washington. June 26, 1922.)

1. Robbery §7—Forceful taking of money by prearranged plan held robbery.

The taking of money from complaining witness by threatening him with a revolver, when by prearranged plan he was discovered in a room in a hotel with a woman, was robbery.

2. Robbery §1—Threats §1(1)—Distinction between "robbery" and "extortion" stated.

The chief distinction between "robbery" and "extortion" is that to commit "robbery" the taking must be without the consent of the person robbed, while in "extortion" the taking is with consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extortion—Extortion; Robbery.]

3. Robbery §26—Whether money taken by force question for jury.

Where money was taken by threatening with a revolver, after complaining witness by prearranged plan was discovered in a hotel room with a woman, it was for the jury to determine whether the money was taken by force and under threats and against his consent.

4. Criminal law §742(1), 1159(4)—Credibility of witnesses for jury, and appellate court will not interfere on such grounds.

The credibility of witnesses is always for the jury, and under ordinary circumstances the appellate court will not interfere with the verdict of the jury on these grounds.

Department 1.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

T. A. Casto was convicted of aiding, counseling, and abetting in the commission of robbery, and he appeals. Affirmed.

A. G. Laffin, of Tacoma, for appellant.

J. W. Selden and Leo Teats, both of Tacoma, for the State.

BRIDGES, J. The information in this case charged the defendant with the crime of aiding, counseling, and abetting one Omer D. James and Elizabeth Hixon in the commission of the crime of robbery. The defendant has appealed from a judgment of sentence entered upon the verdict of the jury.

The chief reason assigned here for reversal is that, if the state proved any crime whatsoever, it was that of extortion, and not robbery. There was ample testimony from which the jury might have concluded that the three persons named agreed that at a certain hotel room in Tacoma Elizabeth Hixon should meet a certain soldier who they knew had some money on his person, and that, while the soldier and the woman were together in the room, James should appear and pretend to be the brother or husband of the woman, and thereby obtain the money from the soldier. There was ample testimony to show that the appellant was one of the chief instigators of the crime and the moving spirit therein. According to the program, late at night, the woman visited the soldier's room in the hotel. She had been there but a few minutes when James, according to prior arrangement, knocked on the door and demanded admittance, and after some controversy he was allowed to enter. He thereupon represented himself to be closely related to the woman and abused her for being found in such circumstances, drew a revolver on the soldier and held it close to or against his person, and threatened to do him bodily injury, and at that time received from him a considerable sum of money.

[1-3] There are in these facts all the elements of robbery. The chief distinction between robbery and extortion is that to commit the former the taking must be without the consent of the person robbed, while in extortion the taking is with consent. It does not require any argument or citation of authorities to show that, under the evidence in this case, it was for the jury to determine whether the money was taken from the soldier by force and under threats and against his consent.

[4] Appellant argues extensively that the evidence was insufficient to sustain the verdict and judgment. He attacks the credibility of the witnesses for the state, contend-

ing that their characters and reputations are such as that the jury was not justified in believing them, and that the verdict should have been in accordance with the testimony of his own witnesses, whose characters he extols. The credibility of the witnesses is always for the jury, and this court, will not, under ordinary circumstances, interfere with the verdict of the jury on these grounds. A reading of the record convinces us that there was ample testimony upon which the verdict may rest.

One or two other assignments of error are made but they are without merit.

Judgment affirmed.

PARKER, C. J., and FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

(121 Wash. 74)

LOFTHUS v. NAVY YARD CITY MILL CO.
(No. 17123.)

(Supreme Court of Washington. July 17, 1922.)

Appeal and error \S 1002—Verdict on disputed question of fact not disturbed.

A verdict on a disputed question of fact cannot be disturbed.

Department 2.

Appeal from Superior Court, Kitsap County; Walter M. French, Judge.

Action by E. Lofthus against the Navy Yard City Mill Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bryan & Garland, of Bremerton, for appellant.

Thomas Stevenson, of Bremerton, for respondent.

PER CURIAM. Replevin action tried to the court and a jury. No objections were made to the instructions, and the important question is whether there was sufficient evidence to sustain the verdict. The respondent had purchased from one Rothwell 100,000 laths on an oral contract. It is the claim of the appellant that there had been no segregation or identification of the particular laths. This presented purely a question of fact, on which there was a dispute, and of which the jury was entitled to accept either the respondent's or the appellant's version.

It is next contended that, there being no bill of sale, as against the existing creditors, of whom the appellant claims to be one, the sale is invalid, for the reason that the property had been left in the possession of the vendor. This also presented a question of fact on which there was a dispute, and the verdict of the jury cannot be disturbed merely for that reason.

There are a few other minor assignments of error which we feel it is unnecessary to consider.

Judgment affirmed.

(121 Wash. 93)

BLAIR v. KILBOURNE. (No. 17192.)

(Supreme Court of Washington. July 26, 1922.)

1. Municipal corporations \S 705(3)—More care required of auto driver in observing possibility of danger to nine year old child.

Though plaintiff's nine year old son was negligent and was of sufficient age to have realized the danger of running into a main thoroughfare frequented by automobiles without looking for approaching automobiles, defendant was not justified in assuming that the child could be depended upon to exercise the same degree of care for his safety as an adult, and, when defendant observed the possibility of danger, more caution was called for than would ordinarily be necessary.

2. Death \S 58(2)—Showing held to make case for recovery for death of child.

A case for recovery by a father under Rem. Code 1915, \S 184, for the death of his nine year old son is made by showing that the boy was a healthy child of average intelligence.

Department 2.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by M. E. Blair against F. H. Kilbourne. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

Shank, Belt & Fairbrook, of Seattle, for appellant.

Tom S. Patterson, James M. Gephart, and Hiram S. Patterson, all of Seattle, for respondent.

HOVEY, J. The nine year old son of the respondent was struck by an automobile owned and driven by appellant and received injuries from which he died in a few hours. Respondent sued for loss of services under section 184, Rem. Code, and recovered a judgment for \$5,000.

Appellant was driving with his wife in a Cadillac inclosed car on the afternoon of a clear day on a paved street in the city of Seattle known as Greenlake boulevard. Sixty-Fifth street enters this street from one side, and the lake lies on the other. The boy was flying a kite during school recess and ran into the intersection from Sixty-Fifth street. He did not observe the car and continued to cross the street, keeping his attention at all times upon the kite, and was struck by the car without ever having seen it. He had been cautioned by his father not to play in the street and of the danger from automobiles. The car slid a distance of over

27 feet after the application of the brakes, and, in the opinion of an expert familiar with the type of car, it was going at the rate of 35 miles per hour. The only eyewitness of the entire train of events was the conductor on an approaching street car. Both his testimony and that of the appellant and his wife placed the speed of the automobile at 20 miles per hour or under, and the testimony of appellant is that he first tried to drive around the boy, and when he saw that he could not do this he applied his brakes and stopped as quickly as possible. Shortly after the accident appellant made a statement to the police department in several respects varying from his testimony upon the stand.

[1] Appellant's chief ground for reversal is the contributory negligence of the deceased, and he contends that as a matter of law his motion for a nonsuit or for a directed verdict should have been granted. We believe the boy was guilty of contributory negligence under the undisputed testimony, and that he was of sufficient age to realize the danger of running into a main thoroughfare frequented by automobiles. But, on the other hand, appellant would not be justified in assuming that a child could be depended upon to exercise the same degree of care for his own safety as an adult, and, when appellant observed the possibility of danger, more caution was called for than would ordinarily be necessary. It is true appellant claims the accident was unavoidable on his part, but under the testimony the jury were justified in adopting the doctrine of last clear chance in accordance with the instructions given them by the court, as we consider that there was sufficient evidence from which they might have found that the appellant did not use proper precautions after the danger to the boy became apparent.

Errors are predicated upon instructions, but, so far as they are not covered by what we have said, we do not think them of moment when the instructions are considered as a whole.

[2] Error is predicated upon the amount of recovery. The evidence showed that the boy was a healthy child of average intelligence, and that the father was an employé in the United States custom service. This made a case for recovery (*Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620), but in our opinion there is not sufficient showing of the value of the boy's services to justify the amount of recovery in this action.

The judgment is reversed, with directions to grant a new trial unless the respondent is willing to accept the sum of \$2,500 together with costs of the action in the trial court; neither party to recover costs here.

PARKER, C. J., and MAIN, MACKINTOSH, and HOLCOMB, JJ., concur.

(121 Wash. 106)

STATE v. AUSTIN. (No. 17238.)

(Supreme Court of Washington. July 31, 1922.)

1. Criminal law \S 576(8)—Refusal to dismiss prosecution for failure to bring defendant to trial within 60 days held not error.

In a prosecution for grand larceny, where the trial was commenced 62 days after the information was filed, overruling a motion to dismiss, not filed until the trial was at hand, in view of the fact that defendant had made no previous effort to note the case for trial, was not an abuse of discretion.

2. Larceny \S 28(4)—Information for grand larceny held sufficient.

An information for grand larceny, which alleged false representations by defendant, and that money was obtained by such representations, stated the ultimate facts, and fairly apprised defendant of the crime with which he was charged, and was not erroneous for failing to allege the means by which the matter was conducted, so as to prejudice defendant.

3. Criminal law \S 371(2)—Admission of evidence of similar false representations to other held proper.

In a prosecution for grand larceny through false representations as to the condition of a corporation, admission of evidence that defendant had made similar representations to other purchasers of stock was proper for the purpose of showing intent.

4. Criminal law \S 371(2), 1169(11)—Admission of evidence of defendant's statement to a witness held reversible error.

In a prosecution for grand larceny committed through misrepresentations as to the condition of a corporation, admission of testimony by defendant's employé that defendant had requested the employé not to mention that defendant had been negotiating for the services of the employé only a short time, and that defendant had represented to stockholders that he had been negotiating with the employé for a considerable time was prejudicial error, since the testimony was not concerning transactions similar to those in question in the criminal charge, but amounted only to charging defendant with being dishonest.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

P. L. Austin was convicted of grand larceny, and he appeals. Reversed for a new trial.

Walter S. Fulton, John F. Dore, and John T. Casey, all of Seattle, for appellant.

Malcolm Douglas, T. H. Patterson, and Chester A. Batchelor, all of Seattle, for the State.

HOVEY, J. Appellant was convicted of the crime of grand larceny upon an information charging that he obtained money from

another by misrepresenting the condition of a corporation.

The evidence of the state was to the effect that the transaction involved the transfer of certain shares of stock in the corporation named in the information and belonging to appellant, and that the false representations as to the condition of the corporation were an inducement by which the money was secured by the appellant.

[1] The trial of the appellant commenced 62 days after the information was filed, and a motion was made to dismiss because appellant had not been brought to trial within 60 days. This motion, however, was not filed until the trial was at hand, and appellant had made no previous effort to note the case for trial. We think no abuse of discretion was shown by the trial court in denying this motion.

[2] It is claimed that the information is insufficient, and objection was made to the introduction of any testimony at the time the trial commenced, and the objection has been raised in various forms since then. We do not consider the information a model to be approved of, but we believe that it states the ultimate facts, namely, false representations and the fact that the money was obtained by these representations; the appellant was fairly apprised of what he was charged with, and we consider he was not prejudiced by the failure to allege the means by which the matter was conducted. *State v. Garland*, 65 Wash. 666, 118 Pac. 907; *State v. Anderson*, 107 Wash. 336, 181 Pac. 696, 185 Pat. 624; *State v. Millroy*, 103 Wash. 193, 174 Pac. 10.

[3] Evidence was received of the making of similar representations by the appellant to several other purchasers of stock, and this is claimed to be erroneous. In *State v. Anderson*, supra, this court has settled the law in this jurisdiction that similar representations are admissible in a case of this kind for the purpose of showing intent.

[4] Testimony was received from a witness named Clark to the effect that similar representations had been made to him, and that upon the faith of them he came from Massachusetts to Seattle and accepted employment as factory superintendent upon the promise of a salary and certain shares of stock as a bonus. The witness received from the appellant the following telegram:

"One hundred letters received yours appealed to us. Salary \$3,600 6 months, \$4,000 6 months, 2 years \$4,800. With us one year \$2,500 in stock bonus. We own factory site and buildings, opportunity like this seldom offered. Sales far exceed our present output. Expenses upon arrival.

"United Rubber Products Co.,
"P. L. Austin, Pres."

And upon his arrival appellant told the witness that appellant had been representing

to the other stockholders that he had been in negotiation with the witness for a considerable time, and he would prefer that the witness say nothing about the short period of time that had transpired between the first correspondence and the time that witness arrived. Objection was made to this testimony, and the matter argued out before the court in the absence of the jury. The court overruled the objection, and permitted the testimony to go in. In our opinion this testimony was erroneously received, and we cannot say that it was not prejudicial. The transaction with this witness was not a stock sale, but one of employment, and the effort made to have this witness conceal the true situation was not testimony of similar transactions, but amounted simply to charging the appellant with being dishonest. A defendant has a right to have his trial limited to the charge made against him, and the inquiry can only be extended to other transactions when there is a recognized exception having a legal reason for its basis.

Appellant moved for an instructed verdict of not guilty upon the ground that the evidence was insufficient. In our opinion the evidence properly received was sufficient to sustain a conviction.

Error is predicated upon the instructions. We do not find any error in them when considered as a whole.

On the error in receiving the Clark testimony, the case will be reversed for a new trial.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

(121 Wash. 65)

MANCHE et ux. v. RUSSELL et al.
(No. 17257.)

(Supreme Court of Washington. July 17, 1922.)

Limitation of actions §170—Defense of statute held not available in action to declare judgment against husband a community judgment.

Where judgment was rendered against the husband on a community liability, in an action against the community setting up the judgment and alleging that the claim on which it was rendered was a community judgment and a lien on community real estate, the proceeding being supplemental to determine the scope and effect of the judgment, the defense that the action was not begun within 3 years from the time the original cause arose was not available.

Department 1.

Appeal from Superior Court, Pierce County; Wm. D. Askren, Judge.

Action by E. J. Manche and wife against James Russell and others. From judgment for plaintiffs, defendant named and wife appealed. Affirmed.

J. W. A. Nichols and Maurice Langhorne, both of Tacoma, for appellants.

Benton & Lee and Blackburn & Gielens, all of Tacoma, for respondents.

TOLMAN, J. Respondents, in December, 1918, recovered a judgment against the appellant, James Russell, in the superior court for Pierce county, in an action sounding in tort. Thereafter this action was brought. In the complaint the prior judgment is set up and described, and it is alleged that the prior action was prosecuted to recover for personal injuries inflicted upon respondent Virginia Manche through the negligent operation of an automobile truck owned and operated by the community composed of Russell and wife; that the claim arising therefrom was a community liability; that the judgment rendered is and of right ought to be a community judgment and a lien upon the community real estate of the Russells theretofore and still owned by them; and prayed that such judgment be adjudged to be a community judgment and a first lien upon the real estate therein described.

From a judgment as prayed for, the Russells only have appealed. The defense of the statute of limitations was raised below, and it is urged here that, this action not having been brought within three years from the time the original cause of action arose, the community can now interpose that defense as a bar. If this were an original proceeding based upon the negligence of the community which occurred more than three years prior to the filing of the complaint, the point would be well taken, but if it be a supplemental proceeding to determine and declare the scope and effect of the prior judgment, then the result must be otherwise.

While the defense of the statute of limitations was not there raised, still the precise question here to be determined was presented and determined in *Woste v. Rugge*, 68 Wash. 90, 122 Pac. 988, and it was there held: (a) That a judgment rendered upon a community obligation in an action to which the wife is not a party is enforceable against the community property, though the question of the community character of the obligation will remain open to the wife to be determined in some appropriate proceeding (citing many previous cases here decided); and (b) that this rule applies as well when the liability rests upon negligence or other wrongful act as it does when the liability rests upon contract. It is there said:

"We think there is no sound reason for differentiating between cases involving these different classes of obligations, so far as the

making of the wife a defendant is concerned. The only question she is interested in, to wit, that of the community character of the obligation, is equally open to her whether the obligation arises out of contract or negligence. So far as the merits of the claim is concerned, the husband defends, not only for himself, but for the community, even though the wife is not named as defendant. When the husband negligently maintained the trapdoor in the floor of the store belonging to and operated in the interest of the community, as alleged in this complaint, he was acting as agent for the community as completely as when he incurred a community debt by the purchase of goods to replenish the stock in the store. We are not able to see that one was the act of the community any more or less than the other."

This proceeding simply afforded the wife an opportunity to contest the community character of the prior judgment, and that alone; hence the statute of limitations as to the original cause of action is not now available as a defense.

The judgment appealed from is affirmed.

PARKER, C. J., and FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

(120 Wash. 525)

**McMULLIN v. DEPARTMENT OF LABOR
AND INDUSTRY OF WASHINGTON.**
(No. 17250.)

(Supreme Court of Washington. June 23, 1922.)

1. Master and servant \S 417(7)—Amount of compensation award for properly classified injury not reviewable.

Where the Department of Labor and Industry has properly classified an injury, if the court will disturb a decision upon the question of the amount of compensation, it will do so only where the discretion of the Department has been exercised in a capricious and arbitrary manner.

2. Master and servant \S 419—Industrial insurance department's refusal to reopen compensation claim held not reviewable.

In the absence of showing that the industrial insurance department acted arbitrarily under Workmen's Compensation Act (Rem. Code 1915, \S 6604—21), in refusing to reopen a claim for compensation on the ground of aggravation of injury, as to which there was an honest difference of opinion between doctors, the court cannot disturb the department's decision.

Department 2.

Appeal from Superior Court, King County; Austin E. Griffiths, Judge.

Proceeding by John McMullin against his employer before the Department of Labor and Industry of the State of Washington for

an award. After an award was made, the claimant filed a petition to have his claim reopened. From a judgment of the superior court reversing an order of the Department of Labor and Industry refusing to reopen the claim and directing additional compensation to be paid, the Department of Labor and Industry appeals. Judgment reversed.

Lindsay L. Thompson and John H. Dunbar, both of Olympia, for appellant.

D. E. Twitchell and Max Hardman, both of Seattle, for respondent.

PER CURIAM. The respondent, in June, 1919, received an injury for which claim for compensation was made, and his injury was classified as a permanent partial disability, for which he received payment. Some months thereafter he filed a petition to have his claim reopened on the ground of aggravation of injury. After review this petition was denied, and an appeal was taken to the superior court, which reversed the order of the appellant refusing to reopen the claim, and directed additional compensation to be paid. From this judgment the Department of Labor and Industry has appealed.

There is no question in the case that the respondent's injury was properly classified as a permanent partial disability. The only question is whether the aggravation is, as the respondent claims, the result of the original injury.

[1] The court has held, from the time this sort of question was presented to it, that where the Department of Labor and Industry has properly classified an injury, the court, if it will disturb the decision of the Department upon the question of the amount of the award at all, will only do so where the discretion of the Department in that regard has been exercised in a capricious and arbitrary manner. *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5; *Chalmers v. Industrial Insurance Commission*, 94 Wash. 490, 162 Pac. 576; *Parker v. Industrial Insurance Department*, 102 Wash. 54, 172 Pac. 830; *Foster v. Industrial Insurance Commission*, 107 Wash. 400, 181 Pac. 912; *Whipple v. Industrial Insurance Commission* (Wash.) 199 Pac. 455; *Sweltzer v. Industrial Insurance Commission* (Wash.) 199 Pac. 724; *Krause v. Industrial Insurance Commission* (Wash.) 206 Pac. 358; *Taylor v. Industrial Insurance Commission* (Wash.) 206 Pac. 973.

[2] The record in this case does not justify a finding that the appellant acted in such a manner in refusing to reopen the respondent's claim. The most that the record justifies is a finding that there is an honest difference of opinion between the doctors, and in such condition of the record, and in view of section 6604-21, Rem. Code, we are powerless to substitute what might be our judg-

ment in the case for that of the appellant. *Marney v. Industrial Insurance Department*, 98 Wash. 483, 167 Pac. 1085.

Judgment reversed.

(120 Wash. 581)

PHILLIPPAY v. PACIFIC POWER & LIGHT CO. (No. 16859.)*

(Supreme Court of Washington. July 8, 1922.)

1. Electricity \S 7—Power company held not liable for inductive interference of telephone line.

A power company, lawfully maintaining a high-powered transmission line, constructed according to the best standards of modern engineering, on one side of a highway, is not liable for inductive interference of a telephone line on the other side of the highway, or for the cost of metalizing the telephone line, so as to prevent such interference, where the telephone line was a single wire system, with a return circuit through the ground, which was not in accordance with the best standards of modern engineering.

2. Electricity \S 5—Prior franchise held not to give superior rights to telephone over power company.

That a telephone company was granted a franchise to maintain a telephone line on a highway before a power company was granted a franchise to maintain a power line did not give the telephone company a superior right, in view of Rem. Code 1915, \S 5612, providing that no exclusive franchise to use a highway shall be granted.

Department 2.

Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by A. F. Philippay, as receiver of the Connell-Kahlotus Telephone Company, against the Pacific Power & Light Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss the action.

Sharpstein, Smith & Sharpstein, of Walla Walla, and John A. Laing and Henry S. Gray, both of Portland, Or., for appellant.

Chas. W. Johnson, of Pasco, for respondent.

MAIN, J. The plaintiff as receiver for the Connell-Kahlotus Telephone Company, a corporation, brought this action seeking to recover damages from the defendant for the cost of metalizing a telephone line in order to prevent inductive interference with the telephone service by the high-power transmission line of the defendant, and for loss of profits occasioned by such interference. After the issues were framed, the cause came on for trial before the court and a jury, and resulted in a verdict in favor of the plain-

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Opinion modified on rehearing see 211 Pac. 572.

tiff in the sum of \$1,400; special verdicts being also returned, finding that the cost of metallicizing was \$900 and the loss of profits \$500. At the conclusion of the case, and before it was submitted to the jury, the defendant moved for a directed verdict, which was overruled. After the return of the verdict the defendant moved for a judgment notwithstanding the verdict. This motion was also overruled. Judgment was entered against the defendant for \$1,400, and from that judgment it prosecutes this appeal.

During the year 1910 the telephone company having received a franchise from the county commissioners constructed a rural telephone line extending from Connell to Kahlotus, a distance of approximately 22 miles. From this line constructed along the highway branch lines extended out to telephone users. In 1917 the appellant, who will be referred to as the power company, after having obtained a franchise constructed a transmission line from Pasco to Lind. A portion of this line was upon the same highway as that of the telephone company and paralleled its line, the telephone line being on one side of the highway and the power line on the other. The transmission line of the power company transmits energy at 66,000 volts, and when it was energized it interfered with the use of the telephones, causing a buzzing noise and preventing their accustomed use. There is no claim that the power line was not constructed, maintained, and operated in accordance with the best standards of modern engineering practice. A wire which carries an electric current creates an electric field surrounding itself, and induces a certain amount of its current into every other wire within the same field. The testimony shows that the electric field created by the power line in this case extended for 1,000 feet to one mile on either side thereof. It was the flow of the current from the power line to the telephone line that caused the buzzing noise and interfered with the use of the telephones. This transmission of the current through the air from one line to the other is called induction. Where the current is transmitted or flows through the earth, it is called conduction. The telephone company maintained a single wire, or what is called a grounded system, by which the circuit is completed by the electricity returning through the earth from the terminal of the circuit to the point of origin. The metallicizing consisted in changing the telephone line from a single line to a two-line system, thus furnishing a wire for the returning circuit, which with the single line had been completed, as stated, by returning through the ground. The induction from the power line to the telephone line in no manner injured any property of the telephone company, but only

interfered with its use. When the power line was not energized, the telephone could be used; the buzzing noise not being present. There was no way that the power line could have been constructed, operated, or maintained which would prevent interference by induction.

[1] The appellant contends that it, being rightfully on the highway by reason of a franchise properly granted, was under no duty of metallicizing or bearing the cost of metallicizing of the telephone line. The respondent contends that, since the power line interfered with the use of the telephones, that company should bear the expense of metallicizing. The controlling question, then, is whether the power company was under obligation to bear such cost. This question is one of first impression in this court. It should be remembered, in considering the question, that the telephone company did not own the land through which, with its single line system, the current returned to the point of origin. The weight of authority, so far as the question has been determined, is in favor of nonliability of the power company. In *Deiser on the Law of Conflicting Uses of Electricity and Electrolysis*, at page 21, after considering the cases upon the question, summarizes the principles as follows:

"Summarizing the results of these cases, and in particular the case last examined, this much may be accepted as established in legal controversies of this sort. The attempt to enjoin the construction and operation of a street railway, because of any inconvenience to other franchise holders produced by its mere operation, is hopeless. Nor can the holder of another franchise, such as the telephone, hope to recover the cost of remedying defective apparatus, and any telephone apparatus capable of being disturbed to any marked extent by induction must be classified as defective, so long as there exist insulating or isolating devices, such as the complete metallic circuit, or the noninductive circuit, that would protect the telephone or telegraph lines. This much may be taken as settled. The operation of the railway cannot be enjoined in such cases, nor can the railway be compelled to change from a single to a double trolley system."

In *Lake Shore & M. S. Ry. Co., v. Chicago, L. S. & S. B. Ry. Co.*, 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596, was involved the conflicting claims of two transportation companies, each operating on its own right of way. In that case the plaintiff was operating a steam railroad through a portion of the state of Indiana. In connection with the operation of the railroad, it used a system of electric telegraph lines and signals necessary to its operation. The defendant was engaged in constructing on its private right of way adjacent and paralleling its road an electric railway between the towns

of Gary and South Bend, a portion of which had been constructed and was in operation. The company's cars were operated by an electric system known as the "single phase alternating current." By reason of the proximity and parallelism of the two lines, the high-tension current used by the defendant interfered with the maintenance and use by the plaintiff of its system of electric telegraph lines and signals, the current there as here passing from the defendant's line to the plaintiff's by induction. It was held that the operation of the defendant's line would not be interfered with at the suit of the plaintiff. In the course of the opinion it was said:

"This controversy is between users of electricity; appellant using light currents, and comparatively delicate instruments, which are interrupted by escaping currents from the wires carrying exceedingly high voltage belonging to the appellee. It is not a question between one engaged in the ordinary development of his land and the customary and appropriate employment of it according to its inherent qualities and its surroundings, without bringing upon it artificiality of any substance not naturally found there (*Evans v. Reading, etc., Co.*, 160 Pa. 209, 28 Atl. 702; *Pennsylvania Coal Co., v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. St. Rep. 445), and one engaged in the unnatural and extraordinary use of his property, calling for the application of the maxim '*Sic utere tuo*,' etc., which is the governing principle in *Fletcher v. Rylands, supra*, and *Rylands v. Fletcher*, L. R. 3 H. L. 330. In this case the use of electricity is common to both parties, and both are acting under legislative grants. In such cases it seems to be the consensus of opinion, both in England and in this country, that where one is acting under legislative authority, and within the right thus given, and reasonably within the exercise thereof, using care and caution regarding the rights of his neighbor, any inconvenience of incidental damage which may arise in the absence of any negligence from the reasonable use of his own property will be regarded as within the rule *damnum absque injuria*."

A like result was arrived at in the case of *Eastern & S. A. Teleg. Co. v. Cape Town Tram. Cos.*, 2 British Ruling Cases, 114, decided by the House of Lords of England on appeal from the Supreme Court of the Cape of Good Hope. In that case an action was brought by the telegraph company against the tramway company for damages for disturbance of the telegraph line caused by the working of the tramway, and for the cost of appliances to prevent such interference. The interference there, as here, was caused by induction, and it was held that the tramway company was not liable, and in affirming the case it was said:

"Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded

liability on the principle in question, and which have always constituted some interference with the ordinary use of property. Now the kind and degree of interference with the respondents' property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for, given the cable as it now is, there is no injury. This is referred to, not because their lordships consider that the respondents have made out that the twin cable had the general use and recognition which they ascribed to it, but as showing that it cannot be predicted of the electric escape in question that it is destructive of telegraphic communication generally, but only that it affects instruments made in a certain way. Now, if the instrument be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbors. To describe this as a delicate instrument might be inaccurate, if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all. The true comparison is with things used in ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees, to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbors than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbors, that must be found in legislation; the remedy at present invoked is an appeal to a common-law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbor by applying his own property to special uses, whether for business or pleasure."

In the case of *Dakota Central Telephone Co. v. Spink County P. Co.*, 42 S. D. 448, 176 N. W. 143, the Supreme Court of South Dakota sustained the rule of liability by reason of the particular statute of that state, but indicated that, if there had been no legislative direction either way, the court would adopt the view that there was no liability. The respondent cites and quotes quite extensively in support of his position from Deiser on the Law of Conflicting Uses of Electricity and Electrolysis. When the text relied on is carefully read in the light of the authorities cited in the footnotes, it is plain that the author in the paragraphs cited was referring to conductive instead of inductive interference, or to cases where there was something in the construction, maintenance,

and operation of the power line that could be corrected and thus obviate the disturbance. If this is not the correct view, then the author necessarily takes inconsistent positions, because in the paragraph above quoted he expressly, in summarizing the principles, states the rule to be one of nonliability. In *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236, the Supreme Court of Tennessee adopted a rule of liability whether for conduction or induction, basing its holding on the conclusion that while there was not any damage to property, an interference with the use thereof was sufficient in the opinion of the court to sustain the action.

There is another line of cases holding nonliability, which are cited in the appellant's brief, but which do not seem to us to be in point. They are cases where the current used by a street car line in a city interferes with a telephone line upon the same street, and they are based upon the theory that the primary use of the street is being promoted by the use of electricity for propelling street cars, and that the use of the street for a telephone line is a subordinate use. While the precise question has not been considered by many courts or text-writers, we are inclined to adopt the rule of nonliability. The telephone company, in order to maintain its single wire system, must make use of the earth in which it has no rights for the completion of its return circuit. It does not seem reasonable to hold that the duty was not upon it to standardize its line in a way that would prevent interference in accordance with good modern engineering practice, when to maintain a single line it must make use of something which it does not own.

[2] It is suggested that, since the telephone company was first upon the highway, it has a superior right. But this position cannot be sustained. The statute (Remington's 1915 Code, § 5612) provides that no exclusive franchise or privilege shall be granted. The authorities are against the rule of superior right based upon priority. *Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838; *Cincinnati Inclined Plane Ry. Co. v. Telegraph Ass'n*, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. Rep. 559; *Lake Shore & M. S. Ry. Co. v. Chicago, L. S. & S. B. Ry. Co.*, 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596. The prior occupant, as stated in *Joyce on Electricity*, vol. 1, § 372a—

"while it obtains no exclusive right to the occupation of the street, does acquire a right, which is in the nature of an exclusive one, to the continued occupation of the space occupied by its poles and wires, subject to the proper

control by the state or municipal authorities, and this right must be recognized by the subsequent company in the construction of its line."

The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the action.

PARKER, C. J., and HOLCOMB, MACKINTOSH, and HOVEY, JJ., concur,

(120 Wash. 393)

STATE ex rel. SIMON v. SUPERIOR COURT
FOR KING COUNTY et al.
(No. 17236.)

(Supreme Court of Washington. June 12, 1922.)

1. Prohibition ¶3(5), 5(3)—Writ to restrain hearing of account of former administrators ordered to turn assets over to relator, their successor, denied.

Where administrators of the partnership estate of deceased and relator were improperly appointed by the superior court, which was ordered to appoint relator instead, and to direct them to turn the assets, less expenses, over to him, a proceeding by that court in probate to hear and determine their account will not be restrained on application by relator, as it is in execution of the order, and relator's remedy by appeal is adequate as to any items improperly allowed.

2. Partnership ¶251—Survivor as succeeding administrator of partnership estate entitled only to amount of estate less allowances, etc., permitted by court.

Where administrators of a partnership estate of decedent and his survivor were improperly appointed by the superior court sitting in probate, which was ordered to appoint the survivor, instead, and to direct them to turn over to him the assets, less expenses, the survivor is only entitled to receive the amount of the estate, deducting such allowances, etc., as the court may deem proper.

Department 2.

Appeal from Superior Court, King County

Proceeding by the State, on the relation of Barney Simon, against the Superior Court for King County, Hon. Mitchell Gilliam, Judge, and Zelma Levy and Bernhard Levinson, for a writ of mandate and prohibition. Writ denied.

Peters & Powell and Arthur C. Bannon, all of Seattle, for relator.

Walter B. Allen and Chadwick, McMicken, Ramsey & Rupp, all of Seattle, for respondents.

MACKINTOSH, J. [1] Zelma Levy and Bernhard Levinson, two of the respondents

here, were appointed administrators of the partnership estate of Louis Levy, deceased, and Barney Simon, the relator. Thereafter this court, in *Simon v. Levy*, 114 Wash. 556, 186 Pac. 1025, held that they were improperly appointed and that Barney Simon was entitled to administer the estate. On the appeal no supersedeas bond was filed, and Levy and Levinson proceeded with the administration and sold the partnership property, and thereafter the matter was again brought to this court in *State ex rel. Barney Simon v. Superior Court*, 201 Pac. 25, where the superior court was directed to enter an order that the former administrators (Levy and Levinson) "turn over to him (Simon) all of the assets of the estate now in their hands, less such deductions for expenses of administration, including administrators' and counsel's fees, as shall be found proper. * * *

The former opinion of this court made no reference to the action of the acting administrators pending the appeal, nor is it the intention at this time to disturb the same so far as they are regular and comply with the law." In compliance with that order, the judge of the superior court, sitting in probate, entered an order appointing Simon administrator, and, for the purpose of determining what should be turned over to him by the former administrators, proceeded to hear and determine their account. The relator then applied to this court for a writ restraining the lower court from hearing the account, and requiring the former administrators to turn over to the relator the assets of the estate forthwith.

[2] An examination of the record convinces us that the probate court was proceeding in conformity with our order, and that the matters he was considering were necessary to determine in order to arrive at an account of the partnership estate in the hands of Levy and Levinson to be turned over to the relator here. If any items were improperly allowed by the court, the relator has an adequate and proper remedy in the ordinary course of appeal, and all he is entitled to receive is the amount of the estate, less such allowances, etc., as the trial court may deem proper. Of course, the order turning over to him the estate will not be in any sense a final determination of all those matters, nor in the event the relator is dissatisfied or appeals will it amount to a closing of the estate, leaving nothing for the relator to do but to make distribution. It is merely a settlement of the accounts of the administrators whom this court has found were improperly appointed, and terminates their relations to the estate as administrators.

For these reasons, the writ will be denied.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(38 Okl. 257)

MODERN BOOK & NEWS CO. et al. v. STERNMAN. (No. 13235.)

(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

1. Appeal and error ⇨516—Contents of record proper stated.

The record proper in a civil action, under the procedure in this state, consists of the petition, answer, reply, demurrers, process, rulings, orders, and judgment.

2. Appeal and error ⇨528(1), 553(2)—Motion for new trial and action in overruling motion no part of record proper; assignment that court erred in overruling a motion for new trial not presented by transcript of record.

A motion for new trial and the action of the court in overruling the same being no part of the record proper, the assignment that the court erred in overruling the motion cannot be presented to this court by transcript of the record.

3. Appeal and error ⇨520(1)—Motions, rulings thereon, and exceptions thereto must be presented by bill of exceptions or case-made.

Motions presented to the trial court, the rulings thereon, and exceptions thereto, are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same in a bill of exceptions or case-made.

Appeal from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action between the Modern Book & News Company and another against Benj. Sternman, a sole trader, doing business as Benj. Sternman & Co. From the judgment rendered, the former appeal. Appeal dismissed.

Lewis & Lewis and Hayson & Lukenbill, all of Oklahoma City, for plaintiffs in error.

S. K. Bernstein, of Oklahoma City, for defendant in error.

JOHNSON, J. This is an appeal by transcript. The petition in error contains but one assignment, which is:

"Said court erred in overruling the motion of plaintiffs in error for a new trial."

The motion to dismiss this appeal was filed, with proof of service thereon, on May 2, 1922, to which no response has been made.

[1-3] A motion for new trial and the action of the court in overruling the same, being no part of the record without case-made or bill of exception, cannot be presented to the court by transcript. *Collins v. Garvey* (Okl. Sup.) 171 Pac. 830; *Wyant v. Beavers*, 68 Okl. 68, 162 Pac. 732; *Miller v. Markley*, 49 Okl. 177, 152 Pac. 845; *Vannier v. Frat.*

Aid Ass'n, 40 Okl. 732, 140 Pac. 1021; Williams v. Kelly (Okl. Sup.) 178 Pac. 204.

In the absence of a case-made or bill of exceptions, the errors complained of cannot be considered. The motion to dismiss must be sustained, and it is so ordered.

HARRISON, C. J., and NICHOLSON, ELTING, and KENNAMER, JJ., concur.

(86 Okl. 259)

CHICAGO, R. I. & P. RY. CO. v. PEACOCK.
(No. 10894.)

(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

1. Abatement and revival §74(1)—Action not revived against representatives or successor of a defendant more than one year after revival could have been first made.

An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successors, unless in one year from the time it could have been first made, except as otherwise provided by law. Section 5293, Rev. Laws 1910.

2. Appeal and error §334(7)—Appeal dismissed for failure to revive action within year after defendant in error's death, pending appeal.

When the defendant in error has died, pending the appeal in this court, and more than a year has elapsed since the death of the defendant in error, and the cause of action has not been revived and the personal representatives of defendant in error move to dismiss the appeal, this court may sustain such motion and dismiss the appeal under said section 5293.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Action by J. N. Peacock against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal for failure to revive action in name of plaintiff's personal representatives within year after plaintiff's death, pending appeal. Appeal dismissed.

C. O. Blake, of El Reno, for plaintiff in error.

J. H. Harper, of Waurika, for defendant in error.

MILLER, J. This action was commenced in the district court of Jefferson county by J. N. Peacock, as plaintiff, to recover damages against the Chicago, Rock Island & Pacific Railway Company, because said company had carelessly and negligently operated its railroad train in such a manner as to

frighten the horse of the plaintiff which he was driving and which resulted in injury to the plaintiff. There was a verdict and judgment for the plaintiff in the sum of \$200. Defendant appeals and appears here as plaintiff in error.

Jennie Peacock, as surviving widow and heir at law of J. N. Peacock, deceased, on May 16, 1922, filed a motion to dismiss the appeal, a copy of which motion was served on the plaintiff in error. The motion to dismiss is supported by an affidavit and is on the ground that the defendant in error, J. N. Peacock, died on the 9th day of March, 1921, and that more than a year has elapsed since the death of defendant in error and this action has not been revived in the name of the personal representatives of the said J. N. Peacock, deceased; that under section 5293, Revised Laws of Oklahoma 1910, the plaintiff in error cannot now revive the action.

[1, 2] The plaintiff in error has not filed any response to the motion to dismiss the appeal, neither does it deny the grounds thereof. Under said section 5293, supra, we think the appeal should be dismissed. Said section reads as follows:

"An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successors, unless in one year from the time it could have been first made, except as otherwise provided by law."

The motion is sustained, and the appeal is hereby dismissed.

HARRISON, C. J., and JOHNSON, KENNAMER, and NICHOLSON, JJ., concur.

(86 Okl. 351)

MUSGRAVES v. CANNON. (No. 10665.)
(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

Appeal and error §773(2)—Appeal dismissed for failure to file brief.

Where a cause pending in this court has been set for hearing on the regular printed docket, and no appearance is made on behalf of the plaintiff in error, nor brief filed in compliance with rule No. 7 of this court (165 Pac. vii), and no showing made why the cause has not been briefed, this court will assume that the appeal has been abandoned, and the same will be dismissed for failure to file brief.

Appeal from District Court, Atoka County; J. H. Linebaugh, Judge.

Action between Tom S. Musgraves and James A. Cannon. From a judgment for the latter, the former appeals. Appeal dismissed.

Hatchett & Ferguson, of Durant, for plaintiff in error.

J. W. Clark, of Atoka, for defendant in error.

KENNAMER, J. This is an appeal by T. S. Musgraves from a judgment rendered in the district court of Atoka county in favor of J. A. Cannon.

The cause was set for hearing and submission on April 11, 1922. No appearance has been made on behalf of Musgraves, plaintiff in error, nor brief filed, as required by rule No. 7 of this court. Motion was filed on May, 8, 1922, by the defendant in error, to dismiss the appeal.

In this situation, the motion is sustained, and the appeal dismissed.

HARRISON, C. J., and JOHNSON, MILLER, and NICHOLSON, JJ., concur.

(87 Okl. 7)

HUFF v. OKLAHOMA STATE BANK et al.
(No. 10842.)

(Supreme Court of Oklahoma. July 11, 1922.)

(Syllabus by the Court.)

1. Banks and banking §131—Bank notified that person other than depositor claims deposit must hold deposit a sufficient time to afford other person opportunity to assert claim.

Where money is deposited in a bank to the credit of one person, and thereafter the bank receives notice that it is claimed by another, the bank upon proper notice is bound to hold the deposit a sufficient length of time to afford such person opportunity to assert his claim, and if the party has a reasonable time allowed him for the purpose of asserting his claim, and fails to do so, the bank may pay the deposit to the depositor without any liability to the adverse claimant.

2. Banks and banking §154(9)—Reasonable time for person to assert claim to deposit made by another is generally for jury.

The general rule is that what is a reasonable time for a person to assert his claim is a mixed question of law and fact, which under proper instruction should be submitted to the jury.

3. Husband and wife §129(4)—Wife estopped from asserting claim to deposit made by husband on failure to assert rights within a reasonable time.

When a wife knowingly permits her husband to deposit her money in the bank to his credit, and thereafter notifies the bank of her claim, and the bank holds the money a reasonable time in order for her to assert her rights, and she fails to assert them within a reasonable time, the grounds of estoppel will apply to her the same as any other individual.

Appeal from District Court, Pontotoc County; J. W. Bolen, Judge.

Action by Laura J. Huff against the Oklahoma State Bank and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Wimbish & Duncan, of Ada, for plaintiff in error.

King & Crawford and B. H. Epperson, all of Ada, for defendant in error Oklahoma State Bank.

McNEILL, J. This action was commenced in the district court of Pontotoc county by Laura J. Huff against John Huff for divorce, and the Oklahoma State Bank was joined as defendant, the plaintiff seeking to recover \$850 deposited in the bank in the name of John Huff, but was the money of plaintiff, and the plaintiff notified the bank not to pay out said money, and the bank disregarded said notice, and permitted the same to be withdrawn by Huff, and prayed judgment against the bank for said amount. The defendant bank filed its answer and denied it had any money belonging to plaintiff deposited in the name of John Huff, and alleged that there was certain money in the bank, and after the bank received notice of the claim of plaintiff held the same for a reasonable time in order that plaintiff might file garnishment, or take other proceedings to restrain Huff from withdrawing the same, but the plaintiff refused to take any steps to prevent the bank from paying said money to Huff, and she is estopped by her negligence in not taking the proper steps to protect herself. The case was submitted to the jury, and the jury returned a verdict in favor of the defendant and against the plaintiff. From the said judgment the plaintiff has appealed.

The facts are substantially as follows: That the plaintiff and John Huff were husband and wife, and in June, 1917, certain money was deposited in the bank by John Huff to his credit. The plaintiff and her husband separated, and on the 9th day of July, 1917, the plaintiff and her attorney served written notice upon the bank that plaintiff claimed the money in the name of John Huff and ordered the bank not to pay the same to John Huff. The evidence is conflicting as to what was said; it being contended by the bank that plaintiff and her attorney were advised by the bank that the money would be held a reasonable time or as long as possible in order to permit her to bring garnishment proceedings, or obtain a restraining order to prevent them from paying out said fund. A few days after service of the notice on the bank, its president, at the request of Huff, called on Mrs. Huff, asking her to sign a release, which she refused. The bank held the funds until the 18th day

of July. The plaintiff had taken no steps to obtain said money when John Huff and his attorney came and presented a check to the bank and demanded the money, which was paid by the bank. On the 20th day of July plaintiff commenced her divorce proceeding and had a restraining order issued against the bank paying the money.

[1, 2] For reversal it is contended that the court erred in refusing to instruct the jury to return a verdict in favor of plaintiff and against the defendant. We think there was no error in this refusal. In this jurisdiction, when a party deposits funds in a bank, the relation of debtor and creditor exists between the bank and the depositor. In regard to money deposited in the bank in the name of one person, and claimed by a third party, the general rule appears to be as follows:

"The law presumes that a deposit belongs to the person in whose name it is entered, and the bank cannot question his right thereto, and may lawfully pay it out on his order. * * * If a deposit is claimed by a person other than the depositor who forbids the bank from paying it to any person other than himself, the bank may be held liable for a disregard of such notice in case the claim is substantiated. * * * However, the bank cannot be required to hold the money beyond a reasonable time in order for the claimant to assert his rights, and, if he fails to assert them within such time, he is estopped." See 7 C. J. 639, 640.

In the case of Drumm-Flato Commission Co. v. Gerlack Bank, 92 Mo. App. 326, it is stated:

"Where a bank receives money as the property of A., and before payment acquires notice of B.'s claim thereto, it cannot be required to hold said money beyond a reasonable time for B. to protect his rights; and, if he does not assert his rights within such time, he will be estopped. What is a reasonable time is a question for the jury."

See Drumm-Flato Commission Co. v. Gerlach Bank, 107 Mo. App. 428, 81 S. W. 503.

The evidence in the case disclosed the bank held the money for nine days after receiving the notice of the plaintiff. Whether this was a reasonable time was a question for the jury, and there was no error in overruling the motion to instruct a verdict for plaintiff.

It is next contended that the court erred in the giving of certain instructions. The principal objection is made to instruction No. 5, where the court advised the jury that, in determining whether the plaintiff acted within a reasonable time or not, they should take into consideration all the circumstances of the case, and that the plaintiff would have a reasonable length of time to determine her rights in the matter, but no more, and it was her duty to determine her rights in the matter to protect her property by suit. We

think there was no error in the giving of this instruction. The instruction, when considered with the other instructions, we think fairly submitted the case to the jury.

The plaintiff requested the court to advise the jury they should take into consideration plaintiff's business experience, in determining whether she acted within a reasonable time. We think there was no error in refusing this instruction because there was no evidence regarding her business experience. Further, at the time she served the notice on the bank, she was acting upon the advice of her lawyer who was present representing her and advising her of her rights.

[3] It is next contended that the ground of estoppel or laches does not apply to a wife in a transaction between husband and wife. This may be true, but this is a transaction with a third party, and the rule in 16 Cyc. 777, is stated as follows:

"A wife who knowingly permits her husband to deal with her property as his own will be estopped to assert her ownership against persons who have dealt with the husband in reliance on his apparent ownership or authority."

There are no authorities cited to support any of the other assignments of error, and therefore will not be considered by the court. *Blue v. Board of County Com'rs, Garvin County*, 82 Okl. 178, 198 Pac. 850.

For the reasons stated, the judgment of the court is affirmed.

JOHNSON, MILLER, KENNAMER, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 214)

BERQUIST v. THOMAS. (No. 10345.)

(Supreme Court of Oklahoma. June 13, 1922.)

(Syllabus by the Court.)

1. Brokers \S 85(7)—Subsequent contract between purchaser and seller modifying terms of original contract held admissible in broker's action for commission.

In an action by a real estate broker to recover commission for making a sale which has not been completed, where the broker procures a written contract signed by the purchaser and approved by the seller, it was not error to introduce in evidence a subsequent contract between the purchaser and seller, which changed or modified the terms of the original contract in regard to the payments only and what was done by the parties under and by virtue of said latter contract.

2. Contracts \S 164—Two written agreements, one supplementary to the other, construed as constituting one contract.

The general rule is that two written agreements, one being supplementary to the other, should be construed together as constituting one contract. This is true although not dated

at the same time; yet they refer to the same subject-matter, and on their face show that each was executed as a means of carrying out the intent of the other.

3. Brokers \S 63(1)—Where broker procures purchaser ready, willing, and able to buy on seller's terms, and seller refuses to sell, broker is entitled to commission.

Where a real estate broker procured a purchaser for the land listed with him that was ready, willing, and able to buy, upon the terms imposed by the seller, and secured the signature of said purchaser to an enforceable written contract of sale, and the seller refused to make the sale, the broker has earned his commission.

4. Appeal and error \S 1002—Verdict on conflicting evidence not disturbed.

Where the evidence is conflicting, but there is sufficient evidence upon which the jury could reasonably predicate the verdict, and the instructions given by the court are free from error, this court will not reverse the judgment on appeal.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

Action by Ross E. Thomas against Sarah E. Berquist. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Eagleton, of Norman, for plaintiff in error.

Wilson, Tomerlin & Threlkeld, of Oklahoma City, for defendant in error.

McNEILL, J. This action was commenced in the district court of Oklahoma county by defendant in error against the plaintiff in error to recover the sum of \$500 for commission for procuring a purchaser for certain real estate.

The petition alleged E. T. Bynum was the duly authorized agent of defendant, and, pursuant to her instructions, listed the property, being a farm, with plaintiff for sale at \$8,500 cash net. The plaintiff procured Charles O. Rhoades, who agreed to purchase the land from the defendant for the sum of \$9,000 cash. Defendant entered into a written contract with Rhoades for the sale of said land for \$9,000.

The defendant answered, denying that she was the owner of the land, but admitted that she had an interest in the same, denied that plaintiff was her agent, and denied that E. T. Bynum had any authority to employ an agent to sell the land. The case was tried to the jury, and a verdict returned in favor of the plaintiff and against the defendant. Judgment was rendered on the verdict, and from said judgment the defendant has appealed.

The defendant for reversal first contends that the court erred in permitting the plaintiff to introduce certain testimony which was objected to at the time by the defendant. A

written contract was entered into on the 16th day of October, 1917, by E. T. Bynum, as agent of Mrs. Berquist, and Charles O. Rhoades, for the sale of this land for the sum of \$9,000, to be paid as follows: \$1,000 placed in escrow in the American National Bank of Oklahoma City together with the contract and \$8,000 to be paid the 1st of January, 1918. This contract disclosed Mrs. Berquist placed her written approval on the same. Mrs. Berquist resided in Nebraska, and came to Oklahoma City about the 1st of January or a little before to complete the transaction. The parties had several meetings regarding the sale of the land, and on the 18th day of January, 1918, another written contract was entered into. This contract provided plaintiff would pay \$6,000 cash and \$3,000 within five years. It also provided that the carrying of this deferred payment was to be subject to the approval of George Berquist, the son of the defendant. The parties telegraphed to George Berquist, and he refused to consent to the deferred payment. The plaintiff contends that they were to meet the next Monday at the office of Dr. Bynum and complete the transaction. The plaintiff contends that Rhoades had made arrangements to pay the full \$9,000 and was present to do so, but that the defendant left for Nebraska and refused to complete the transaction.

[1, 2] Plaintiff in error contends it was error to permit any evidence regarding the introduction of the second contract and what the parties did in carrying out its terms. We think there was no error in admitting this evidence. The second contract, according to the evidence, although the evidence is conflicting, was a part and parcel of the same transaction, and so disclosed, and, while not executed at the same time, it was for the purpose of carrying into effect the sale of the land. This court in the case of *Brake v. Blain*, 49 Okl. 486, 153 Pac. 158, stated as follows:

"Although not executed at the same time, where two written instruments refer to the same subject-matter and on their face show that each was executed as a means of carrying out the intent of the other, both should be construed as one contract."

In the case of *Kelly v. Baughman* (Okl.) 167 Pac. 80, the court stated:

"The two agreements in writing presented here constitute one contract, being supplementary one to the other, and should be construed together. This is true although not dated at the same time; yet they refer to the same subject-matter, and on their face show that each was executed as a means of carrying out the intent of the other."

We think there was no prejudicial error in the introduction of this evidence.

[3] It is next contended that the defendant in error was not entitled to recover, for the reason the contract entered into in January, 1918, was not an enforceable contract, for the reason the contract was not definite and certain regarding the executing of a note and mortgage of \$3,000. We do not think this contention is well taken. When the two contracts are taken together, and construed as one contract, and the evidence introduced regarding that portion of the latter contract that is indefinite and uncertain, there was an enforceable contract. The rule appears to be well settled in this jurisdiction, where a real estate broker is employed to procure a purchaser for property and seeks to recover commission for making sale which has not been completed, it is necessary for him to prove that he had a purchaser who was ready, willing, and able to purchase, and, when he procures a contract from the purchaser to buy which is enforceable against him, and executed by the seller, he has earned his commission. See *Gilliland v. Jaynes*, 36 Okl. 563, 129 Pac. 8, 46 L. R. A. (N. S.) 129; *Childs v. Moore*, 57 Okl. 638, 157 Pac. 333; *McCartney v. Shores*, 77 Okl. 273, 188 Pac. 663; *Piller v. Thompson* (Okla.) 202 Pac. 1016.

The other assignments of error of plaintiff in error are subdivided as follows:

First. Where the property is listed at a net price by the owner, the broker cannot collect the commission unless the sale is consummated.

Second. A real estate agent who takes property for sale with knowledge that the party contracting has a defective title and the trade fails for that reason he cannot recover his commission.

Third. The contract provided for a cash consideration to be paid in cash, and, the purchaser produced being unable to pay said purchase price in cash, plaintiff is not entitled to his commission.

[4] The evidence in this case is conflicting upon all these questions, and why the sale was not consummated, it being contended by defendant in error that the plaintiff in error left the state of Oklahoma and refused to consummate the deal, and the defect of title was not the cause of the failure to consummate the deal. There was evidence that the plaintiff in error was able to pay the full purchase price in cash. The court instructed the jury regarding all these questions. Neither party excepted to any of the instructions given, nor requested any additional instructions, and there is evidence in the record to support the judgment and the finding of the jury.

This court in a long line of decisions has announced the rule that, where the evidence is conflicting, but there was sufficient evidence upon which the jury could reasonably predicate the verdict, and the instructions

given were free from error, this court will not reverse the judgment.

There being sufficient evidence in the record to sustain the finding of the jury, and no exceptions having been taken to the instructions, the judgment of the court will be affirmed.

JOHNSON, MILLER, ELTING, KENNAMER, and NICHOLSON, JJ., concur.

(86 Okl. 279)

CALLAHAN v. NIDA. (No. 10682.)

(Supreme Court of Oklahoma. May 23, 1922.
Rehearing Denied July 11, 1922.)

(Syllabus by the Court.)

1. Appeal and error \Leftrightarrow 15—One appeal upon one petition in error and one case made from separate judgments in separate actions tried together for convenience only dismissed for duplicity.

Where three separate actions between the same parties were tried together for convenience only, but separate verdicts and judgments were entered, and the plaintiff prosecutes one appeal upon one petition in error and one case made, such appeal may be dismissed for duplicity.

2. Assignments without merit.

Record examined, and held that the assignments of error are without merit and the appeal should be dismissed.

Appeal from District Court, Logan County; John P. Hickam, Judge.

Actions by J. Y. Callahan against E. V. Nida. Judgments for defendant, and plaintiff appeals. Appeal dismissed.

Pearson & Baird, of Oklahoma City, for plaintiff in error.

John Adams, of Guthrie, for defendant in error.

KENNAMER, J. J. Y. Callahan, plaintiff in error, prosecutes this appeal against E. V. Nida, defendant in error, to reverse two distinct judgments rendered in favor of the defendant in error in the district court of Logan county, wherein three different causes of action were tried together before the same jury.

The record discloses that J. Y. Callahan commenced an action of forcible detainer against E. V. Nida before a justice of the peace, which resulted in a judgment in favor of the plaintiff, from which judgment the defendant, Nida, appealed to the district court; that after said cause had been filed in the district court on appeal, the plaintiff, Callahan, commenced a replevin action against Nida to recover possession of a number of cattle, hogs, etc., and that the plain-

tiff, Callahan, instituted a second replevin action against the defendant, Nida, in the district court to recover possession of certain household goods, cream separator, and Soudan grass seed. It appears that all three of the actions were instituted about February, 1918; that in December, 1918, the parties by consent proceeded to try the three actions at the same time before the same jury for the convenience of the parties. No order of the court was made consolidating the actions. The jury returned a separate verdict in the unlawful detainer action in favor of the defendant.

The defendant made no claim to the right of possession to the property replevied in the two replevin actions on the date of the trial, but had filed an answer in the actions, pleading that he was entitled to certain damages in each of the cases. The jury returned a single verdict in the replevin actions, finding in favor of the defendant for damages. The trial court entered two distinct judgments upon the two verdicts of the jury in the three causes. The plaintiff filed two different motions for a new trial, which were overruled by the court. To reverse the judgments of the trial court, this appeal has been prosecuted by filing one petition in error in this court and case-made of the record.

The three actions were instituted by the plaintiff, Callahan, by reason of a controversy having arisen between him and the defendant, Nida, with respect to the use and occupancy of certain lands owned by Callahan by Nida. It appears that in August, 1917, Callahan made an oral contract with Nida to work the land of Callahan and look after certain live stock of Callahan's which he had upon the land, including about 20 head of Holstein milch cows; that Callahan undertook to dispossess Nida about February, 1918, and, on account of a dispute between the plaintiff and defendant as to the terms of the contract entered into, the plaintiff instituted the three actions against the defendant, which resulted in the judgments rendered by the trial court upon the verdicts of the jury.

[1] We are clear that this appeal should be dismissed for the reason the petition in error discloses on its face that the plaintiff seeks to have this court review by one peti-

tion in error two distinct judgments determining three different causes of action, which were never consolidated by the trial court. It is true the parties for convenience submitted the three different causes of action to the same jury upon the same evidence, but it has been held that, where three cases are tried together and the same evidence was presented by consent of the parties and a single decree entered, and the pleadings, taken together, make issues to which the decree is responsive, the cases on appeal will be treated as if an order of consolidation had been made. *Brammell v. Adams*, 146 Mo. 70, 47 S. W. 931. But in the instant case two distinct judgments were rendered, and we can conceive of no actions where the issues raised by the pleadings could be more distinct than in an unlawful detainer action and a replevin action.

In the case of *Louisville & N. R. Co. v. Summers*, 125 Fed. 719, 60 C. C. A. 487, the Circuit Court of Appeals of Sixth Circuit held:

"Where two separate actions depending on the same facts were consolidated and tried together for convenience only, but the verdicts and judgments were separate, it was improper to include both in a single writ of error."

This court in the case of *Harper et al. v. Stumpff* (Okla. Sup.) 203 Pac. 194, held:

"Where the parties have undertaken, by one appeal upon one petition in error and one case-made, to reverse two or more judgments, this court will dismiss such an attempted appeal for duplicity."

We deem it unnecessary to again review the authorities in support of the rule that an appeal will be dismissed for duplicity, as in the case of *Harper et al. v. Stumpff*, *supra*, Mr. Justice Miller reviewed the authorities at great length.

[2] In the case at bar we have examined the assignments of error and the briefs of the respective parties, and we are clear from an examination of the same and the record in the cause that there appears no reversible error in the record. Therefore the appeal is dismissed.

HARRISON, C. J., and JOHNSON, MILLER, and NICHOLSON, JJ., concur.

(86 Okl. 244)

DODGE et al. v. BISHOP. (No. 10722.)

(Supreme Court of Oklahoma. June 27, 1922.)

(Syllabus by the Court.)

Appeal and error \S 977(3)—**Order granting new trial not disturbed where granted upon consideration of facts, and appeal does not involve a pure and unmixed question of law.**

Where the trial court grants the application of one of the parties for a new trial, on appeal from said order, where the record discloses that the order was granted upon consideration of the facts, and the appeal does not involve a pure and unmixed question of law, the order will not be disturbed on appeal.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

Action by Maggie L. Bishop, doing business as the Bishop Jewelry Company, against Thomas F. Dodge and another. Judgment for plaintiff, and defendants appeal. **Affirmed.**

W. J. Barnard, of Claremore, for plaintiffs in error.

John Q. Adams and Richard H. Wills, both of Claremore, for defendant in error.

MCNEILL, J. This action was commenced in the district court of Rogers county by Maggie L. Bishop, doing business as the Bishop Jewelry Company, against Thomas F. Dodge and W. J. Barnard to recover a judgment against Dodge for the sum of \$953 and to set aside a conveyance from Dodge to Barnard to a certain tract of land situated in Rogers county, and prayed the property be sold to satisfy said judgment. Plaintiff filed an amendment to the petition, alleging it had a judgment for said amount in the state of Michigan, and the foundation of the judgment was the balance due for the purchase price of the land conveyed to Barnard, and by reason thereof plaintiff had a first and prior lien upon the land for the purchase price, and the conveyance to Barnard was with full knowledge of said fact.

The defendant filed an answer, and the cause was tried to the court without a jury, and the court made findings of fact and conclusions of law, and denied the plaintiff any relief, and dismissed plaintiff's petition. Plaintiff filed a motion for new trial, which was granted. It was suggested to the court by both parties at the time that the case might be again submitted to the court upon the same evidence, but the court advised counsel that he would not do so, unless the evidence was transcribed so that he might reconsider the same and read it. From the motion granting a new trial, the defendants have appealed. The plaintiff in error attempts to argue this question upon the law as to the merits of the case and as to the findings of

fact the trial court made. This cannot be considered at this time.

This court in a long line of cases has announced the following rule:

"Where the trial court grants the application of one of the parties for a new trial, and, on appeal from the order, it is not shown by the record that, in granting such application, the court erred upon some pure and unmixed question of law not involving a consideration of the facts, the action of the trial court will not be disturbed." *Everly v. Northcutt* (Okla.) 176 Pac. 921; *Conservative Loan Co. v. Saulsbury*, 75 Okl. 194, 182 Pac. 685; *Richards v. Claxton*, 79 Okl. 133, 192 Pac. 199; *Todd v. Orr*, 44 Okl. 459, 145 Pac. 393.

The record in this case discloses that the court granted the new trial, not upon a question of law, but because the court was not sufficiently advised regarding the findings of facts. This leaves no question to be reviewed by this court, as the court has set his findings of fact aside, and there were no facts found for this court to apply the law to.

The judgment of the trial court is therefore affirmed.

HARRISON, O. J., and KENNAMER, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 251)

GRAHAM et al. v. PERRY. (No. 10721.)

(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

Appeal and error \S 773(2)—**Appeal dismissed for failure to file brief.**

Where a cause pending in this court has been set for hearing on the regular printed docket, and no appearance is made on behalf of the plaintiff in error, nor brief filed in compliance with rule No. 7 of this court (165 Pac. vii), and no showing made why the cause has not been briefed, this court will assume that the appeal has been abandoned, and the same will be dismissed for failure to file brief.

Appeal from District Court, Tulsa County; Conn Linn, Judge.

Action between W. M. Graham and another and J. C. Perry. From judgment for the latter, the former appeal. **Appeal dismissed.**

West, Sherman, Davidson & Moore, of Tulsa, for plaintiffs in error.

Woodson E. Norvell, of Tulsa, for defendant in error.

KENNAMER, J. This is an appeal by W. M. Graham and United States Fidelity & Guaranty Company, a corporation, from a judgment rendered in the district court of Tulsa county in favor of J. C. Perry.

• \S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The cause was set for hearing and submission on April 18, 1922. No appearance has been made on behalf of W. M. Graham and United States Fidelity & Guaranty Company, a corporation, plaintiffs in error, nor brief filed as required by rule No. 7 of this court.

In this situation the court will assume that the appeal has been abandoned. It is therefore ordered that the appeal be, and the same is, dismissed.

HARRISON, C. J., and JOHNSON, MILLER, and NICHOLSON, JJ., concur.

(86 Okl. 254)

EDMONDSON v. WELLS. (No. 11265.)

(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

Appeal and error \S 781(4)—Appeal involving appointment of guardian for minor dismissed, as presenting moot question on minor's arrival at majority pending appeal.

Where the district court, on an appeal from the county court, orders the county court to appoint a certain person, naming him, as guardian of a certain minor, and an appeal is taken from this order to the Supreme Court, but said order is not superseded, and the county court, pursuant to such order of the district court, appoints the person named in such order as guardian of the minor and, pending the appeal in this court, the minor arrives at his majority and no practical relief can be gained by a decision in this court, the questions sought to be presented to this court by the appeal have become moot and will be regarded as abstract and hypothetical and not necessary for decision, and the appeal will be dismissed.

Appeal from District Court, Muskogee County; Benjamin B. Wheeler, Judge.

Proceeding in the county court for the appointment of a guardian for Harris Tucker, a minor. From order of the district court on appeal, directing the county court to appoint Oscar A. Wells as guardian, E. A. Edmondson appeals. On motion to dismiss appeal, on the ground that the case has become moot in view of minor's arrival at majority pending appeal. Appeal dismissed.

Howell Parks, of Muskogee, for plaintiff in error.

Neff & Neff, of Muskogee, for defendant in error.

MILLER, J. E. A. Edmondson, as plaintiff in error, prosecutes this appeal from an order of the district court of Muskogee county, Okl., made on the 16th day of September, 1919, directing the county court of

Muskogee county to appoint Oscar A. Wells as guardian of the person and estate of Harris Tucker a minor, in the place and stead of E. A. Edmondson. This judgment was not superseded, and the county court of Muskogee county, pursuant to said order, appointed Oscar A. Wells as guardian of the person and estate of said Harris Tucker, a minor, and said Oscar A. Wells duly qualified and proceeded to act as such guardian until said Harris Tucker arrived at his majority, which was on the 2d day of January, 1922.

The defendant in error has filed a motion to dismiss the appeal, for the reason that the questions sought to be raised by this appeal have become moot.

In the case of *Doctors' Oil Co. v. Adair et al.* (Okl. Sup.) 200 Pac. 858, this Court said:

"Where an oil and gas lease by its terms expires while an action is pending for the cancellation thereof, and no practical relief can be gained by a decision, the case becomes mooted, and will be regarded as abstract and hypothetical, and not necessary for decision, and will be dismissed."

See, also, *State of Oklahoma v. Taylor et al.*, 82 Okl. 220, 200 Pac. 149; *Thomason, County Treasurer, v. Board of County Commissioners*, 56 Okl. 79, 155 Pac. 881; *Parish v. School District No. 19* (Okl. Sup.) 171 Pac. 461; *Killough v. Ft. Supply Tel. Co.*, 55 Okl. 198, 154 Pac. 1192.

The appeal is hereby dismissed.

HARRISON, C. J., and JOHNSON, KENNAMER, and NICHOLSON, JJ., concur.

(87 Okl. 12)

LAWRENCE v. CAREY et al. (No. 10781.)

(Supreme Court of Oklahoma. July 11, 1922.)

(Syllabus by the Court.)

Appeal and error \S 781(4)—Appeal involving oil and gas lease dismissed as presenting moot question, where lease expires pending appeal.

Where an oil and gas lease, by its terms, expires while an action is pending for the cancellation thereof, and no practical relief can be gained by a decision, the case becomes moot, and will be regarded as abstract and hypothetical, and not necessary for decision, and will be dismissed. *Doctors' Oil Co. v. Adair et al.* (Okl. Sup.) 200 Pac. 858.

Appeal from District Court, Cotton County; Cham Jones, Judge.

Action by Nellie Carey against A. D. Lawrence, and others, to cancel a certified oil and gas lease. From judgment holding the lease valid, and decreeing certain defendants to be the owners thereof, and directing that named defendant execute an assignment of

said lease to certain defendants, the named defendants appeals. Appeal dismissed.

S. I. McElhoes, of Lawton, and Bridges & Vertrees, of Waurika, for plaintiff in error.

L. E. McKnight, of Enid, Johnson & Stevens and Parmenter & Parmenter, all of Lawton, for defendants in error.

MILLER, J. A. D. Lawrence, as plaintiff in error, prosecutes this appeal from a judgment of the district court of Cotton county, Okla., entered on the 1st day of February, 1919, decreeing that certain of the defendants in error were the owners of an interest in and to the oil and gas lease in controversy, and directing that the plaintiff in error execute to said defendants in error a good and sufficient assignment of said lease.

The attorney for plaintiff in error has, under date of June 3, 1922, filed in this court the following suggestion:

"The plaintiff in error, A. D. Lawrence, is now deceased and the lease involved in this suit is also dead, so that the questions involved herein are now moot. Under such circumstances the administrator of the estate of A. D. Lawrence has not felt it advisable to revive the case before its disposition, hence, under the circumstances, makes the suggestion to the court, leaving the disposition of the case to the court."

As the questions presented by this appeal have become moot, this appeal will be dismissed under the authority of the following cases: *Doctors' Oil Co. v. Adair et al.* (Okla. Sup.) 200 Pac. 858; *Edmondson v. Wells* (No. 11265, Oklahoma) 207 Pac. 969 opinion filed June 20, 1922; *Oklahoma v. Taylor et al.*, 82 Okla. 220, 200 Pac. 149; *Thomason County Treasurer, v. Board of County Commissioners*, 56 Okla. 79, 155 Pac. 881; *Parrish v. School District No. 19* (Okla. Sup.) 171 Pac. 461; *Killough v. Ft. Supply Tel. Co.*, 55 Okla. 198, 154 Pac. 1192.

The appeal is hereby dismissed.

MCNEILL, ELTING, KENNAMER, and NICHOLSON, JJ., concur.

(86 Okla. 201)

NORMAN v. NORMAN. (No. 12719.)

(Supreme Court of Oklahoma. June 6, 1922.)

(Syllabus by the Court.)

1. Appeal and error \S 794—On motion for dismissal for failure of plaintiff in error to comply with orders of court, plaintiff must show a legal defense.

When a motion by defendant in error has been filed in this court to dismiss an appeal because the plaintiff in error has failed to comply with the orders of this court, and this court has granted plaintiff in error time in which to respond to such motion, it is the duty

of such respondent to set up in his response a concise statement of any existing facts that would constitute a legal defense to such motion to dismiss.

2. Appeal and error \S 794—Motion for dismissal for noncompliance by plaintiff in error with order of court will be sustained, where response does not state facts showing compliance or constitute a legal defense for noncompliance.

Where the plaintiff in error files a response and fails to state facts which show that he has complied with the order of the court complained of, or fails to state facts which constitute a legal defense for his failure to comply with the order complained of, this court may sustain such motion and dismiss the appeal.

3. Appeal and error \S 1236—Where appeal is dismissed for plaintiff in error's failure to pay money as required by supersedeas bond, court will render judgment against sureties on bond.

When on application of plaintiff in error to this court he is granted a supersedeas, and one of the conditions of such supersedeas bond is that the plaintiff in error will do and perform the things which he may be ordered to do and perform by this court, and such plaintiff in error fails to pay certain money to the defendant in error pending the appeal, and by reason of such failure to pay said sums of money the appeal is dismissed, it is the duty of this court to render judgment against the sureties on such supersedeas bond.

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

Application by Maude E. Norman for citation in contempt proceeding against Robert S. Norman for failure to comply with the former orders of the trial court in the payment of money for the support of their minor children. Citation issued. Verdict against Robert S. Norman, finding him guilty of indirect contempt. Judgment on the verdict committing him to the county jail of Creek county. Robert S. Norman appeals. Appeal dismissed for failure to comply with the orders of this court, and judgment affirmed.

On March 29, 1918, Robert S. Norman filed a petition in the superior court of Creek county praying for a decree of divorce against his wife, Maude E. Norman. Issues were joined, and on June 19, 1918, a trial was had, which resulted in a judgment granting the plaintiff, Robert S. Norman, a decree of divorce. The decree awarded certain property to Maude E. Norman, also the care and custody of their two minor children, Richard L. Norman, age five years, and George F. Norman, age three years. The decree further provided that plaintiff, Robert S. Norman, pay to defendant, Maude E. Norman, by depositing in the First National Bank of Sapulpa, Okla., the sum of \$30 each month, in advance, from the date of the de-

cree for the support and maintenance of said two minor children. This judgment was not appealed from. That part of the judgment requiring the payment of \$30 a month was complied with only at irregular intervals, and several citations were issued by the court against the plaintiff, requiring him to appear and show cause why he should not be committed for a contempt in failing to comply with the order of the court.

On June 6, 1921, a duly verified application for citation was filed, alleging his failure to comply with the judgment of the court, in that he had failed to pay the \$30 per month for certain months in 1920 and certain months in 1921. On this application a citation was issued. On July 12, 1921, an answer was filed, in which he alleged his inability to comply with the order of the court. In support of this allegation he set out his approximate earnings and expenses for the year 1920. He further stated that he had remarried in 1919; that his present wife owned certain land on which there was a mortgage indebtedness, and that he had to pay the sum of \$336.00 per annum on this indebtedness and pay certain amounts as premiums on life insurance.

On the 28th day of September, 1921, the case was called for trial in the superior court of Creek county. Robert S. Norman asked and was granted a jury trial, which resulted in a verdict finding the defendant guilty of indirect contempt of court and leaving his punishment to be fixed by the court.

A motion for a new trial was filed, which was overruled by the court. Thereupon the court sentenced Robert S. Norman to jail until he complied with the order of the court by paying all money due and payable under the former judgment of the court up to the date of the sentence, which was the 3d day of October, 1921. Robert S. Norman gave notice of appeal, perfected this appeal, and appears here as plaintiff in error.

On the 12th day of October, 1921, on the application of the plaintiff in error, this court granted a supersedeas bond, staying the jail sentence of the trial court and admitting said Robert S. Norman to bail pending the determination of this appeal. Pursuant to this order a supersedeas bond in the sum of \$500 was approved by the court clerk and filed in the superior court of Creek county.

On the 10th day of January, 1922, this court made an order requiring the plaintiff in error to pay the sum of \$25 per month, beginning on the 1st day of September, 1921, for the support of said minor children and the further sum of \$100 as attorney fees for the use and benefit of the attorneys of the defendant in error in defending this appeal in this court.

On January 28, 1922, the defendant in error filed a motion in this court to dismiss this appeal, because the plaintiff in error had

failed to comply with the order of this court made on January 10, 1922. A copy of this motion was served on Preston S. Davis, attorney for plaintiff in error, by the sheriff of Craig county, Okl. The plaintiff in error ignored this motion and the service thereof, and on the 16th day of May, 1922, this court made an order, giving plaintiff in error 10 days to file a response to the motion to dismiss on account of his failure to comply with the court order. On May 25, 1922, the plaintiff in error filed the following response:

"Response by plaintiff in error to the defendant in error's motion to dismiss appeal on account of failure of plaintiff in error to comply with an order of the Supreme Court: The plaintiff in error respectfully avers that he had no notice of the application for any order from the Supreme Court, nor did his counsel of record have any notice that defendant in error would make application for any such order, nor has any order made by the Supreme Court in this case ever been served upon him, nor upon his counsel of record in this case, nor did the plaintiff in error herein nor his counsel of record in this cause have any notice whatever that counsel for the defendant in error would on the 16th day of May, 1922, apply to this court to dismiss the appeal of the plaintiff in error on the ground that he had not complied with an order of this honorable court, at which time this court allowed the plaintiff in error 10 days in which to file this response. That the inclosed statement from the clerk of this court was the first and only intimation of the same that this plaintiff in error ever had. That this plaintiff in error has violated no order of this court that he is aware of, and asks that this matter, if pressed further, be set down at some reasonable date in the future, giving the plaintiff in error and his counsel sufficient time to appear before this honorable court, upon reasonable notice, to the end that the same may be heard upon the law and evidence.

"All of which is most respectfully submitted, Preston S. Davis, Counsel of Record for the plaintiff in error."

Preston S. Davis, of Vinita, for plaintiff in error.

Albertson & Blakemore, of Sapulpa, for defendant in error.

MILLER, J. The question now before this court is: Should the motion to dismiss the appeal be sustained or denied?

If the response is sufficient to raise an issue of fact, the motion should not be sustained until the issue of fact is determined. We do not think the response raises any issue either of law or fact. The motion of the defendant in error to dismiss the appeal is supported by her duly verified affidavit that the order of the court, made on January 10, 1922, has not been complied with by the plaintiff in error. The plaintiff in error evades this issue by saying: "He has violated no order of this court that he is aware of."

[1, 2] If the plaintiff in error had complied with the order of the court made on January 10, 1922, it was his duty to so state in his response and give all necessary detailed information that this court might be fully advised. He has neither done this, nor filed any motion or application to modify the order, or set up any reason why it has not been complied with. This response is evasive, it does not meet the issues, and is nothing less than trifling with the court. The response asks that, if the motion is to be pressed further, that it be set down at some reasonable date in the future to give counsel for plaintiff in error sufficient time to appear upon reasonable notice. When plaintiff in error was given opportunity to respond, he is charged with notice that the motion is before this court for its determination. The opportunity given him to respond is that he may set up in concrete form the facts, if any he has, upon which he may rely to defeat the motion. He would not have been called upon to respond if there had been nothing pending before this court. It was his duty, in filing his response, to meet the issue squarely. If he had paid the \$25 per month provided for in the order of this court made on January 10, 1922, he could have so stated in his response.

When a divorce is granted and in the same decree the husband is required to pay to his wife certain sums of money, monthly, for the support of his minor children, and he is convicted of contempt of court and sentenced to jail for failure to comply with such order, and he appeals from such conviction and sentence to this court, the Supreme Court, under its appellate jurisdiction and as an incident to such jurisdiction, has authority to make an order requiring such appellant to pay a specified sum monthly for the support of his minor children, pending a determination of such appeal, and also the necessary attorney fees for the attorneys employed by his former wife in defending against such appeal. See *Spradling v. Spradling* (Okla. Sup.) 181 Pac. 148.

It is also within the inherent power of this court to enforce its orders, and in doing this it may dismiss the appeal.

In *Spradling v. Spradling*, supra, paragraphs 3 and 4 of the syllabus read as follows:

"(3) Where an appeal is taken without supersedeas, from a judgment awarding alimony and a sum for the maintenance and education of minor children, and plaintiff in error refuses to comply with the order of this court to pay to the clerk, for the benefit of an indigent defendant in error, certain counsel fees, etc., and, having disposed of his property, goes and remains without the confines of the state and beyond process of the court, the appeal may be dismissed.

"(4) The dismissal of an appeal under such

circumstances is not a denial of any constitutional right of the plaintiff in error."

In 19 Corpus Juris at page 323, paragraph 746, the rule is stated as follows:

"There is authority to the effect that where, pending an appeal by the husband, the wife is awarded counsel fees for the purpose of resisting the appeal, if the husband fails to pay such fees the court may dismiss the appeal."

This rule is supported in: *Hall v. Hall*, 77 Miss. 741, 27 South. 636; *Tuttle v. Tuttle*, 21 N. D. 503, 13 N. W. 460, Ann. Cas. 1913B, 1; *Brown v. Brown*, 22 Wyo. 316, 140 Pac. 829, 51 L. R. A. (N. S.) 119.

Under the order made by this court, plaintiff in error was to pay \$25 per month for the support of said minor children, beginning September 1, 1921. Ten monthly payments are now due; also \$100 as attorney fees for defendant in error's attorneys, and the plaintiff in error has wholly ignored the order. When called upon for a response, he evades the issue. His appeal is not entitled to further consideration, and it should be dismissed.

[3] A copy of the supersedeas bond, which supersedeas was granted by this court, appears as a part of the case-made, and this bond provides, in part, as follows:

"The conditions of this recognizance are such, that if the above bound, Robert S. Norman, will appear and perform the judgment of said superior court of Creek county, state of Oklahoma, and the judgment of the Supreme Court of said state, should judgment be rendered against him, and will pay the judgment against him in the lower court, should such judgment be affirmed by the Supreme Court of said state, and will do and perform all things which he may be ordered to do by the Supreme Court of the state of Oklahoma, or by the said superior court of Creek county, Oklahoma, then this recognizance shall be null and void, otherwise it shall be and remain in full force, effect and virtue. Robert S. Norman, Principal, Ray Wood, Chas J. Wolfe, Sureties."

The conditions of this bond have been broken by the plaintiff in error failing to do and perform the things he was ordered to do by this court, and the defendant in error is entitled to judgment against the sureties on said supersedeas bond. As the order made by this court on January 10, 1922, requiring the plaintiff in error to pay \$25 per month, has not been complied with, that part of said order is hereby vacated and set aside, and the order of the trial court, requiring him to pay \$30 per month, is reinstated and continued in full force and effect from the date of the order, in all respects as though the order of January 10, 1922, had never been made by this court. That part of the order requiring the payment of \$100 as attorney fees is not vacated, but remains in full force and effect. As the amount now due from the

plaintiff in error under the order of the trial court, requiring him to pay \$30 per month, and the order of this court, requiring him to pay \$100 as attorney fees, exceeds the amount of the supersedeas bond, the defendant in error is entitled to a judgment against the sureties on said bond in the full amount thereof.

Therefore it is by this court considered, ordered, adjudged, and decreed that the defendant in error, Maude E. Norman, do have and recover of and against Ray Wood and Charles J. Wolfe the aforesaid sum of \$500, together with interest thereon at the rate of 6 per cent. per annum from this date, and that this judgment be spread of record in the office of the court clerk of Creek county, Okl., and that execution be issued thereon against the judgment debtors herein. That when this judgment is collected the proceeds shall be applied as follows: First, to the payment of the \$100 as attorney fees, granted by this court, for the use and benefit of the attorneys for the defendant in error in defending this appeal; second, to liquidating the monthly payments of \$30 per month now due and in arrears, and to be applied to such months as may be directed by the trial court or judge thereof.

The appeal is hereby dismissed, and the judgment of the trial court is affirmed.

KANE, JOHNSON, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 258)

MOODY v. MOODY. (No. 12564).

(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

1. Divorce \S 186—Husband's appeal dismissed for failure to comply with orders of Supreme Court for payment of alimony pendente lite.

When a motion by defendant in error has been filed in this court to dismiss an appeal because the plaintiff in error has failed to comply with the orders of this court, and such motion has been duly served on the plaintiff in error, and he neglects to file any response or show any cause why said motion should not be sustained, this court may sustain such motion and dismiss the appeal.

2. Appeal and error \S 1236—Judgment by Supreme Court on supersedeas bond on dismissal of husband's appeal for failure to comply with orders for payment of alimony pendente lite.

When the husband is granted a divorce by the district court, and he appeals from certain parts of the judgment and files a supersedeas bond, which is incorporated in and made a part of the case-made, and after the appeal is

lodged in the Supreme Court, this court makes an order, requiring him to pay certain sums of money monthly as alimony pendente lite, and appellant fails to comply with such order, or show any cause excusing his noncompliance therewith, and on motion of the defendant in error the appeal is dismissed, this court may render judgment against the sureties on such supersedeas bond.

Appeal from District Court, Coal County; J. H. Linebaugh, Judge.

Action by J. A. Moody against Maggie Moody. Judgment was rendered, granting plaintiff a divorce and requiring him to pay certain sums to defendant for the support of a minor child, and decreeing certain property to the defendant, and plaintiff appeals. On defendant's motion to dismiss appeal for plaintiff's failure to comply with certain orders of the Supreme Court for the payment of alimony pendente lite. Appeal dismissed, and judgment affirmed.

O. M. Threadgill, of Coalgate, for plaintiff in error.

G. T. Ralls, of Coalgate, for defendant in error.

MILLER, J. This action was instituted in the district court of Coal county by J. A. Moody, as plaintiff, asking for a decree of divorce against his wife, Maggie Moody. A trial was had, and judgment rendered in favor of the plaintiff, granting to him a decree of divorce, but awarding to Maggie Moody certain property and the care and custody of their minor child, ordering that the plaintiff pay \$30 per month for the support of said minor child and the further sum of \$25 as attorney fees for defendant's attorneys. From that part of the judgment awarding the custody of their minor child to defendant, Maggie Moody, the payment of monthly allowances for the support of said minor child, the attorney fees, and the property decreed to the defendant, the plaintiff appealed to this court, and appears here as plaintiff in error. The appeal was filed in this court on August 23, 1921. Thereafter, on October 25, 1921, on application of the defendant in error, this court made an order requiring the plaintiff in error to pay the sum of \$50 per month as alimony pending the appeal.

[1] On May 17, 1922, the defendant in error filed in this court a motion to dismiss this appeal, which motion states that the plaintiff in error has failed and refused to pay said sum of \$50 per month or any part thereof. This motion is duly verified by the defendant in error. On May 16, 1922, a copy of said motion was served upon the attorney of record for plaintiff in error, and service duly acknowledged by him, and he was also served with a notice that the defendant in error

would file said motion in the Supreme Court on the 17th day of May, 1922, and ask this court to dismiss said appeal because the plaintiff in error had failed to comply with the order of the Supreme Court. Notwithstanding the plaintiff in error was duly served with the notice and copy of motion, and a month has elapsed since the service thereof, yet he has failed and neglected to respond in any way or show any valid reason why said motion should not be sustained. Therefore, under the authority of *Norman v. Norman*, 207 Pac. 970, No. 12719, Oklahoma Supreme Court, opinion filed June 6, 1922, and *Hansing v. Hansing*, 76 Okl. 34, 183 Pac. 978, and cases cited in each of said opinions, the motion should be sustained, and this appeal dismissed.

[2] An examination of the record shows that the plaintiff in error filed a supersedeas bond in the sum of \$300, to abide by the judgment of this court, a copy of which appears as a part of the case-made, with John Hutchinson and Ed. L. Anderson as sureties. The conditions of said bond have been broken by the plaintiff in error failing to perform and do the things he was ordered to do by this court, and the defendant in error is entitled to a judgment against the sureties on said supersedeas bond. As the amount due the defendant in error, under the order of this court made on October 25, 1921, exceeds the amount of the supersedeas bond, the defendant in error is entitled to judgment against the sureties on said bond in full amount thereof. *Norman v. Norman*, supra. Therefore, it is by this court considered, ordered, adjudged, and decreed that the defendant in error, Maggie Moody, do have and recover of and against John Hutchinson and Ed. L. Anderson the aforesaid sum of \$300, with interest thereon at the rate of 6 per cent. per annum from this date, and that this judgment be spread of record in the office of the court clerk of Coal county, Okl., and that execution be issued thereon against the judgment debtors herein.

The appeal is hereby dismissed, and the judgment of the trial court is affirmed.

HARRISON, C. J., and JOHNSON, KENNAMER, and NICHOLSON, JJ., concur.

(86 Okl. 262)

CANODE v. CLAYPOOL & WHEELER et al.
(No. 12976.)

(Supreme Court of Oklahoma. June 27, 1922.)

(Syllabus by the Court.)

1. Master and servant §354(7) — Industrial Commission's decision as to facts in compensation case final.

In a suit instituted in this court to reverse an award of the State Industrial Commission,

the suit must be to reverse an error of law, and not an error of fact. The decision as to all matters of fact is final.

2. Master and servant §354 — Injured employee settling with third party held not entitled to compensation.

On a claim before the Industrial Commission for compensation under chapter 246, Sess. Laws 1915, where the evidence disclosed the injury was caused by the negligence or wrong of another not in the same employ, and the evidence further disclosed that the claimant had settled with said third party and executed a receipt in full relieving said third party from all claim of damages and the amount received by claimant was more than he was entitled to receive under the evidence, under the Compensation Act, held, it is not error to disallow the claim for compensation.

3. Appeal and error §854(2) — Supreme Court will affirm judgment where correct result was reached irrespective of erroneous reasoning by lower court.

This court is not bound by the trial court's opinion as to the effect of the facts found, or its reasoning in reaching its conclusion of law, but will affirm, irrespective of erroneous reasoning, where the correct result is reached.

Appeal from State Industrial Commission.

Proceedings by Walter Canode under the Workmen's Compensation Act for compensation for injuries, opposed by Claypool & Wheeler, employers, and the Associated Employers' Reciprocal Company, insurance carrier. From an order of the Industrial Commission denying the claimant compensation, he appeals. Affirmed.

Graham & Rollins, of Okmulgee, for appellant.

Burford, Miley, Hoffman & Burford, of Oklahoma City, for appellees.

McNEILL, J. This action was commenced in this court by Walter Canode against Claypool & Wheeler and Associated Employers' Reciprocal Company to reverse an order of the Industrial Commission denying the petitioner compensation against his employers, Claypool & Wheeler, and Associated Employers' Reciprocal Company, as insurance carrier. The order of the Commission was dated the 17th day of December, 1921, and was based upon testimony taken before the Commission on July 26, 1921. The Commission found that the claimant was an employee of Claypool & Wheeler and received an accidental injury in the nature of a burn on December 4, 1920, while engaged as a well driller; that the injury grew out of and was in the course of the claimant's employment, and was inflicted by a third party, the Amerada Petroleum Company, a corporation. Thereafter the claimant entered into negotiations with the Amerada Petroleum Company and was paid the sum of \$1,125, for

which the claimant executed a release to said company in full satisfaction for the injury he had received.

The Commission, as a conclusion of law, held the claimant elected to pursue his remedy at law against the Amerada Petroleum Company, and the Commission was without jurisdiction to award him compensation. The Commission dismissed the claim for want of jurisdiction. The appeal involves: First, a construction of section 18, art. 2, c. 246, Session Laws 1915, and the findings of fact of the Commission; second, whether the Commission applied the proper law to the facts as found. Section 18, *supra*, provides in substance, if a workman entitled to compensation under this act be injured by the negligence or wrong of another not in the same employ, he shall elect whether to take compensation under this act or pursue his remedy against such other. The act then provides: The election shall be evidenced in such manner as the Commission may by rule or regulation prescribe. The act then provides: If he elects to take compensation under this act, the cause of action against such other party shall be assigned to the insurance carrier, or, if he elects to proceed against the other person or insurance carrier, the employer shall contribute only the deficiency, if any, between the amount of recovery actually collected and the compensation provided or estimated by this act. It further provides that the compromise of any such cause of action by the employee at any amount less than the compensation provided by the act shall be made only with the written approval of the Commission and otherwise with the written approval of the person or insurance carrier liable to pay the same.

The Commission, as authorized in said section, adopted the following rules and regulations:

"If a workman entitled to compensation be injured by the negligence of another not in the same employ as set out in section 18, art. 2, c. 246, of the Session Laws of 1915, the employee shall elect whether to take compensation under the Workmen's Compensation Act or pursue his remedy at common law against such other in the following manner:

"If he elects to take compensation, he shall so notify the Commission and shall make assignment of his cause of action against such other person to the insurance carrier, and, if he elects to pursue his remedy against such other person causing injury, he shall in writing notify the Commission and the insurance carrier. In the event he fails to make such notification, the Commission will make no award against the insurance carrier for a deficiency if he recovers and collects less than what his compensation would have been under the Workmen's Compensation Act.

[1] This section of the statute and the rules are plain and unambiguous. Under and by virtue of section 10, c. 14, Session Laws 1910, a suit in this court must be to review

an error of law and not an error of fact. The decision as to all matters of fact is final. See *Wilson Lumber Co. v. Wilson*, 77 Okl. 312, 188 Pac. 666, and a long line of decisions of this court following that rule.

In the case of *Associated Employers' Reciprocal Co. v. Industrial Commission* (Okla. Sup.) 200 Pac. 862, this court held, if there was no evidence to support a finding of fact, the appeal then involved a question of law. Counsel for plaintiff in error, however, contends that, under the last-quoted decision, it is the duty of this court to weigh the evidence. That is an erroneous contention. This court has so often decided that the statute was binding on this court, and the finding of the Commission upon a question of fact is conclusive that the contention that this court will weigh the evidence in view of the statutes and decisions of this court must be pronounced futile to the point almost of being frivolous. Counsel contends there is no evidence to support the finding that the injury was caused by the negligence of a third party, to wit, the Amerada Petroleum Company. The evidence of the claimant himself was that the injury was caused by a gas explosion; that the gas came from flow tanks of the Amerada Petroleum Company and filled the air surrounding these tanks and then exploded and caused the injury. It is hard to conceive the idea that this evidence would not be considered sufficient to make a *prima facie* case.

[2] It is next contended that the evidence does not disclose claimant pursued his remedy against the Amerada Petroleum Company. The evidence of the claimant shows that he and his attorney settled with these people for \$1,125 and executed a release to said third party which was in full for any claim or loss or injury or damage arising out of the injury. This evidence is also sufficient to support the finding of the Commission. While the court did not make any finding as to what compensation the claimant would be entitled to under the law, yet his own testimony is copied in the brief of the respondent. He was asked how long from the time he was injured until he was able to go to work, and he answered 10 weeks, and that he was receiving \$15 per day. So under the Compensation Law he would be entitled to receive \$180. By applying section 18, *supra*, of the statute, the claimant having proceeded against a third person, and the law providing the employer shall only be liable to contribute the deficiency between the amount actually collected and the compensation provided under this act, the claimant has received more than \$900 more than he would have been entitled to receive under the act, and is not entitled to recover. This is not considering the defense or failure of claimant to follow the procedure followed in said statute nor the rule of the Commission.

[3] It is unnecessary for us to discuss

whether the Commission erred in concluding as a matter of law that it had no jurisdiction because by applying the law to the findings of fact the claimant is not entitled to recover. This court in a long line of decisions has announced the rule that the judgment of the lower court will be affirmed, if correct, although the wrong reason was given by the trial court. Board of Equalization of Oklahoma County v. First State Bank of Oklahoma City, 77 Okl. 291, 188 Pac. 115; Nance v. Fouts, 68 Okl. —, 173 Pac. 1038; Kibby v. Binion, 70 Okl. —, 172 Pac. 1091.

The complainant contends and cites cases where the claimant, even though he has executed a release to a third party, was permitted to maintain his claim under the Compensation Act. It is unnecessary for us to construe these cases, because in no case cited was the statute the same as ours, nor under facts where the claimant received more from a third party than he was entitled to under the Compensation Act.

For the reasons stated, the order of the Commission is affirmed.

HARRISON, C. J., and JOHNSON, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 262)

RIGDON v. CLAYPOOL & WHEELER et al.
(No. 12977.)

(Supreme Court of Oklahoma. June 27, 1922.)

Appeal from State Industrial Commission.

Proceedings by George B. Rigdon for compensation under the Workmen's Compensation Act, opposed by Claypool & Wheeler, employers, and the Employers' Reciprocal Insurance Company, insurance carrier. From order denying compensation, the petitioner appeals. Affirmed.

Graham & Rollins, of Okmulgee, for appellant.

Burford, Miley, Hoffman & Burford, of Oklahoma City, for appellees.

McNEILL, J. This proceeding was instituted in this court by George B. Rigdon against Claypool & Wheeler, Associated Employers' Reciprocal Insurance Company, and the State Industrial Commission to reverse an order of the Industrial Commission denying the claimant compensation under the Workmen's Compensation Act (Laws 1915, c. 246). The questions involved are identical with the case of Walter Canode v. Claypool & Wheeler (Okl. Sup. No. 12976) 207 Pac. 974, this day decided, and the questions there decided control the questions involved in this case.

The order of the Industrial Commission is affirmed upon authority of the case of Canode v. Industrial Commission Case (No. 12976), this day decided.

HARRISON, C. J., and JOHNSON, ELTING, and NICHOLSON, JJ., concur.

(86 Okl. 263)

BROWN et al. v. MINTER et al. (No. 10684.)

(Supreme Court of Oklahoma. June 27, 1922.)

(Syllabus by the Court.)

Wills §55(5), 166(1)—Evidence held to sustain finding that testator was of sound mind; duress, fraud, or undue influence held not shown.

The record examined, and held, that the order of the district court ordering the will to probate and finding that the deceased at the time of making the will was of sound and disposing mind, and was not acting under duress, fraud, or undue influence, is not clearly against the weight of the evidence, but is supported by a preponderance of the evidence, and will not be reversed.

Appeal from District Court, Marshall County; J. M. Crook, Judge.

Petition by J. O. Minter to probate the will of Joe Brown, contested by Josephine Brown and another. From judgment of the district court admitting the will to probate on appeal from the county court, contestants appeal. Affirmed.

T. B. Orr, of Ardmore, for plaintiffs in error.

J. O. Minter and Rider & Hurt, all of Madill, for defendants in error.

McNEILL, J. This action originated in the county court of Marshall county by J. O. Minton filing a petition to probate the will of Joe Brown, a full-blood Indian, which will had been approved by the county judge of Marshall county. Odie L. Brown and Josephine Brown, minor children of the said Joe Brown, filed a protest against admitting said will to probate, and upon hearing the protest was overruled, and the will admitted to probate. An appeal was taken to the district court, where the case was tried de novo, and the district judge admitted said will to probate. From said judgment appeal has been taken to this court.

The probate attorney, T. B. Orr, was appointed guardian ad litem for said minors. No briefs have been filed, and this court would be justified in dismissing the appeal for want of prosecution, but, in view of the fact that the interests of certain minors are involved, the court has deemed it advisable to examine the record. The material facts are about as follows: Joe Brown, a full-blood Chickasaw Indian, left surviving him his wife, Ella Brown, and two children, the contestants herein, and two stepchildren, Nora Andrews and Alpha Mandress, being children of Ella Brown by a former marriage, and who made their home with Joe Brown since about 10 years of age until

their marriage. The will was executed the 10th day of February, 1918, and Joe Brown died February 14, 1918. At the time of his death he was the owner of 200 acres of land located in Marshall county, which, according to the petition, was valued at \$2,500, and personal property valued at \$250. He bequeathed to his wife 50 acres of land, being one-half of his homestead allotment. He bequeathed to his wife's two daughters, Nora Andrews and Alpha Mandress, 100 acres to them in equal shares. The third bequest was the remainder of the estate to be divided equally between his wife, Ella Brown, his son, Odis L. Brown, and his daughter, Josephine L. Brown. His own children, the contestants, had received an allotment of their own which they still owned, but the stepchildren were noncitizens, and had not received allotments.

It was contended in the trial court that the deceased was not of sound and disposing mind, and was acting under duress, menace, fraud, and undue influence at the time of executing the will. The will was prepared by J. O. Minton, who was named as executor in the will. The executor testified the decedent told him how he wanted to dispose of his property, and appeared to be rational. The subscribing witnesses also testified to that fact. The county judge who approved the will also testified to that fact. The county judge, however, stated that he was not advised that the devisees, Nora Andrews and Alpha Mandress, were stepchildren of the deceased. He stated that Brown was quite sick at the time, but appeared to be rational, having talked to him upon other subjects, and was a fairly intelligent Indian for a full-blood.

The evidence on behalf of opponents consisted of two witnesses, one a physician, and a son-in-law of the physician, but neither of these parties' testimony went to the extent that the deceased was of unsound mind, and unable to understand the nature of the will, although the evidence to a certain extent might be construed that he was hardly able to transact business. The evidence in this case is somewhat conflicting, but the great weight of the evidence supports the judgment of the court that testator was of sound and disposing mind at the time of executing the will. There is no evidence of duress, fraud, or undue influence. The finding of the trial court is not clearly against the weight of the evidence, but, upon the other hand, we think the finding of the court is supported by a preponderance of the evidence.

For the reasons stated, the judgment of the court is affirmed.

HARRISON, C. J., and JOHNSON, ELTING, and NICHOLSON, JJ., concur.

ANDERSON v. STATE. (No. A-3694.)

(Criminal Court of Appeals of Oklahoma.
Feb. 6, 1922. Rehearing Denied
April 17, 1922.)

(Syllabus by the Court.)

1. Criminal law §1144(3)—Where information is first objected to on introduction of evidence or on appeal, it should be sustained if possible.

Where defendant goes to trial, and for first time objects to the information when state attempts to introduce testimony thereunder, or upon appeal, the objection should be overruled, if by any intentment or presumption the information can be sustained.

2. Banks and banking §62 — Information charging cashier with making a false report to bank commissioner and state banking board held sufficient.

For information held sufficient to charge an offense under section 269, Rev. Laws 1910, and reasons therefor, see statement of the case and body of the opinion.

3. Banks and banking §62—Evidence held to support a conviction of a bank cashier for making false reports to state officers.

Evidence examined and held sufficient to support the verdict and judgment.

4. Banks and banking §62—Instruction following statute held not erroneous.

Instruction, defining offense which substantially follows the language of the statute, is held not to be erroneous.

5. Criminal law §1151—Refusal of continuance disturbed only for abuse of discretion.

Applications for a continuance are addressed to the discretion of the trial court. The trial court's action on such an application will not be disturbed, unless a manifest abuse of discretion appears.

6. Criminal law §593—Absence of counsel not a statutory ground for continuance, but if denying continuance prevented a substantial defense, a conviction will be reversed.

Absence of counsel is not made one of the statutory grounds for a continuance. If, however, the trial court's action in overruling an application based on this ground resulted in depriving defendant of the benefit of counsel, or even if it appeared from the record that defendant had a substantial defense to the charge which he was unable to present by reason of the absence of counsel, this court would unhesitatingly set aside a conviction for failure to grant a reasonable continuance.

7. Criminal law §614(1)—Where defendant secured continuance for one day for absence of counsel, refusal of further continuance held not abuse of discretion.

Where defendant has employed two counsel, one of whom is present in court and asks a continuance in order that the absent counsel may have an opportunity to present a "technical defense," without stating in the application what such defense is, and the trial

court continues said cause until the following day in order to give defendant an opportunity to make further arrangements for trial, we find no abuse of discretion in overruling a further motion for continuance presented on the second day, still based on the absence of leading counsel.

Appeal from District Court, Custer County; Thomas A. Edwards, Judge.

J. H. Anderson was convicted of the crime of willfully and knowingly making a false report, with intent to deceive, as to the condition of the bank of which he was cashier, and appeals. Affirmed.

See, also, 204 Pac. 132.

On the 18th day of October, 1919, an information was filed in the district court of Custer county, Okl., charging the defendant, J. H. Anderson, with the crime of willfully, knowingly and feloniously subscribing to and making a false written report of the affairs, financial condition and property of the Farmers' State Bank of Weatherford, Okl., with intent to deceive the State Bank Commissioner, the State Banking Board, and other persons to the informant unknown. The information alleges, in substance, that said defendant, being cashier of the Farmers' State Bank of Weatherford, Okl., prepared and signed a written report showing the financial condition of said bank as of the close of business of the 12th day of May, 1919; that said report discloses that the loans and discounts of said bank owned by it on said date amounted to a sum equal to the value of \$107,258.74, and that certain warrants owned and held by it were of the value of \$37,352.59; that said defendant then and there knew that said report was false and untrue, in that the loans and discounts of said bank on said date amounted to only the sum of \$83,336.57, and the amount of warrants amounted only to \$28,824.89; that the difference in the amount of loans and discounts and the amount of warrants, as shown by said report and as actually existing, was due to the fact that among the loans and discounts and warrants included in said report were certain notes and warrants that were forged and counterfeit instruments, which said fact was then and there well known to the defendant. A list and copy of said notes and warrants are set out in the information. The information charges that said report was by the defendant made with the willful and felonious intent to deceive the Bank Commissioner and the Banking Board of the State of Oklahoma, and other persons to the informant unknown, as to the true financial condition and property of said bank, as of said 12th day of May, 1919.

No demurrer was filed by the defendant to this information but, upon arraignment to same, the defendant entered his plea of "not

guilty," and upon the issues so joined and on the 4th day of November, 1919, said cause was called for trial in the district court of Custer county, Okl. On said date the defendant filed an application for a continuance, and the court made an order continuing the case to November 5, 1919, at which time the defendant filed an additional application for a continuance, which application was overruled, and the case proceeded to trial, resulting in a verdict of conviction and the imposition of a punishment of imprisonment in the state penitentiary for a period of three years.

The evidence in this case shows that the defendant, J. H. Anderson, on the 12th day of May, 1919, and for several years prior thereto, was cashier of the Farmers' State Bank of Weatherford, Okl., and was during all of said time the active managing officer of said bank. That Roy A. Cooper, an Assistant Bank Commissioner of the State of Oklahoma, in the month of July, 1919, made an examination of said bank and from said examination found there were included in the bills receivable of said bank certain notes aggregating the face value of \$23,922.17, which were forged and counterfeit instruments; that among the warrants held by said bank were five warrants of the face value of \$8,527.70, which were forged and counterfeit instruments. That at the time of the examination of said bank there were present the defendant, J. H. Anderson, Walter Anderson, brother to the defendant, A. A. Gray, and Wm. A. Umbach, and J. S. Wilks.

The witness Cooper testified:

"Q. Now, I will ask you, Mr. Cooper, whether as an Assistant Bank Commissioner of the State of Oklahoma you made an examination of the Farmers' State Bank of Weatherford, Okl., and, if so, when? A. I examined them in July, 1919.

"Q. That was at Weatherford, in Custer county, in this state? A. Yes, sir.

"Q. Who was acting as cashier of the bank on that date? A. J. H. Anderson.

"Q. Was he present on that date? A. He was.

"Q. When you made that examination? A. Yes, sir.

"Q. Were any of the other officers or directors present? A. The assistant cashier, Mr. Gray, and a brother of Mr. Anderson—I don't remember his given name—were present; later in the evening Mr. Umbach and Mr. Wilks were present.

"Q. Now, just detail to the jury what you did when you went into the Farmers' State Bank at Weatherford at the time of this examination. A. The first thing I did was to verify the cash, as shown by the books; then I listed the discounts, that's the notes, and took what is known as a transcript of the bank; verified the time certificates and the cashier's checks outstanding; inquired as to the notes as shown, and was told by Mr. Anderson that a

number of them were forged. Do you want me to—

"By Mr. Mitchell: Now, that is objected to as not responsive to the question—that latter part, with reference to the forgery of the notes.

"By the Court: Do you move to strike it out?"

"By Mr. Mitchell: Yes.

"By the Court: It will be stricken at this time.

"By Mr. Zwick: Exception—yes, sir.

"Q. In making this examination as to the notes and warrants in the bank did you find any of them to have been forged? A. I did.

"Q. I wish you would detail to the court and jury how you ascertain that fact.

"By Mr. Mitchell: Now, this testimony is objected to for the reason that the same is without the issues in this case.

"The Court: Overruled.

"Counsel for the Defendant: Save an exception.

"A. My suspicions were directed, first, to a note which had been raised from some \$700 to \$1,700 and another from some \$400 to \$1,400. I asked Mr. Anderson which amount he was carrying, and he said he was carrying the latter amount. I took—I asked where these parties were. He said one lived near Custer, and another lived near Arapaho and—or near Thomas, and I told him to secure an automobile; that I intended to go and inquire of these parties if that note, or those notes, were the ones that they had executed. About that time a clerk of a school district—I don't just recall the school district now, came in with reference to some warrants which had been discounted by the Farmer's State Bank, in Oklahoma City. I was sitting at the desk, right back of the work room; Mr. Anderson was standing leaning on the desk to my right. I took—I made a certified copy of these two warrants, and told the clerk if I wanted him further I would call him. He left, Mr. Anderson—I was then what we call listing the big lines; in other words, going through the notes to see who is borrowing large amounts, and then to ascertain if in our judgment the loan is too great for the security. I was listing these, and Mr. Anderson was standing to my right. I looked at him and says, 'What have you got to say now?' He says, 'They're phony.' I says, 'What else is phony?' He says, 'Oh, there's \$2,000 or \$3,000 in here.' I says, 'Where?' He says, 'In the note case.' I says, 'Can you pick them out?' He says, 'Yes,' and he smiled. He reached around to the left of me, reached into the note case, and he took them out and dealt them out like he was playing cards. I was making a list of them as he was calling them to me, and he put them out faster than I could write. I then asked him if that was all. He said no, there was some warrants that were forged, and he gave me those warrants. I asked him if that was all. He said no, there was some at Kansas City, and he went in and he got his discount sheet and gave me the amounts of the warrants that he had sold in Kansas City; I asked him then if he would make that in writing. He said yes. I went to the front of the bank, asked him for some paper. He offered me letter heads. I told him it was too small, and asked him if he had some legal paper. He said

no. I then left and went out and purchased some legal paper, returned and wrote his statement and handed it to him and asked him: 'Mr. Anderson, is that correct? Is that the facts of it?' He said it was. I asked him to sign it if he would. He says, 'All right.' He signed it, and I swore him to it."

The state introduced in evidence this sworn statement. This exhibit shows that as early as 1915 down to the date of the examination of the bank in July 1919, the defendant in this case forged a great number of notes and warrants, and that on the day of the examination of the bank there were in said bank the forged notes and warrants set out in the information in this case; that the correct amount of said forged notes and warrants was \$32,449.87.

The witness, William Umbach, testified that he was president of the Farmers' State Bank of Weatherford and that J. H. Anderson was its cashier; that he was well acquainted with the signature of the said J. H. Anderson, and that the signature to the written confession of the defendant as to the forgery of the notes and warrants in the bank was the signature of the defendant herein; that he was present in the bank at the time Mr. Cooper, the Bank Examiner, was conducting his examination of the bank, and that he, the witness, after looking through about half the notes in the bank, asked Mr. Anderson, the cashier, "You say all of this bunch has been forged—these are all forgeries, you forged them all?" He says, "Yes, sir." I asked him then, "What did you do with the money?" He says, "That's pretty hard to explain."

J. S. Wilks testified that he was a director of the bank, and that the defendant had had the active management and supervision of the bank for some three or four years; that during the examination of said notes by Mr. Cooper, in the presence of Mr. Umbach and the witness, the defendant stated that said notes were forged; that the defendant was asked what he had done with the money obtained by said forged instruments, and that he replied, "Well, it is hard to tell."

The state then called as witnesses C. J. Welland, Jonathan Jones, W. Peppard, P. M. Peck, A. D. Nikkel, J. J. Yoder, Frank Long, and Joseph J. Miller, whose names were purported to have been signed by this defendant to certain notes described in this information, and each of said witnesses testified that they did not sign the names, nor did they authorize any one else to sign their names for them; nor did they have any business transactions with said bank whereby an obligation was created in the bank's behalf as evidenced by the notes, or otherwise.

The witness M. L. Wood testified that in 1918 and 1919 he was city clerk of the city of Weatherford, Okla., and, being presented with the warrants set out in the informa-

tion, was asked whether the name "M. L. Wood" on the warrants was signed by him, or whether he ever authorized the signing of his name thereto, and the witness testified said warrants did not contain his signature, and that the said M. L. Wood thereon was neither signed by him nor did he authorize any one to sign his name thereto. The exhibits of warrants show that the name of J. H. Anderson as mayor of the city of Weatherford was signed to each of said false warrants.

At the conclusion of the introduction of this testimony the defendant interposed a demurrer to the state's evidence, which demurrer was by the court overruled, and exceptions allowed. There was no testimony introduced by the defendant. A motion for a new trial was thereupon filed, considered by the court, and overruled.

The petition in error in this case recites:

(1) The court erred in overruling plaintiff in error's motion for a new trial.

(2) The court erred in overruling plaintiff in error's supplemental motion for new trial.

(3) The court erred in refusing a continuance and forcing defendant to trial in the absence of his attorney, A. J. Welch; said attorney being unable to attend court on account of his own illness.

(4) There was a total failure of evidence to support the material allegations of the information.

(5) The court erred in giving instructions Nos. 3, 4, 5, and 6.

(6) The court erred in overruling defendant's demurrer to the state's evidence and his motion to be discharged at the close of the case.

A. J. Welch, of Clinton, for plaintiff in error.

S. P. Freeling, Atty. Gen., and Wm. H. Zwick, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). Defendant moved for a new trial on the ground, among others, that the court erred in overruling objection of the defendant to the introduction of any evidence by the state. Such objection was based upon the allegation that the information did not contain facts sufficient to charge the defendant with any crime. While it is urged in the brief of counsel representing the defendant that the information is insufficient, the petition in error does not contain an assignment to that effect.

[1] This court has repeatedly held that where a defendant goes to trial and for the first time objects to the information when the state attempts to introduce testimony thereunder, or upon appeal, the objection should be overruled if by any intendment or presumption the information can be sustained. *White v. State*, 4 Okl. Cr. 1743, 111 Pac. 1010; *Edwards v. State*, 5 Okl. Cr. 20, 113 Pac. 214; *Ex parte Jim Spencer*, 7 Okl.

Cr. 113, 122 Pac. 557; *McDaniel v. State*, 8 Okl. Cr. 209, 127 Pac. 358; *Wilsford v. State*, 8 Okl. Cr. 535, 129 Pac. 80.

[2] The information in this case charges the defendant with the crime of making a false report as to the financial condition of the Farmers' State Bank of Weatherford, as of the close of business of May 12, 1919. The statute on which this information is based reads as follows:

"Every officer, director, agent or clerk of any bank doing business under the laws of the State of Oklahoma who shall willfully and knowingly subscribe to or make any false report or any false statement or entries in the books of such bank, or knowingly subscribe to or exhibit any false writing or paper, with the intent to deceive any person as to the condition of such bank, shall be deemed guilty of a felony, and shall be punished by a fine not to exceed one thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment." Section 269, Rev. Laws 1910.

The foregoing statement of the case includes a substantial outline of the material allegations of the information. In the case of *State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60, the Supreme Court of Idaho held an information substantially like the one in this case to be sufficient as against a demurrer. Such information was based upon section 7128, Rev. Codes of Idaho, the provisions of which are very similar to the statute, above quoted, upon which this information is founded.

It is the opinion of this court that the information in this case is not only sufficient to withstand an objection to the introduction of testimony thereunder, but is good as against a demurrer should one have been lodged upon the ground of insufficient facts.

[3] It is next contended that the evidence on behalf of the state fails to support the material allegations of the information or to prove the commission of any public offense. With this contention the court is unable to agree. No defense whatever was interposed. Reliance was placed entirely upon the failure of the state to prove its case. The evidence clearly establishes the fact that during the month of July, 1919, and for some four years prior thereto, J. H. Anderson, the defendant, was the cashier and active managing officer of the Farmers' State Bank of Weatherford, Okl.; that William Umbach, the president of the bank, was a farmer living in the country some distance from the town of Weatherford; that he had no banking experience, was not actively connected with the running of the bank, and was seldom in the bank, except for the purpose of examining its notes and other papers as a director; that J. S. Wilks, also one of the bank's directors, was a farmer with no banking experience, and had nothing to do with the active management of the

bank; that the defendant had active charge of the bank with one or two subordinate employees working under him. In July, 1919, defendant admitted and confessed to the Bank Examiner that in the year 1915 he commenced to execute notes payable to the bank, purporting to be signed by farmers living in that neighborhood, that these notes would be placed in the bank's note case, and defendant admitted that it was "hard to explain" what he had done with the funds covered by these various forged notes. This system of misappropriating the bank's funds was not discovered until the month of July, 1919, when the Bank Examiner was making an examination of the notes found in the bank's note case. Defendant was present when this examination was being made, and the Bank Examiner became suspicious of two notes, one of which had apparently been raised from \$700 to \$1,700, and another from \$400 to \$1,400 and when the Examiner asked the defendant which of these amounts he was carrying on the notes defendant informed him that he was carrying the larger amount on each note. The Bank Examiner then asked the defendant where the makers of the notes lived, and, upon being told, informed the defendant that he (the Bank Examiner) intended to interview the purported makers of the notes. It was then that the defendant admitted that these and other notes which the bank was then carrying, also certain municipal warrants, were all forgeries.

These notes and warrants were being carried as part of the assets of the bank in July, 1919, and the purported date of execution of most of the notes antedated the 12th day of May, 1919, while the due date was subsequent to the 12th day of May, 1919. The dates of the issuance of the purported warrants of the city of Weatherford were also anterior to the 12th day of May, 1919. These notes were not obtained by the Farmers' State Bank of Weatherford by a rediscount, but said bank was the payee named in each of said notes. The only reasonable deduction from said evidence, as we see it, is that said notes had been carried as part of the assets of said bank from the purported date of their execution, and were considered by the defendant and included by him in the report of the resources of said bank to the Bank Commissioner on the 12th day of May, 1919, under the item in said report, "loans and discounts on which stockholders are liable, \$107,258.74." Further, it is a reasonable conclusion from the evidence that the defendant included within said report between \$8,000 and \$9,000 of fictitious municipal warrants of the city of Weatherford, which were found among the purported assets of the bank at the time of its examination in July, 1919. In regard to the warrants held by the bank, the report of the

12th of May, 1919, by this defendant, under the item of resources, includes as "securities with the banking board" the sum of \$1,449.26. As to this particular item, at the time the examination of the bank was made in July, 1919, the defendant confessed that the warrants deposited with the banking board as security in the sum of \$1,449 were forgeries. As to this particular item the evidence is uncontradictory that it was included in the report, and the evidence is conclusive that as to that particular item the report was false. As to the evidence as to the notes being included within the report, it is circumstantial, but, in our opinion, the circumstances are such as to lead to no other conclusion than that the defendant considered and included the false and forged notes as part of the resources of the bank in making the report on the 12th day of May, 1919, as charged in the information. We deem the evidence amply sufficient to sustain the verdict and judgment.

[4] Further, it is contended that the court erred in giving certain instructions. This assignment of error is not supported by the citation of any authority. The particular instruction complained of is not copied in the brief. The petition in error complains of the instructions Nos. 3, 4, 5, and 6. From the argument advanced we surmise that instruction No. 4 is the one contended to be prejudicial. This instruction reads as follows:

"You are instructed that every officer, director, agent or clerk of any bank doing business under the laws of the State of Oklahoma, who shall willfully, and knowingly subscribe to or make any false report, with the intent to deceive any person as to the condition of such bank, shall be deemed guilty of a felony, and shall be punished by a fine not to exceed one thousand dollars or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment."

Said instruction appears to be a fair exposition of the statute upon which this prosecution was based. We fail to discover any reason why the giving of this instruction was prejudicial to the defendant, and counsel has failed to impress this court with any sound reason for holding the same erroneous.

Lastly, it is contended that the trial court erred in overruling defendant's application for a continuance. This application was based on the ground of the absence of one of the counsel for defendant, the motion containing an allegation that said counsel was ill and unable to participate in the trial. Defendant, prior to making the application, had employed two attorneys to represent him: Mr. A. J. Welch, of Clinton, Okl., and Mr. T. W. Jones, Jr., of Weatherford, Okl. The application was presented to the trial court by the latter attorney. The allegations in the motion for a continuance were

substantially as follows: That Mr. T. W. Jones, Jr., had been employed by the defendant in an advisory capacity in the trial of the case. That he is physically unable to hear the answers of witnesses and jurors to questions asked, and unable to hear the questions and rulings of the court thereon. That A. J. Welch, of Clinton, Okl., was employed to try the case and has the entire charge of the preparation of said case for trial. That the said Welch was present in court on the day preceding the making of the affidavit, and expected to be present when the case was called for trial, but was taken sick and confined to his bed on the evening preceding, and is now sick and confined to his residence in Clinton, Okl., and has in attendance upon him Dr. A. J. Jeter of Clinton, Okl., whose certificate under oath as to the sickness of the said A. J. Welch is attached and made a part of the motion. That defendant, by reason of the sudden sickness of the said Welch, has been unable to employ other counsel and to give them sufficient time to make preparation for the trial. That said case is founded upon a number of instruments which will require careful examination and discussion in order to prepare for said trial. That the said Welch has prepared a defense in the case which is technical and requires study on the part of counsel trying the case and a detailed examination of the witnesses offered. That said Jones is not familiar with said defense, and is unable to present the same, even though he could hear the testimony. That the motion is not made for the purpose of delay, but in order that substantial justice may be done.

The motion was subscribed and sworn to by T. W. Jones, Jr., and attached to it was the following:

"Dr. A. J. Jeter, Clinton, Okl. This is to certify that Mr. A. J. Welch is sick with a light case of influenza, and it is unsafe for him to leave the house or to be in public on account of infection. Resp. A. J. Jeter, M. D.

"Subscribed and sworn to before me this 4th day of November, 1919. V. F. Carleton, Notary Public. [Seal.] My com. expires November 29, 1922."

When the motion came on for hearing the following proceedings were had:

"By the Court (after examination of the foregoing motion for continuance): Is there anything you want to say about this, Mr. Jones?"

"By Mr. Jones: Nothing, only, as your honor knows, I can't try the case. Mr. Welch is sick, and the doctor is in attendance upon him, and the matter having come up at this late date Mr. Anderson couldn't get other counsel to present the matter at this time, and, your honor, please, Mr. Welch has had entire charge of the case as far as the court proceedings are concerned, and has prepared the case, and, if your honor has seen the information, there are a great number of instruments involved in this matter—it is a matter that counsel will have to study

carefully in order to prepare the defense, and it is a serious matter to the defendant, and I think, your honor, please, he ought to be given—

"By the Court: The court has read the application and considered it, and in view of all the circumstances I think I will allow a postponement until to-morrow morning at 9 o'clock, during which time the defendant may make such arrangements as he sees fit—the case will go to trial to-morrow morning at 10 o'clock.

"By Mr. Jones: Will the court note our exceptions to the ruling on the motion?"

On the following day when the case was again called for trial the following proceedings were had:

"By the Court: The first case on the call this morning is the case of the State of Oklahoma v. J. H. Anderson. What says the state?"

"By the County Attorney: The state is ready.

"By the Court: What says the defendant?"

"By Counsel for Defendant (E. L. Mitchell): I want to say that I am appearing in this case this morning for Mr. Welch, on motion—its a motion for continuance.

"By the Court: Let's see your motion, Mr. Mitchell."

Whereupon Mr. Mitchell presents to the court an application for continuance filed in this court on this date, which application, with all indorsements thereon, is as follows, to wit:

"State of Oklahoma v. J. H. Anderson.

"Application for Continuance.

"Comes now the defendant and makes this additional application for continuance of this cause and says:

"(1) That he has a just and legal defense to the charge made against him in the information; that owing to the present illness of his attorney, A. J. Welch, he cannot safely go to trial of this cause at this time; that he employed said Welch to represent him in this case some two months ago, and that he employed no other attorney in the case except T. W. Jones, who was employed only in an advisory capacity; that said Jones is so nearly deaf that it is impossible for him to participate in this or any other trial, and he never attempts to conduct the trial of a case, and for this reason said Jones has made no preparation or study of the case for trial, and is wholly unable to appear as attorney in the case.

"That said A. J. Welch is confined to his bed at home ill, unable to attend court, and a doctor's certificate has been presented and filed with the application filed herein yesterday; that said Welch had prepared the defense herein, and was ready and able, and but for his recent and present illness would have appeared in this trial and conducted the defense herein, but is wholly unable to so act by reason thereof.

"That, owing to the nature and character of the case, the information containing some 40 typewritten pages, defendant is not able, and it is impossible, to employ other counsel to take charge of his case and present his defense on so short a time, and become familiar with the case so that the same may be legally and properly conducted and his rights therein protected. Defendant says that the charges made

in the complaint are untrue. Defendant says that this is the first term at which this case was called; the preliminary having been only about 15 days ago.

"Said Welch did not take sick until the day before the case was set for trial, and defendant talked with him that day, when he still hoped to be able to take charge and try the case, but went to bed under the doctor's care the evening before, and now is too ill to attend court.

"This application is not made for delay, but that he may have justice in a fair and impartial trial. Wherefore defendant moves that this cause be continued for the term.

"J. H. Anderson,

"Subscribed and sworn to this 4th day of Nov.

"R. B. Strong, Court Clerk."

"State of Oklahoma, Custer County.

"Comes now E. L. Mitchell and makes oath in due form of law, in addition to the foregoing application for continuance, and says: That he was only consulted in this case the first time the evening of November 4th, and that he was then requested by A. J. Welch to appear in court and present this application for a continuance and do whatever he was able to do on behalf of the defendant; that owing to the nature of the case he has not even been able to or had the time to read the information or to discuss the defense of the case with the defendant, and but very briefly with the said Welch.

"That he has no information whatever as to the defense in this case, and has not been able to talk with any of the witnesses or to read any of the pleadings or consult with any person in reference thereto, except the said Welch, and was unable, on account of the illness of the said Welch, to obtain any information from him with reference to the facts or the preparation of the case. E. L. Mitchell.

"Subscribed and sworn to this 4th day of Nov., 1919.

"R. B. Strong, Court Clerk."

When the supplemental motion for a continuance was presented the state asked leave to make a counter showing which was granted, and the county attorney thereupon interposed a showing to the effect that Mr. A. J. Welch, one of the attorneys for the defendant, upon whose alleged illness application for a continuance had been presented the day previous, was present at his office on that day, and had transacted business at his office by dictating a letter to his stenographer, and further, on said day had discussed certain business matters with a justice of the peace in the city of Clinton, and in addition thereto the state was permitted and did introduce Mr. R. P. Phillips, a practicing attorney at Arapaho, Okl., who testified, in substance: That on the morning the supplemental motion for a continuance had been presented and just a short time prior thereto, Mr. A. J. Welch had called him by phone with reference to certain civil cases in which they were both interested, on opposite sides, to find out if the side represented by Mr. Phillips would be ready for trial, and in the conversation Mr. Welch

stated that he would agree to a continuance of the cause, that he had some cold, a slight attack of flu, or something like that.

[5, 6] It has been repeatedly held by this court, and requires the citation of no authority, that applications for a continuance are addressed to the discretion of the trial court, and that the trial court's action on such an application will not be disturbed unless a manifest abuse of discretion appears. Absence of counsel is not made one of the statutory grounds for a continuance. Section 5045, Rev. Laws 1910.

If, however, the trial court's action in overruling an application on this ground resulted in depriving the defendant of the benefit of counsel, or even if it appeared from the record that the defendant had a substantial defense to the charge which he was unable to present by reason of the absence of counsel, this court would unhesitatingly set aside a conviction for failure to grant a reasonable continuance.

[7] In this case, however, it appears that defendant had employed two counsel, one of whom was present in court and presented the application. In the application presented by him he asks that a continuance be granted in order that the other counsel may present a technical defense. What this defense is is not stated, and in view of the confession made by the defendant in this case the court is at a loss to surmise that defendant had a defense other than that which was afterwards presented to the jury and urged in this court, to wit, the failure of the state to make out its case.

While this court has always-regarded favorably the right of a defendant to be heard and present a substantial defense to any criminal charge lodged against him, we have never been impressed with the necessity of delaying a criminal prosecution merely for the purpose of affording an opportunity to present only technicalities not directed to the substantial merits of the prosecution.

The record in this case shows conclusively that the defendant was the only person who had any knowledge of the falsity of the state's case, if it were false, and he certainly had time to explain his apparent criminal conduct as made out by the state's case, if such an explanation could have been made consistent with his innocence. This he did not do, nor does he pretend in any of the motions presented, nor, if a new trial should be granted him, that either he or any other witness will be able to make an explanation of his conduct which would in any degree raise a reasonable doubt of his guilt.

It appears conclusively from the foregoing excerpts of the record that the trial court granted a continuance for one day in order to permit him to make arrangements for other counsel if he desired to do so, and it further appears that thereafter he was repre-

vented by another very able counsel who conducted his trial, cross-examined the state's witnesses, and saved numerous exceptions to the court's rulings throughout the trial.

In *Payne v. State*, 10 Okl. Cr. 314, 136 Pac. 201, it is held:

"An application for a continuance, for the term, on the ground of the absence of leading counsel, is properly denied, where the defendant is duly represented by his other counsel."

In the body of the opinion it is said:

"To reverse the case on the ground here set up with reference to the absence of counsel would be to place it within the power of counsel to control the running of the courts and the disposition of cases."

See, also: *Vance v. Territory*, 3 Okl. Cr. 208, 105 Pac. 307; *Snyder Co-op. Ass'n v. Brown et al.*, 172 Pac. 789.

We think it evident that there was no manifest abuse of discretion in overruling the motion and application for a continuance in this case. Further, there is no reason to believe that upon a second trial an intelligent and honest jury would arrive at any other verdict than that of the guilt of the accused. It appearing from the motion for a continuance that the application was made solely for the purpose of permitting the defendant to present a defense entirely technical in its nature, we think it would be a travesty on justice to set aside an apparently righteous judgment for such a reason. The willful and unlawful spoliation of the funds of a bank by its officers is more dangerous to the depositor and to the public generally (in that it destroys confidence in the entire banking system, both federal and state, and strikes a blow at the very foundations upon which the business of the country is based) than is the action of a highwayman who takes the funds of the bank at the point of a gun. The law should be enforced against one in the same measure and with the same certainty that it is enforced against the other.

The judgment is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

SWAN v. STATE. (No. A-4220.)

(Criminal Court of Appeals of Oklahoma.
July 15, 1922.)

(Syllabus by the Court.)

Criminal law §1131(4,5)—Appeal not considered, unless accused is where he can respond to judgment or order in case; appeal by fugitive dismissed on motion.

Where a defendant has been convicted and sentenced, and perfects an appeal, this court

will not consider his appeal, unless defendant is where he can be made to respond to any judgment or order which may be rendered or entered in the case. And where a defendant makes his escape from the custody of the law and becomes a fugitive from justice, pending the determination of his appeal, this court will, on proper motion, dismiss the appeal.

Appeal from County Court, Stephens County; G. T. Burrows, Judge.

Denny Swan was convicted of a violation of the Prohibitory Liquor Law, and he appeals. Appeal dismissed.

Womack & Brown, of Duncan, for plaintiff in error.

George F. Short, Atty. Gen., and N. W. Gore, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Denny Swan, was convicted in the county court of Stephens county on a charge that he did have in his possession intoxicating liquor, to wit, about 7 gallons of whisky, with the unlawful intent to barter, sell, give away, and otherwise furnish the same to other persons, and, in accordance with the verdict of the jury, he was sentenced to be confined in the county jail for 90 days, and to pay a fine of \$250. From the judgment he appealed by filing in this court on February 27, 1922, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal, on the ground that, since the appeal was taken, plaintiff in error has become a fugitive from justice, being charged with a felony, to wit, forgery, and is not now, and has not for some time prior hereto, been within the jurisdiction of this court.

In support of the motion is filed the affidavit of P. D. Sullivan, county attorney, and E. H. Rhyne, sheriff of Stephens county, and J. B. McLendon, cashier of the National Bank of Duncan. These affidavits show that, on the 2d day of June, 1922, there was filed a preliminary complaint in the county court of Stephens county, Okl., charging the said Denny Swan with the crime of forgery in the second degree, and a warrant was by the said court on the said date issued for the arrest of said Denny Swan for the said offense; the said warrant has not been served; that said sheriff deposes:

"I have made diligent effort to serve the same; I have searched for said Denny Swan personally, and had my deputies to look for him; I have wired peace officers in the cities of El Paso, Tex., El Dorado, Ark., Kansas City, Mo., and Little Rock, Ark., and many other places, endeavoring to have said Denny Swan apprehended and returned to Stephens county, and the said Denny Swan is now a fugitive from justice."

We are of the opinion that the motion to dismiss the appeal should be sustained as coming within the rule declared by this court in numerous decisions, that where the defendant has been convicted and sentenced and perfects an appeal, this court will not consider his appeal unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the case, and where a defendant makes his escape from the custody of the law and becomes a fugitive from justice, pending the determination of his appeal, this court will, on proper motion, dismiss his appeal. It follows that plaintiff in error has waived the right to have his appeal in this case considered and determined. The appeal is therefore dismissed. Mandate forthwith.

MATSON and BESSEY, JJ., concur.

SWAN v. STATE. (No. A-4221.)

(Criminal Court of Appeals of Oklahoma.
July 15, 1922.)

(Syllabus by Editorial Staff.)

Criminal law §1131(5)—Appeal of fugitive from justice dismissed on motion.

Where defendant escapes and becomes a fugitive from justice, pending the determination of his appeal, the court will, on proper motion, dismiss it.

Appeal from County Court, Stephens County; G. T. Burrows, Judge.

Denny Swan was convicted of a violation of the Prohibitory Liquor Law, and he appeals. Appeal dismissed.

Womack & Brown, of Duncan, for plaintiff in error.

George F. Short, Atty. Gen., and N. W. Gore, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Denny Swan, was convicted on a charge that he did commit the crime of manufacturing intoxicating liquor, to wit, whisky, and, in accordance with the verdict of the jury, he was sentenced to be confined in the county jail for 30 days and to pay a fine of \$500. From the judgment rendered on the verdict an appeal was perfected by filing in this court on February 27, 1922, a petition in error with case-made.

The Attorney General has filed a motion to dismiss his appeal, on the ground that plaintiff in error is now and has been for a long time prior hereto a fugitive from jus-

tice, being charged with a felony. In support of the motion is filed the affidavits of the county attorney and the sheriff of Stephens county.

Upon an examination of the motion and the proof supporting the same, we are of opinion that plaintiff in error has waived his right to have his appeal in this case considered and determined. The appeal is therefore dismissed. Mandate forthwith.

SWAN v. STATE. (No. A-3970.)

(Criminal Court of Appeals of Oklahoma.
July 15, 1922.)

(Syllabus by Editorial Staff.)

Criminal law §1131(5)—Appeal of fugitive dismissed on motion.

Where a defendant escapes and becomes a fugitive from justice, pending the determination of his appeal, the appellate court will, on proper motion, dismiss it.

Appeal from County Court, Stephens County; G. T. Burrows, Judge.

Denny Swan was convicted of conveying intoxicating liquor, and he appeals. Appeal dismissed.

Womack & Brown, of Duncan, for plaintiff in error.

George F. Short, Atty. Gen., and N. W. Gore, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Denny Swan, was convicted on a charge of conveying intoxicating liquors, and, in accordance with the verdict of the jury, was sentenced to be confined in the county jail for 60 days and to pay a fine of \$500. From the judgment rendered on the 28th day of February, 1921, an appeal was taken by filing in this court, on April 18, 1921, a petition in error with case-made.

The Attorney General has filed a motion to dismiss this appeal, on the ground that plaintiff in error is now and has been for a long time prior hereto a fugitive from justice, being charged with a felony. In support of the motion is filed the affidavits of the county attorney and the sheriff of Stephens county.

Upon an examination of the motion and the proof supporting the same, we are of opinion that plaintiff in error has waived his right to have his appeal in this case considered and determined.

The appeal is therefore dismissed. Mandate forthwith.

(24 Ariz. 202)

HOPKINS v. STATE.. (No. 535.)

(Supreme Court of Arizona. June 28, 1922.)

1. Criminal law §887—Instructions should be followed by the jury.

The instructions are the law of the case and should be followed by the jury, and the failure to do so is reversible error.

2. Criminal law §887—Verdict held not contrary to instructions.

Where the jury, after deliberating several hours, returned into the court and the foreman stated that they had not agreed upon a verdict and wanted to know in case defendant was not guilty by reason of insanity would he be put free, and the court stated that was within the discretion of the court, and the jury brought in a verdict of guilty, *held*, that the answer of the foreman did not indicate that they had reached a verdict, nor was their verdict influenced by the answer of the court, nor contrary to instructions providing that the jury should not speculate as to the result in case the defendant was found insane.

Appeal from Superior Court, Yavapai County; Joseph S. Jenckes, Judge.

Anna Irene Hopkins was convicted of throwing a caustic chemical upon another, and she appeals. Affirmed.

John A. Ellis, of Prescott, for appellant.

W. J. Galbraith, Atty. Gen., F. W. Perkins and George R. Hill, Asst. Attys. Gen., and John L. Sullivan, Co. Atty., of Prescott, for the State.

McALISTER, J. Appellant, Anna Irene Hopkins, was convicted of the crime of throwing a caustic chemical, to wit, carbolic acid, upon the person of one Lucille Gallagher with the intent to injure her flesh and disfigure her body, and sentenced to an indeterminate term of not less than 5 nor more than 14 years in the state prison. She has appealed from this judgment and the order denying her a new trial.

Among other defenses, the insanity of appellant at the time the act was committed was interposed, and for the purpose of placing the law of this defense before the jury the court instructed as follows:

"You are instructed that it is not the province of the jury to speculate as to what would be the result in case the defendant is found not guilty by reason of insanity, because it is the duty of the court in such case, if it believes the insanity yet exists, to order a hearing to pass upon that question, and the full responsibility with respect to that is upon the court.

"I instruct you that the law recognizes that insanity is a disease of the mind, and that, as distinguished from earlier times, it is the policy of the law that diseases of the mind should be treated in hospitals for the insane, as distinguished from penal institutions, and in this case, if you believe from the evidence submit-

ted that the defendant at the time of the commission of the act charged was suffering from a disease of the mind to such an extent that it controlled her will and compelled the commission of the act charged, then, notwithstanding that this act in a sane person would be punished criminally, it will be your duty to find the defendant not guilty by reason of insanity."

After deliberating several hours, the jury returned into court at 3:10 p. m., all parties being present, and the following proceedings were had:

"The Court: Gentlemen of the jury, have you agreed upon your verdict?

"The Foreman (Mr. Massing): No.

"The Court: Do you desire some further information?

"The Foreman (Mr. Massing): Yes. The information we want is in case the defendant not guilty by reason of insanity, we come to the agreement, would the defendant be put free?

"The Court: Well, that is a matter that will be in the discretion of the court.

"The Foreman: I think that is all we want to know.

"The Court: Very well. You may retire, gentlemen."

The jury then retired for further consideration of the case, and at 4:30 p. m. of the same day returned a verdict finding the defendant guilty as charged.

Several errors are assigned, but they each raise the only question relied on by appellant, which is that the verdict is contrary to law, in that it does not accord with the foregoing instructions, and in support of this view it is argued that the question asked the court by the foreman of the jury when it came in for further instruction shows conclusively that the jury had agreed that appellant was insane at the time she committed the act charged against her, but that the answer of the court led it to believe that if it returned a verdict of not guilty because of insanity appellant might be allowed to go free; that the jury's conviction that she was insane at the time entitled her to an acquittal, regardless of whether she would be put free even though insane, and its failure to follow the instructions in this respect and return a verdict in accordance with its conviction was a disregard of its duty.

[1] Appellant cites a number of authorities to show that the jury should have taken the law from the court and followed it, and that its failure to do so was reversible error. There can be no question but that such was its duty, whether the court correctly or incorrectly instructed it, for this court, in line with the holding of all the courts on the subject, said in *Pacific Gas & Electric Co. v. Almanzo* (Ariz.) 198 Pac. 457, that—

"The instruction, although erroneous, was the law of the case until reversed, and should have been followed by the jury, even though in

doing so a verdict which accorded with its ideas of right could not have been returned. Under our system of jury trial procedure the judge of the court determines the law of the case and the jury the facts, and to allow the jury to constitute itself the judge of the law as well as the facts would violate this fundamental principle."

To determine, however, whether the jury failed to follow the court's instruction as claimed by appellant, it would be necessary to know first whether it had reached or agreed upon a verdict that defendant was not guilty by reason of insanity when it came into court for further information and also whether its later conviction that she was guilty, with a verdict to that effect, was brought about in a proper way. It is clear from the statements of the foreman that the jury was considering the proposition of appellant's sanity and perhaps had questioned it seriously, but it will be observed that in reply to the court's query as to whether it had agreed upon a verdict the foreman, speaking for the full jury, answered, "No." He then wanted this further information:

"In case the defendant not guilty by reason of insanity, we come to the agreement, would the defendant be put free?"

This sentence is not complete, yet we think it fairly imports but one thing, and that is this: In case the jury come to the agreement that the defendant is not guilty by reason of insanity, would the defendant be put free? This view is strengthened by the minute entries of the clerk of the court shown by the following:

"Thereupon the court makes inquiry of the jury as to what verdict has been agreed upon, whereupon John Massing, one of the jurors, states to the court in effect and substance that the jury desires to know if, in case said jury returns a verdict finding the defendant not guilty by reason of insanity, whether under such circumstances the defendant would be set free, and the court states to the jury that that matter would be left to the discretion of the court, and it appearing that the jury has not yet definitely decided upon a verdict, the jury again retires in charge of the bailiffs, W. A. Murray and Jack Morrison, for further deliberation."

We think the language of the foreman, fairly interpreted, especially in view of his statement that a verdict had not been agreed on, cannot be given the meaning appellant claims for it. What the jury concluded as to her sanity must be gained from the verdict itself, and the mere fact that the foreman's remarks indicate that the jury was then considering this question seriously does not justify a holding that it had at that time a definite conviction different from that finally reached. But even if it then had the view contended for, the fact that it finally

came to the opposite conclusion would not justify this court in saying that the jury had not followed the court's instruction not to speculate as to what the result of an acquittal would be, in reaching its final verdict, because through argument and reasoning jurors often reach conclusions different from those entertained by them when they first enter the jury room or even after they have discussed for a while the evidence. And there is nothing in the record showing that it did not reach its verdict in this way.

No error appearing, the judgment is affirmed.

ROSS, C. J., and FLANIGAN, J., concur.

(24 Ariz. 221)

SOUTHERN CASUALTY CO. v. JOHNSON.
(No. 1994.)

(Supreme Court of Arizona. July 29, 1922.)

1. Insurance \S 424 — Automobile insurance against collision does not cover damages from overturning without collision.

A policy insuring an automobile against collision does not cover damage resulting from the overturning of the automobile when it ran up onto a bank alongside the road and overturned without colliding with any object.

2. Insurance \S 424 — Automobile insurance against collision covers damages from upset caused by collision.

A policy insuring an automobile against damage by collision covers damages which resulted when the automobile overturned if the cause of the upset was a collision.

3. Insurance \S 424 — Automobile insurance against "collision" with vehicles or other objects includes collision with embankment.

Within a policy insuring an automobile against collision with vehicles or other objects, "collision" has its usual meaning of striking together or striking against, and the policy includes the case of an automobile striking against any other object, whether that object be standing or in motion, under the exception to the rule of ejusdem generis, where the particular term includes the whole genus, as does the term "vehicle," so that such policy authorizes recovery for a collision with the embankment alongside the road.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collision.]

4. Appeal and error \S 1041(4) — Permitting amendment to conform to proof admitted without objection does not require reversal unless prejudicial.

Even if it was error to admit evidence over the objection that it was not sustained by the allegations of the complaint, the subsequent permission to amend the complaint to conform to the proof so amended does not require reversal of the case in the absence of a showing

that the amendment surprised or prejudiced defendant, in view of Civ. Code 1913, par. 422, providing that all pleadings or proceedings may be amended at any stage of the action, especially where no claim of surprise was made when the amendment was allowed, and when a continuance was later granted to permit defendant to produce further testimony, but it failed to do so.

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

Action by J. F. Johnson against the Southern Casualty Company on an automobile insurance policy. Judgment for plaintiff, and defendant appeals from the judgment, and from the order overruling a motion for new trial. Affirmed.

Leslie C. Hardy, of Nogales, for appellant.

S. F. Noon, of Nogales, for appellee.

McALISTER, J. This is an action on a policy of automobile insurance issued to Bir Singh and J. F. Johnson, of Nogales, Ariz., on September 10, 1920, by the Southern Casualty Company, upon a certain seven-passenger Hudson car, model 1920 "O," for the sum of \$3,000. From a judgment for plaintiff for the full amount prayed for, together with \$450 statutory damages, \$150 attorney's fee, and costs, and an order overruling appellant's motion for a new trial, it has brought the case here for review.

An indorsement that, in consideration of an additional premium of \$31, the policy also covers damages to the automobile "by being in accidental collision during the period insured with any other automobile, vehicle or object," was attached to the policy, which contained the usual provisions, among them being one stating that within 60 days after loss or damage the assured "shall render a statement to the company, signed and sworn to by said assured, stating the knowledge and belief of the assured as to the time and cause of the loss and damage, the interest of the assured and of all others in the property, the amount of damage and the amount claimed." In the original complaint, upon which appellee went to trial, neither a compliance with this provision nor a waiver of its terms was pleaded, but at the conclusion of his evidence the court permitted him to amend his complaint to conform to his proof, introduced over objection, that appellant had waived the filing of the proof of loss.

The first two assignments challenge the sufficiency of the evidence to support the finding, and the judgment based thereon, that the automobile was injured by being in an accidental collision with the canal embankment. It appears from the testimony that the car was sold by Johnson to Bir Singh, and \$500 paid on the purchase price, both parties becoming coinsurees under the

policy, though Bir Singh transferred his interest in it to Johnson before suit was filed; that Bir Singh drove the car to the Imperial Valley, Cal., where it was to be used, and that within two weeks thereafter, to wit, on September 24th, he had an accident while driving along the highway from Brawley to El Centro, in that state, which resulted in the car's being overturned and greatly damaged; that on the side of and paralleling the road on which he was driving is the embankment of the Brawley main canal, which is six or eight feet high, and made of earth and other material taken from the canal, and that the highway, according to custom in that valley, consists of two parallel roads, separated by a raised border, so that one side may be flooded in dry seasons without impairing the passability of the other; that Bir Singh, accompanied by one Golab Singh, was driving in a northeasterly direction from Brawley on the road to the right and next to the embankment, when a car driven by a Japanese on the road to his left came up from the rear, but before overtaking him crossed over to the road on which he was traveling and passed him, and, in order to prevent being run into, he swerved his car, then running about 25 or 30 miles an hour, slightly to the right. At this point the contentions diverge, appellant claiming that the evidence discloses that when the car swerved to the right it ran "upon and along or over the embankment, and in returning to the highway upset or turned over, and that the injury to the automobile was occasioned by its upsetting or turning over," while appellee contends that the testimony shows that it ran into the embankment, which was rough and almost perpendicular at this point, and was overturned. In other words, it is appellant's position that there was no collision with the embankment, but rather a "running upon and along or over it," resulting in the upsetting and overturning of the car, whereas appellee claims that the automobile did collide with the embankment, and that the collision was the cause of the tip-over.

The court found the fact to be as claimed by appellee, and appellant challenges the sufficiency of the testimony to support this finding, basing its contention upon two letters written by Bir Singh just after the accident and an affidavit signed and sworn to by him on November 9th, thereafter, in which language is used justifying its position. But the version of the accident accepted by the court and relied on by appellee to support its finding is given in the deposition of Bir Singh, and corroborated in certain important particulars by the testimony of several other witnesses who arrived at the scene of the accident shortly after it occurred, and whose depositions describe the condition of the car and the embankment as they appeared at that time. It will serve no useful purpose

to give in detail the conflicting testimony on this point; it is sufficient to say that under it the court could have come to either conclusion, that there was or that there was not a collision with the embankment which caused the upset and damage to the car, and the finding would have had substantial support.

[1] The conclusion reached, therefore, is determinative of the insurer's liability, because recovery is sought solely under the provision of the policy rendering the insurance company liable for damage to the automobile "by being in accidental collision * * * with any other * * * object," and necessarily a finding that "the automobile accidentally collided with an embankment of earth, * * * and as a result thereof it was damaged," establishes liability, while a finding that the damage resulted from an upset or tip-over caused by the automobile's being run "upon and along or over" an inclining embankment, as claimed by appellant, would not, according to the authorities, bring the accident among those insured against, for the reason that an upset and collision are not regarded as the same. This question was discussed as follows by the Supreme Court of Wisconsin in *Bell v. American Insurance Co.*, 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179, where the testimony disclosed that the driver of an automobile was endeavoring to turn his car, and, while doing so, backed it upon soft ground where it gradually settled and tipped over:

"While it is true that insurance contracts should be construed most strongly against the insurer, * * * yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule [of construction] that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an accident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset could be construed as a collision in the absence of a closer association of the two incidents in popular understanding."

To the same effect are the following: *Moblad v. Western Indemnity Co.* (Cal. App.) 200 Pac. 750; *Stuht et ux. v. United States Fidelity & Guaranty Co.*, 89 Wash. 93, 154 Pac. 137.

[2] However, an upset or tip-over resulting in damage may itself be caused by a collision, and, where this is true, the insurer is just as liable under an "accidental collision policy" as though the damage had resulted

directly from the collision, because the injury to the car is as much due to the collision, though indirectly, as if the upset had not occurred. Even in those policies containing a provision excluding damage resulting from collision, due wholly or in part to upsets, a recovery cannot be defeated where the upset is the result of a collision. 14 R. C. L. 1274; *Harris v. American Casualty Co.*, 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846. Such a "policy does not mean that where a collision has first taken place there can be no recovery because as the result of the collision the machine is upset." *Babbitt on Motor Vehicles* (2d Ed.) par. 788; *Universal Service Co. v. American Insurance Co.*, 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183.

[3] As used in this policy, the word "collision" has its usual meaning of "striking together, or striking against," and includes the case of an automobile striking against any other object, whether that object be standing or in motion, or whether it be another automobile, vehicle, some similar object, or something altogether different, because the rule of ejusdem generis does not apply, but rather the exception to it, which gives general words following particular words including all of their class a meaning different from that of the specific words. As said in *Bell v. American Insurance Co.*, supra:

"By the rule of construction known as ejusdem generis, general words following particular words are limited to other species of the same genus. 'The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes.' 36 Cyc. 1120. It has been held that the rule does not apply where the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless. *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69. We think the reason supporting the rule also dictates the exception, and that the exception applies to the words of this policy provision. Unless the word 'object' as here used be construed as including an object of a different class, it is meaningless, as the term 'vehicle,' it seems to us, includes every species within the genus. We are disposed to construe this provision as sufficiently broad to include a collision with objects other than automobiles or vehicles."

[4] The complaint had failed to plead either a compliance with the provision of the policy requiring appellee to render the company, within 60 days after loss or damage, verified proof of the same, or facts showing a waiver of it, yet evidence of the latter was received during the trial, over appel-

lant's objection that there was not in appellee's pleading any allegation upon which to base it, and at the conclusion of his testimony he was permitted to amend his complaint to conform to this proof, which disclosed that the agent of the company at Nogales, Ariz., who had written the policy, one J. C. Barnes, and, through him, the company itself, had been notified of the accident immediately after it occurred, and that appellee was told by him soon thereafter that the company was working on the adjustment, and that it would not be necessary for him to file proof of loss, or, to use the language of appellant's counsel, "It cannot be disputed that J. C. Barnes, the local agent of appellant, gave appellee to understand that the making and filing of the proof of loss, as provided by the policy, would not be required." The objection is not to the sufficiency of the evidence to prove a waiver, but to the action of the court in permitting an amendment to conform to proof erroneously admitted because not founded upon any averment in the complaint and seasonably objected to upon this ground. There are a number of authorities upholding this view. See *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 399, and 31 Cyc. 452, with citations in the note. There is no claim, however, that by permitting the amendment appellant was surprised, prejudiced, or deprived of any defense, but merely that an abstract rule of procedure was not followed. In a situation of this kind the following language of the Supreme Court of Kansas in *Snider v. Windsor*, 77 Kan. 67, 93 Pac. 600, applies with force:

"If, however, we should concede that the allowance of the amendment was technically erroneous, still the substantial rights of the defendants were not affected thereby. The issue between the parties appears to have been fully and fairly tried, and no complaint is made of the final result. In this situation the language of Mr. Justice Burch in *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549, is pertinent: 'If it be conceded that the rules of procedure have been violated in this case the judgment cannot for that reason alone be overturned. The Legislature has enjoined upon this court the duty of looking beyond defects and errors in pleadings and proceedings to ascertain if they did in fact affect the substantial rights of the party complaining of them. Fixed rules are to be observed and enforced, but not merely for the purpose of vindicating them. Harm must result from a wrong decision or it cannot be reversed. 'The court in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by rea-

son of such error or defect.' Code, § 140; Gen. Stat. 1901, § 4574.'"

See the following: *Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045; *Louisville & S. I. Traction Co. v. Lottich*, 59 Ind. App. 426, 103 N. E. 903; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Seely v. Stoltz's, Inc.*, 32 Cal. App. 458, 163 Pac. 681; *File v. Conzelmann*, 106 Kan. 345, 187 Pac. 878; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Wolf v. Wolf*, 88 Kan. 205, 128 Pac. 374; *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560.

The statutes of Arizona are very liberal on the amendment of pleadings. Paragraph 422, Revised Statutes of 1913, provides that—

"All pleadings or proceedings may upon leave of the court be amended at any stage of the action within such time as the court may prescribe."

And this court said in *Baker v. Maseeh*, 20 Ariz. 201, 179 Pac. 53, that in this state "It is common practice to allow amendments to conform to the proofs at any stage of the proceedings." It is a matter largely within the discretion of the trial court, and, unless it clearly appears that there has been an abuse of this discretion, it is not the province of this court to interfere. *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. 74; *Gartlan v. C. A. Hooper & Co.*, 177 Cal. 414, 170 Pac. 1115. What prompted the court to admit, under the circumstances, the evidence complained of does not appear; but, having received it, and, in consequence of its import learned that a correct determination of the issues could not be had without a pleading upon which to base it, there was no error in permitting an amendment having that effect.

"Granting an amendment during the progress of the trial is not prejudicial where there was no claim of surprise and no continuance was asked for." 4 C. J. 945.

See *Kanner v. Startz* (Tex. Civ. App.) 203 S. W. 603, above; *Steketee v. Waters*, 193 Mich. 177, 159 N. W. 368. No claim of surprise, however, was made when the amendment was allowed, but a continuance was asked for and granted for a period of ten days, after the evidence was all in, to permit appellant to produce further testimony. None, however, was introduced, and the case was decided on the facts already before the court.

No error appearing, the judgment is affirmed.

ROSS, O. J., and FLANIGAN, J., concur.

(71 Colo. 470)

JEWEL v. JEWEL. (No. 10051.)

(Supreme Court of Colorado. April 3, 1922.
Rehearing Denied July 3, 1922.)

1. Divorce \Leftrightarrow 245(1)—Equity may modify alimony decree when changed circumstances make it necessary.

A court of equity by virtue of its general powers has authority to modify a decree relative to alimony, when changed circumstances make it just and necessary.

2. Divorce \Leftrightarrow 234—Where divorce decreed in county court, sustaining demurrer to complaint for \$20,000 alimony in district court error.

Where divorce was granted in the county court and the wife decreed possession of a house for life, in her subsequent action in the district court for alimony, alleging that defendant to induce her to consent to the decree concealed from her that he was owner of a ranch and other property valued at \$50,000, and that the proper award to her would be \$20,000, and that, since the decree was entered in the county court, in which jurisdiction was limited to \$2,000, she was unable to have the decree modified by a proceeding in that court, the district court had power to give relief, and, it being impossible to transfer the case from the county court, it was error to sustain a demurrer to the complaint for want of jurisdiction.

Department 1.

Error to the District Court of Morgan County; L. C. Stephenson, Judge.

Action by Mahala E. Jewel against James E. Jewel. From judgment sustaining demurrer to the complaint, plaintiff brings error. Reversed and remanded, with directions.

Coen, Mallory & Paynter, of Ft. Morgan, for plaintiff in error.

James E. Jewel, of Ft. Morgan, pro se.

TELLER, J. The plaintiff in error began a suit in the district court, and by her complaint alleged that she and the defendant were married in 1871 and were divorced on August 6, 1914. The divorce was obtained in a suit in the county court, begun by the defendant in error, and in which the plaintiff in error filed a cross-complaint; the divorce was granted upon the cross-complaint. The decree gave to plaintiff in error possession during life of a large house in Ft. Morgan, Colo., in which the complaint alleges plaintiff had lived during the succeeding years and supported herself and defendant's daughter by renting rooms in said house.

The complaint further alleged that the plaintiff was of the age of 67 years, a chronic sufferer from Bright's disease, and with vitality so impaired that she was unable to do the work necessary for the care of said house; that she has no other source of income; that she has been compelled to pay

\$1,000 to reduce a mortgage on the property to prevent foreclosure, and that she is unable to support herself on the alimony allowed her by said decree; that the defendant has an income from the practice of law, and is possessed of considerable real estate in Morgan county and elsewhere, and is worth approximately \$50,000, over and above all debts and liabilities; that the plaintiff, during the entire married life of 43 years, kept roomers and boarders and earned considerable sums of money, which she contributed to the joint fund; that the defendant, in order to induce her to consent to the decree, concealed from her the fact that he was the owner of a ranch of the value of \$30,000. She further alleges that a fair and proper award to her by way of alimony from the estate of the defendant would be \$20,000; that by reason of the fact that the decree was entered in the county court, in which the jurisdiction is limited to \$2,000, she is unable to have said decree modified by a proceeding in that court. Wherefore she prays judgment for alimony in the said sum of \$20,000 and for other equitable relief, etc.

A demurrer was filed to the complaint, alleging that the district court had no jurisdiction to modify the decree of the county court; that the complaint fails to state facts sufficient to constitute a cause of action, and that it is barred by lapse of six months from the granting of the divorce. The demurrer was sustained, and the cause is now before us for review on error.

[1] That a court of equity by virtue of its general powers has authority to modify a decree relative to alimony, when changed circumstances make it just and necessary, is asserted by this court in *Stevens v. Stevens*, 31 Colo. 188, 72 Pac. 1060.

[2] The complaint states facts which, if established, would fully justify a judgment in favor of the plaintiff. This is not, as defendant in error supposes, an attempt to modify the decree of the county court; it is an independent suit presenting equitable grounds for relief, and the authorities cited by defendant in error are not in point. That the county court would not have jurisdiction because of the amount involved cannot be disputed, and, unless equity can give relief in an independent proceeding in the district court, there would be no relief possible to the plaintiff. If it is true, as plaintiff alleges, that she aided largely in accumulating the property now held by the defendant, it would be intolerable that she, having become unable by virtue of age and sickness to support herself, and the defendant still having this property, should not be entitled to a reasonable support out of it.

As to the power of the district court to give relief in a case of this kind we have no question; it being impossible to transfer the

case from the county court to the district court, and thus allow the question to be litigated in the original proceeding. The district court erred in sustaining the demurrer.

The judgment is accordingly reversed, and the cause remanded, with directions for further proceedings in harmony with the views herein expressed.

ALLEN and BAILEY, JJ., concur.

(71 Colo. 499)

RUDE et al. v. WAGMAN et al. (No. 10285.)

(Supreme Court of Colorado. June 5, 1922.
Rehearing Denied July 3, 1922.)

Corporations §211(3)—Minority stockholder cannot sue to redress or prevent injuries to the corporation without showing why corporation has not brought or cannot bring action.

Where in a suit by a minority stockholder to prevent or redress alleged injuries to the corporation the bill fails to show why the corporation has not brought or could not bring an action for the same purposes, the suit cannot be entertained nor a receiver appointed by a court of equity so as to take the management of the corporation from its directors and stockholders.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by Abner Wagman against the Marshall Coal Company and others. From a judgment for plaintiff, defendants I. Rude and others bring error and ask for a supersedeas. Judgment reversed and remanded, and supersedeas denied.

J. E. Robinson, of Denver, for plaintiffs in error.

William H. Dickson, of Denver, for defendants in error.

WHITFORD, J. This action was instituted by Abner Wagman, Plaintiff, v. Marshall Coal Company, I. Rude, Otto Hasbach, and N. Weinberg, Defendants. The defendants Rude and Weinberg were minority stockholders of the defendant corporation.

The complaint alleged that the plaintiff "brings this action as president and a director of the company and as a stockholder and as a creditor for and on his own behalf, and on behalf of all other creditors and stockholders." The prayer was for the appointment of "a receiver to take charge of the property and assets of the defendant the Marshall Coal Company for the purpose of preserving and protecting the same from the waste and depreciation, injury and damage now resulting through the wrongful acts of the individual defendants," and for an injunction against the individual defendants, and for an accounting between the three in-

dividual defendants and the defendant coal company, and for costs and general relief. The three individual defendants interposed a general demurrer to the complaint on the grounds that the facts therein alleged were insufficient to entitle the plaintiff to an injunction, or to the appointment of a receiver of the defendant company. The demurrer was overruled, and after answers filed and a hearing, a receiver was appointed. To review that order defendants bring error and ask for a supersedeas. The demurrer should have been sustained. The averments of the bill are insufficient to give the plaintiff as a stockholder a sufficient status to maintain the action. It is elementary that:

"The right of a stockholder to sue in equity to prevent or redress injuries to the corporation, depends upon his inability to obtain relief through the corporation or its officers. The right to sue is primarily in the corporation; and in order that a stockholder may sue in his own name, he must show in his bill or complaint that he has made every reasonable effort to obtain relief within and through the corporation by requesting the directors or other officers to sue or take other proper steps, and, on their refusal to do so, by applying to the stockholders; or else he must show that such a request and application would be useless because the directors and majority of the stockholders are themselves guilty of the wrongs complained of, or because the directors refuse to act, or are guilty of the wrongs, and there is no time or power to call a meeting of the stockholders, or because the majority of the stockholders are parties to or approve the wrongs. Without such a showing as this, a bill or complaint by a stockholder, where the injury is to the corporation, is demurrable." Clark and Marshall on Corporations, § 543.

There was an entire absence of these essential allegations in the bill which were necessary to establish the right of the plaintiff to maintain the suit. No showing whatever was made why the corporation did not or could not bring the action to prevent or redress any supposed injuries to the corporation. Without such a showing a court of equity cannot appoint a receiver at the suit of a minority stockholder, and thus take the management of the corporation out of the hands of its directors and stockholders, even for a limited time.

The supersedeas will be denied, and the judgment is reversed, and the cause is remanded to the court below, with directions to require the receiver to deliver the possession of all the property and assets received by him as such receiver to the person from whom he acquired such possession, and to discharge the receiver and to dismiss the complaint.

Supersedeas denied; judgment reversed and remanded.

TELLER and DENISON, JJ., concur.

(63 Mont. 372)

**GAS PRODUCTS CO. v. RANKIN, Atty. Gen.,
et al. (No. 5031.)**(Supreme Court of Montana. May 18, 1922.
On Motion for Rehearing, July 3, 1922.)**1. Property ⇐7—"Land" defined.**

The word "land" includes, not only the surface of the earth, but everything under or over it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Land.]

2. Common law ⇐3—"Common law" defined.

The common law of England means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in the commonwealth.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Law.]

**3. Constitutional law ⇐296(1)—Gas ⇐2—
Statutes limiting use of natural gas held a
taking of property without due process of
law; "ownership."**

In view of Const. art. 3, § 3, making the right to acquire and possess property an inalienable right, and Rev. Codes 1921, § 6722, providing that real property is covered by the law of the state except where the title is in the United States, section 6663, defining ownership to be the right of one or more persons to possess and use it to the exclusion of others, section 6770, providing that a landowner in fee has the right to the surface and everything permanently situated beneath or above it, and section 5672, adopting the common law of England which recognizes ownership of the surface owner in minerals, sections 3550 to 3552, inclusive, prohibiting burning natural gas from natural gas wells so as to prevent the heat therein contained from being fully and actually applied and used for other manufacturing purposes or domestic purposes, are unconstitutional as a deprivation of property without due process of law within the prohibition of the Fourteenth Amendment and Const. art. 3, § 27.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ownership.]

**4. Mines and minerals ⇐48—Petroleum and
gas are part of realty as long as they remain
in the ground.**

The general rule is that both petroleum and gas as long as they remain in the ground are a part of the realty, and belong to the owner of the land as long as they are on it or in it or subject to his control, and when they escape and go into other land and come into another's control, the title of the former owner is gone, and when produced on the surface they become personal property and belong to the owner of the well.

**5. Eminent domain ⇐2(1)—Depriving own-
er of surface of right to reduce gas underly-
ing land to possession is a "taking of private
property."**

Denying the owner of the surface the right to reduce gas underlying his land to pos-

session is a "taking of private property" within the prohibition of Const. art. 3, § 14, prohibiting taking private property for public use without first making just compensation.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Taking.]

**6. Constitutional law ⇐48—Every intendment
in favor of act will be made, unless its un-
constitutionality appears beyond a reason-
able doubt.**

The constitutionality of an act is presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.

On Motion for Rehearing.

**7. Appeal and error ⇐833(5)—New member
of court will not partake in consideration of
motion for rehearing.**

Where a case is decided by a bare majority of the court, a new member will not partake in deciding a motion for a rehearing, where to do so would require passing on the case on its merits as disposed of on the original hearing, and his decision on the motion for rehearing might have the effect of reversing the prior determination of the case.

Cooper and Holloway, JJ., dissenting.

Appeal from District Court, Lewis and Clark County; A. J. Horsky, Judge.

Suit by the Gas Products Company against Wellington D. Rankin, Attorney General, and another. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Gunn, Rasch & Hall, of Helena, for appellant.

W. D. Rankin, Atty. Gen., and D. R. Young, of Baker, for respondents.

GALEN, J. This is an action in injunction, involving solely the question of the constitutionality of chapter 125 of the Laws of 1921. On defendants' motion, judgment on the pleadings was granted and entered. The appeal is from the judgment.

The purpose of the suit is to enjoin the defendants from enforcing or attempting to enforce the statute, which provides in part as follows:

"Section 1. The use, consumption or burning of natural gas taken or drawn from any natural gas well or wells, or borings from which natural gas is produced for the products where such natural gas is burned, consumed or otherwise wasted without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes is hereby declared to be a wasteful and extravagant use of natural gas and is hereby declared to be unlawful.

"Sec. 2. No person, firm or corporation having the possession or control of any natural gas well or wells, except as herein provided, or borings from which natural gas is produced, whether as a contractor, owner, lessee, agent or manager, shall use, sell, or otherwise dis-

pose of natural gas, the product of any such well or wells, or borings for the purpose of manufacturing or producing carbon or other resultant products from the burning or consumption of such natural gas, without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes.

"Sec. 3. Any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100.00) or more than one thousand dollars (\$1,000.00) for each offense and each and every day in which any person, firm or corporation shall violate any of the provisions hereof shall constitute a separate offense hereunder and subject the offender to the penalty hereby provided." Sections 3550 to 3552, inc., R. C. M. 1921.

It appears that the plaintiff is a South Dakota corporation, legally and regularly doing business in Montana; that it owns in fee 250 acres of land in Fallon county, upon which there are gas wells producing gas by natural flow in merchantable quantities; that prior to the enactment of this statute the plaintiff erected, owned, and operated, and now owns and operates, a factory for the manufacture of carbon black from natural gas derived from its wells, which are located $1\frac{1}{4}$ miles from the town of Baker; that the factory consists of 32 fireproof buildings, together with packing houses, warehouses, conveying and packing machinery, machine shops, tanks, and other buildings, machinery and equipment, covering several acres of ground, in the construction and erection of which the plaintiff has expended over \$200,000. The constitutionality of the act is attacked as violative of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff and others of liberty and property without due process of law, and denies to the plaintiff and others the equal protection of the laws; that it violates the provisions of section 10 of article 1 of the Constitution of the United States, in that it impairs the obligation of contracts; and further, that it is contrary to equity and good conscience and to the letter and spirit of the Constitution of the state of Montana.

Were we content to accept the views expressed by the Supreme Court of the United States as the rule of property rights in this state, our task in determining the questions presented would be comparatively easy. However, the danger of establishing such a principle in this state is apparent, and although we entertain the very highest regard and respect for the decisions of the Supreme Court of the United States, we do not feel constrained to follow blindly its determinations affecting the rights of our citizens, especially in view of our own constitutional guaranties. The act in question is the same as the statute of Wyoming, considered in the

case of *Walls v. Midland Carbon Co.*, decided by the Supreme Court of the United States December 13, 1920 (254 U. S. 300, 41 Sup. Ct. 118, 65 L. Ed. 276), except that the Wyoming statute (Laws 1919, c. 125) applies only to gas wells or sources of supply of natural gas "located within ten miles of any incorporated town or industrial plant." In that case the validity of the Wyoming statute was sustained, Chief Justice White, Mr. Justice Brandeis, and Mr. Justice McReynolds dissenting. The court in the opinion said:

"The question in the case is, as we have said, whether the legislation of Wyoming is a valid exercise of the police power of the state, and brings into comparison the limits of the power as against the asserted rights of property—whether the legislation is a legal conservation of the natural resources of the state, or an arbitrary interference with private rights. Contentions of this kind have been before this court in other cases, and their discussions and decisions have materiality here. We mean, not discussions or decisions on the police power in the abstract or generality, but discussions and decisions involving conditions and principles pertinent to the present case.

"It will be observed that the act under review does not prohibit the use of natural gas absolutely. It prohibits, or, to use its words, declares it to be a 'wasteful and extravagant use of natural gas,' when it is burned or consumed 'without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes.' But not even that unlimitedly, but only when the 'gas well or source of supply is located within ten miles of any incorporated town or industrial plant.' Such is the prohibition upon the user or consumer. There is a prohibition upon the owner or lessee of wells within the designated distance from a town or industrial plant to sell or dispose of the gas except under the specified conditions 'for the purpose of manufacturing or producing carbon or other resultant products.' There are two elements, therefore, to be considered: (1) The distance of the wells from an incorporated town or industrial plant; (2) the element of heat utilization for manufacturing or domestic purposes. These elements are the determining ones in the accusations against the law. The first is the basis of the discrimination charged against it; the second is the basis of the charge that the law deprives the companies of their property by the ruin of their business and capital investments, and impairs the obligations of pre-existing contracts."

After reviewing, discussing, and applying the cases of *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499, *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, and *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160, it was held that the Wyoming statute is a legitimate exercise of the police power, and not constitutionally objectionable under the Constitution of the United States as taking property without due process of law or as an unreasonable

or arbitrary discrimination. The Wyoming case is cited, and relied upon, by counsel for the defendant.

The Supreme Court of the state of Indiana sustained the constitutionality of an act making it unlawful for any person, firm, or corporation operating a natural oil or gas well to permit the flow of gas or oil therefrom to escape into the open air, and directed the issuance of an injunction against the operators for the maintenance of a public nuisance and the commission of waste. *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. This case was reviewed by the Supreme Court of the United States on writ of error (*Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729), and it was there held that the act is not in violation of the Constitution of the United States, and that its enforcement as to persons whose obedience to its commands were coerced by injunction is not a taking of private property without adequate compensation, and does not amount to a denial of due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, but is rather a regulation by the state of Indiana of a subject which especially comes within its lawful authority. Upon examination of the cases cited and relied upon by the Supreme Court of the United States in the Wyoming case, it will be found that its decision is based on the holding announced in the Indiana case; the latter being on writ of error from the Supreme Court of the state of Indiana, and the former on appeal from the federal District Court of Wyoming. In the Wyoming case, the Supreme Court accepted the Indiana rule of property as stated by the Supreme Court of Indiana (*State v. Ohio Oil Co.*, supra), followed by the United States Supreme Court on review (*Ohio Oil Co. v. Indiana*, supra), but this does not necessarily require that we shall declare the rule for Montana the same, especially if not in accord with our constitutional and statutory provisions, and views respecting the established rules of property in Montana.

In the Indiana case the Supreme Court of the United States, noting the lack of harmony existing in the decisions of Indiana on the subject, commented as follows:

"Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they, in every respect, harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the state of Indiana, to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is

also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits without violating the rights of the other surface owners."

The Supreme Court of the United States in the Indiana case very properly accepted and followed the rule of property relating to oil and gas declared by the Supreme Court of Indiana. *Jackson v. Chew*, 12 Wheat. 153, 167 (6 L. Ed. 583). In the case just cited, the court said:

"It is true, that many of the cases in which this court has deemed itself bound to conform to state decisions, have arisen on the construction of statutes; but the same rule has been extended to other cases; and there can be no good reason assigned, why it should not be, when it is applying settled rules of real property. This court adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the states and of the United States, would be productive of the greatest mischief and confusion."

Under the doctrine established in the Indiana case, it follows as of course, that if there is no ownership of an oil or gas well in the earth, but merely a coequal right in all owners of land in which the reservoir of oil or gas exists, to take and appropriate from the common reservoir the oil or gas therein, the taking of one of more than his just proportion is an infringement of the rights of the others. On the other hand, according to the rule in Pennsylvania and other states, the surface owner has the same right to and ownership of the oil or gas within his land as he has to the timber on the surface and the solid minerals below the surface, and cannot be limited in the quantity he may take.

The case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160, referred to in the opinion in the Walls Case, involved the validity of a statute of New York prohibiting the pumping or otherwise drawing by artificial plant from any well made by boring or drilling into the rock mineral waters holding in solution natural mineral salts and an excess of carbonic gas, producing an unnatural flow of carbonic acid gas for the purpose of extracting, collecting, compressing, liquifying or vending such gas as a commodity otherwise than in connection with the mineral water and other mineral ingredients with which it was associated. The case was decided by the Circuit Court for the Southern District of New York (170 Fed. 1023) upon the authority of *Hathorn v. Natural Car-*

bonic Gas Co., 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989. Upon an examination of this last-mentioned case, it will be found that, while the common-law rule of real property was recognized, it was held that this rule limits the surface owner to the water which naturally finds its way into his land, and in the course of its opinion the court said:

"It has been suggested that the Saratoga waters are of a peculiar character and more in the nature of minerals than water, and that, therefore, the use of them by the landowner should be governed by different rules than those which ordinarily apply to the use of subterranean waters. It may be answered to this suggestion that subterranean waters have always been treated as a mineral in the decisions relating to their use and enjoyment, and that no distinction in this case can be predicated upon the peculiar character and quantity of the salts and gases which happen to be in solution. *Westmoreland N. Gas. Co. v. De Witt*, 130 Pa. St. 235, 249; *People's Gas Co. v. Pyner*, 131 Ind. 277, 280. The case of *Huber v. Merkel*, 117 Wis. 355, has been pressed on our attention by the appellant both as sustaining its right at common law to draw water and gas as it has been doing and also as denying the right of the Legislature to pass the statute next to be considered. In that case the court was construing the constitutionality of a law providing in substance that any owner or operator of an artesian well who permitted it to discharge more water than was reasonably necessary for his use, thereby materially diminishing the flow of water in any other artesian well in the same vicinity, should be liable for damages. In the course of its consideration of this law it was stated, 'so it seems inevitable that, in this state at least, the right of a landowner to sink wells and gather and use percolating waters as he will * * * is a property right, which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of eminent domain, or by the police power,' and it was then held that the statute was not a proper exercise of police power and was unconstitutional. It is to be said of this case as greatly distinguishing it from the present one that it was dealing with the natural flow of percolating waters and not with a flow unnaturally forced by artificial means. If, however, some of the broad statements made in the opinion should be deemed pertinent to such facts as are disclosed here and to sustain the right of a proprietor to use at will subterranean waters under the circumstances disclosed in this case, it must be said, as was intimated in the Wisconsin case itself, that the courts of this state and of that one disagree on this subject."

And the fact should not be overlooked that the New York statute, considered in the case of *Lindsley v. Natural Carbonic Gas Co.*, was directed against "pumping or otherwise drawing by artificial appliance," while the Montana statute applies to gas which naturally finds its way to the surface through a well.

The basis for the holding in the *Ohio Oil Company Case* is stated in the opinion in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, as follows:

"The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it, a reduction to possession and property, not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession they could not be deprived of any right which attached to it when in possession."

In the case last cited, a statute of Oklahoma (Laws 1907, c. 67), prohibiting the transportation of natural gas from the state, was declared unconstitutional upon the ground that it was an interference with interstate commerce. The court in the course of its opinion, after referring to and discussing the *Ohio Oil Company Case*, said:

"The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it; indeed, selects its market to reserve it for future purchasers and use within the state, on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."

It is noteworthy that Chief Justice White, who wrote the opinion in the Indiana case, and Mr. Justice Vandevanter, author of the opinion in the *Natural Carbonic Gas Company Case*, both dissented in the Wyoming case. Reasons for the dissent are not assigned, but it is apparent they did not believe the Wyoming statute constitutional, notwithstanding their views theretofore expressed.

Since the constitutionality of the act is attacked, both under the federal and state Constitution, we believe it to be our duty, irrespective of the holdings of other courts, to consider and apply the provisions of our own Constitution and general statutes thereto,

and declare the rule of property for Montana. The Constitution and general laws of the state of Montana contain the following provisions declaratory of property rights in this state. Section 3 of article 3 of the Constitution declares that:

"All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right * * * of acquiring, possessing, and protecting property," etc.

Section 14 of the same article provides:

"Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner."

Section 27 of this article provides:

"No person shall be deprived of life, liberty, or property without due process of law."

And section 6722, R. C. M. 1921, provides:

"Real property within this state is governed by the law of the state, except where the title is in the United States."

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others." Section 6663, R. C. M. 1921.

"The landowner in fee has the right to the surface and to everything permanently situated beneath or above it." Section 6770, R. C. M. 1921.

"The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." Section 5672, R. C. M. 1921.

[1] The common-law rule is stated thus by Blackstone:

"Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. 'Cujus est solum, ejus est usque ad cælum,' is the maxim of the law; upwards, therefore, no man may erect any building, or the like to overhang another's land; and downwards, whatever is in a direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the surface of the earth but everything under it, or over it." Blackstone, Bk. 2, p. 18.

[2] The common law has been a part of our system of jurisprudence from the organization of Montana Territory to the present day. State ex rel. Ford v. Young, 54 Mont. 401, 403, 170 Pac. 947. The common law of England means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth. Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 382, 170 Pac. 760, L. R. A. 1918C, 954.

In Pennsylvania where the common-law

rule of real property is applied to oil and gas, it was held lawful for landowners to use what is termed a gas pump in an oil well on their property to increase the flow of oil, by withdrawing gas from the well by suction, although the use of such power decreased the production of oil and gas in their neighbors' wells. Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 48 L. R. A. 748.

"A landowner has the absolute right to dig a well beneath the surface of his land, and if, in the exercise of such right, he dries up his neighbor's well by diverting the percolating waters underground which supply it, the inconvenience which such neighbor suffers therefrom is *damnum absque injuria*." Houston & T. C. Railroad Co. v. East, 98 Tex. 146, 81 S. W. 279, 66 L. R. A. 733, 107 Am. St. Rep. 620, 4 Ann. Cas. 827.

And the rule laid down in this case is supported by the weight of authorities. See note in 4 Ann. Cas. 829.

In the case of M. O. P. Co. v. B. & M. C. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, this court, in an opinion by Chief Justice Brantly, in discussing the common-law rule relating to land, as the same applies to mining claims, said:

"It is true that the defendant was and is in possession of the surface of the Pennsylvania claim. From this fact the presumption arose that it had title to and possession of everything beneath the surface. The doctrine, 'Cujus est solum, ejus est ad inferos,' applies, but not in the same sense as it does to other species of real estate. At common law this presumption was conclusive where there was no reservation in the grant, or where it did not operate by reason of some local custom. Under the mining laws of the United States, however, it is not conclusive, except as against one who cannot show that he enters beneath the surface in pursuit of a vein of which he owns the apex or portion thereof so intercepted by the end lines of his claim that he is entitled to follow it."

In the case of Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512, this court quoted with approval from the opinion in the case of Chatfield v. Wilson, 28 Vt. 49, as follows:

"The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be seen and known and is uniform. They are not in the earth and made a part of it, and no secret influences move them; but they assume a distinct character from that of the earth, and become subject to a certain law—the great law of gravitation. There is, then, no difficulty in recognizing a right to the use of water flowing in a stream as private property, and regulating that use by settled principles of law. We think the practical uncertainties which

must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land as one of its natural advantages, and in the eye of the law a part of it; and we think we are warranted in this view by well-considered cases."

Further in the opinion, Mr. Chief Justice Brantly, speaking for this court, said:

"The general rule thus stated is subject, however, to the same limitation as the use of the land itself, viz., that embodied in the maxim, 'Sic utere tuo ut alienum non lædas,' or, as is said in some of the cases, the use must be without malice or negligence. This seems to be in accord with the current of decisions in the United States."

In reviewing the decisions of the courts upon the question of ownership of oil and gas, District Judges Pollock and Campbell, in the federal District Court of Oklahoma, in the case of *Kansas Natural Gas Co. v. Haskell* (C. C.) 172 Fed. 545, 563, said:

"The rule of property right in natural gas and oil in all the states save Indiana is stated by Mr. Justice Shiras in *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304, as follows: 'Petroleum gas and oil belong to the owners of the land, and are a part of it, so long as they are on it or in it, or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property.' See, also, *Snyder on Mines*, pp. 954-958, § 1170; *Thornton on Oil and Gas*, pp. 18-20; *White on Mines and Mining Remedies*, p. 223, § 162; *Funk v. Haldeman*, 53 Pa. 248; *Stoughton's Appeal*, 88 Pa. 198; *Blakeley v. Marshall*, 174 Pa. 429, 34 Atl. 564; *Gill v. Weston*, 110 Pa. 317, 1 Atl. 921; *Gas Co. v. De Witt*, 130 Pa. 249, 18 Atl. 724, 5 L. R. A. 731; *Chartiers Block Coal Co. v. Mellom*, 152 Pa. 297, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645; *Hague v. Wheeler*, 157 Pa. 341, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736; *Murray v. Alfred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477; *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 82 Pac. 317; *Ontario Natural Gas Co. v. Gossfield*, 18 Ont. App. 666; *Hughes v. Pipe Lines*, 119 N. Y. 423, 28 N. E. 1042; *Williamson v. Jones*, 39 W. Va. 256, 19 S. E. 436, 25 L. R. A. 222; *South Penn Oil Co. v. McIntire*, 44 W. Va. 305, 28 S. E. 922; *Carter v. Tyler County Court*, 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411; 38 L. R. A. 694, 64 Am. St. Rep. 891; *Wilson v. Youst*, 43 W. Va. 834, 28 S. E. 781, 39 L. R. A. 292; *Preston v. White*, 57 W. Va. 278, 50 S. E. 236; *Kelley v. Ohio Oil Co.*, 57 Ohio St. 328, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Gas Co. v. Ullery*, 68 Ohio St. 271, 67 N. E. 494;

Honemaker v. Amos, 73 Ohio St. 170, 76 N. E. 949, 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708; *Hail v. Reed*, 15 B. Mon. (Ky.) 479; *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304."

[3] Natural gas found within the territorial limits of this state is not a product which may be conserved and preserved by law as a thing in which the people have a common interest as flowing streams, wild animals, etc.; and one who by lawful right reduces it to possession has the absolute right of property therein, with complete authority to use the same for any industrial purpose, and he cannot be deprived of such right by the state without just compensation, for the reason that to us it appears violative of the Fourteenth Amendment to the Constitution of the United States, and is contrary to the guaranty contained in section 27 of article 3 of the Constitution of Montana. See *Kansas Natural Gas Co. v. Haskell*, supra.

We do not intend hereby to indicate as our opinion that the state government may not with propriety prevent the waste of natural resources, even though the fee of the lands on which they are produced are privately owned.

[4, 5] We cannot see how the owner of the surface can be deprived of the right to reduce gas underlying his land to possession without the taking of private property. 12 R. C. L. 866. The general rule is that—

"Both petroleum and gas, as long as they remain in the ground, are a part of the reality. They belong to the owner of the land, and are a part of it as long as they are on it or in it, or subject to his control. When they escape and go into other lands, or come under another's control, the title of the former owner is gone, and when produced on the surface they become personal property and belong to the owner of the well." 18 R. C. L. 1205; *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691, 75 Pac. 995, 1 Ann. Cas. 403.

And, as above indicated, we subscribe to and declare this to be the doctrine applicable in Montana. We can see no distinction between the owner's property rights to minerals in his land and those pertaining to gas taken from the land and reduced to possession.

Were we to sustain the constitutionality of the act, there would be no limit to which the Legislature might go in depriving persons of the use of private property under the guise of the police power. If it may constitutionally prohibit the use of natural gas taken from privately owned property for use in one industrial or manufacturing business, why not in another? If the rule contended for is given sanction, the use of natural gas in blast furnaces, smelters, factories, or for

cooking, heating, or lighting is equally a proper subject for such prohibitory legislation. Under this rule there is no limit to which the Legislature may not go. The owner of coal or minerals in the ground may thus by legislative control have his property rights so limited and restricted that he would be compelled to abandon mining although the owner of the fee in the land. The same rule would be applicable to percolating waters, oil, growing trees, and agricultural crops grown upon the land. The landowner would be subject to regulation as to the number, kind, and character of trees he might cut on his own land, and the conditions for cutting imposed. In short, all recognized principles of property rights would thus be destroyed. If the Legislature may prohibit the burning of natural gas in the manufacture of carbon black because of the loss of heat units, why may it not as reasonably condemn its use for fuel on account of the fact that the carbon black contained therein is wasted? We are living in a free government, with definite guaranties of property rights, not under the rule of an emperor or czar. Such legislation is paternalistic in character and conflicts with the guaranties of the national and state Constitution and is contrary to the theory upon which our government was formed. The paternal theory of government is odious, and we should not treat lightly or disregard the sacred rights of property recognized and guaranteed by the government.

The plaintiff in this case acquired its property in good faith and in reliance upon its vested property rights, made large investment in a plant and equipment, and the injustice of destroying its property and investment by subsequent legislative enactment is so manifestly unjust and unfair, that the act should not be upheld.

[6] We are not unmindful of the settled rule in this state that the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 Pac. 841, and cases there collected.

However, the act under consideration is, in our opinion, pernicious, unreasonable, and confiscatory in character; it violates the constitutional rights of property of the plaintiff in this state; and therefore we have no hesitancy in declaring it unconstitutional.

For the reasons stated, the cause is reversed and remanded to the district court, with directions to enter a permanent injunction, restraining the defendants and all other persons pretending to act under or by virtue of the authority of such statute from

in any manner enforcing or attempting to enforce the same.

Reversed and remanded.

BRANTLY, C. J., and AYERS, District Judge, concur.

AYERS, District Judge, sitting in place of REYNOLDS, J., disqualified.

COOPER and HOLLOWAY, JJ., dissenting.

On Motion for Rehearing.

PER CURIAM. [7] For the reason that the motion for a rehearing does not present any proposition or question which was not fully considered by the court in rendering its decision, and not anything is thereby presented to change the opinion of any member of this court who participated in the original decision upon the question decided, the motion for rehearing is denied. Mr. Justice FARR takes no part in deciding the petition for rehearing.

The petition for rehearing is presented to the court under such circumstances and conditions as to present clearly to the court, in view of the fact that the original decision was by a bare majority of the membership of the court as it was then constituted, the propriety in this particular instance of Mr. Justice FARR participating in the consideration of the petition for a rehearing. In view of the importance of the question of practice involved, it is deemed proper by the court that its views in relation thereto be given.

At the time of the argument and submission of this cause the court consisted of Mr. Chief Justice BRANTLY and Associate Justices REYNOLDS, COOPER, GALEN, and HOLLOWAY. The argument was heard by the full bench, but on account of the subsequent illness of Mr. Justice REYNOLDS he took no part in the consideration of the case. Thereafter, by reason of the disqualification of Justice REYNOLDS, Judge Roy E. AYERS, one of the judges of the Tenth judicial district, who had been serving on the Supreme Court Commission, was taken from the Commission and called into this case pursuant to the authority of section 5 of article 8 of the Constitution of the state of Montana. It has been suggested by the Attorney General that Judge AYERS was called into the case because of a deadlock. While it is true that there was a deadlock—the membership of the court, as it was then constituted, with Justice REYNOLDS being absent, being equally divided—the authority for calling in Judge AYERS to sit in and take part in the decision of the case was not because of the deadlock, but because of the disqualification of Justice REYNOLDS due to his illness. The decision of the court was rendered on May 18, 1922, the opinion of the court being written by Mr. Justice GALEN, and it was concurred in by Mr. Chief Justice

BRANTLY and by Judge AYERS, sitting in place of Mr. Justice REYNOLDS, disqualified, Justices COOPER and HOLLOWAY dissenting. Justice REYNOLDS died on May 19, 1922, and Mr. Justice FARR was appointed to this court to fill the vacancy thus caused. In the meantime, Mr. Chief Justice BRANTLY became disqualified on account of illness, and at the time of the filing of the petition for rehearing, and now, Judge AYERS is sitting in his place in the causes submitted to the court. The petition for rehearing was filed on June 2, 1922.

The Attorney General argues that the petition for rehearing is not made because of the change in the personnel of the court; at the same time it is suggested that the court as it is now constituted should pass thereon. Mr. Justice FARR has not given any consideration to this case on its merits, and expresses no views thereon. For him to now participate in the consideration of the petition for rehearing would require that he consider the case on its merits, and, if after so considering the case he should be compelled to disagree with the conclusion reached by Mr. Justice GALEN and concur with the dissent of Justices COOPER and HOLLOWAY, the ultimate effect would be to reverse the decision made just shortly before he became a member of this court. The real effect of such a conclusion, in the opinion of all the Justices, would be to establish a precedent that might have mischievous and unfortunate results. There is not the slightest reason to suppose that the opinion of any one of the members of this court who participated in the original decision would be changed if a rehearing should be granted and a reargument were allowed. And if the original decision of this court should be reversed, in the language of the Supreme Court of Minnesota, in the case of *Woodbury v. Dorman*, 15 Minn. 341 (Gil. 274):

"This result would follow, not from a conviction upon the part of the members of the court by which the case was originally heard and determined, that the decision was erroneous, nor from the consideration of reasons and arguments not before advanced and considered, but solely from the change in the composition of the court."

Every citizen is desirous of having our laws definitely established, and the decision of the majority of this court upon any legal

proposition coming before it is the law of the state, and should not be subject to change upon the change of the personnel of the court. Rights of persons and of property would never be secure if such were the case. The matter has been given thoughtful and earnest consideration by every member of this court, and it is the opinion of the court that in the orderly and proper administration of justice and interpretation of the law, the motion for rehearing should, under the circumstances and conditions of this particular case, be acted upon only by the members of the court participating in the original decision.

The petition for rehearing has been regularly and carefully considered, and the petitioner is not denied any right by reason of Mr. Justice FARR taking no part in its consideration; nor is any new rule being announced by the court. The matter has been considered upon the conditions as they existed with relation to this particular case. The principles underlying the proposition involved and controlling the court's conclusion have been long and well established by courts of other jurisdictions, and, while the cases cited are not entirely similar to the conditions presented in this case, the fundamental principles governing the attitude of the courts towards rehearings and rearguments are the same. The Supreme Court of the United States, in the early case of *Brown v. Aspden*, 14 How. 25, 14 L. Ed. 311, in an opinion by Chief Justice Taney, concurred in by the entire court, announced the rule for that court as follows:

"But the rule of the court is this, That no reargument will be heard in any case after judgment is entered unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject." *Ambler v. Whipple*, 23 Wall. 278, 23 L. Ed. 127; *United States v. Morehead*, 1 Black, 488, 17 L. Ed. 80; *Public Schools v. Walker*, 9 Wall. 608, 19 L. Ed. 650; *Carmichael v. Eberle*, 177 U. S. 63, 20 Sup. Ct. 571, 44 L. Ed. 672; *People v. Mayor*, 25 Wend. (N. Y.) 254; 35 Am. Dec. 669; *McCutcheon v. Homer*, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212; *People v. Evening News Ass'n*, 51 Mich. 11, 16 N. W. 185, 691.

While Mr. Justice FARR takes no part in deciding the petition for rehearing, he agrees with the views herein expressed as to the reasons for his not participating.

(84 Mont. 211)

DOURIS v. CITY OF BUTTE. (No. 4852.)

(Supreme Court of Montana. July 10, 1922.)

1. Municipal corporations §816(4) — Complaint held sufficient to show knowledge by city of defects in sidewalk.

Averments in complaint in action for injuries received by falling on sidewalk that at the date of the accident and for more than five days prior thereto defendant had care, regulation, supervision, and control of the particular street and sidewalk in question, and had knowledge of the snow and ice on the sidewalk, or by the exercise of reasonable care could have ascertained its condition and the danger incident thereto, and had full knowledge thereof at all times mentioned, was sufficient to show knowledge, either actual or constructive.

2. Municipal corporations §792—City held to have complete notice of snow and ice on sidewalk.

Where snow and ice were permitted for a much longer period than five days to accumulate upon a sidewalk in a section patrolled by a city policeman, the city had actual and constructive notice thereof.

3. Municipal corporations §771—City held liable for injuries caused by slipping on ice on sidewalk.

Where snow and ice were permitted to accumulate on a sidewalk and form a slippery and sliding surface so that it was dangerous to pass over it while exercising due care, the city is liable for injuries caused therefrom, provided it had actual or constructive notice.

4. Municipal corporations §818(9)—Refusal to exclude evidence of fall of witness near the same spot where plaintiff slipped held not error.

In an action for injuries received by slipping on snow and ice on sidewalk, the refusal to exclude testimony of a witness regarding a fall which she experienced in front of the vacant lot in question was not error, where the witness testified that the snow and ice was in front of the whole lot, though the place where she fell was not the same place at which plaintiff fell.

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

Action by Mrs. William Douris against the City of Butte. From a judgment for plaintiff and from an order denying motion for new trial, defendant appeals. Affirmed.

J. O. Davies, of Butte, for appellant.

John V. Dwyer and N. A. Rotering, both of Butte, for respondent.

COOPER, J. This is an action to recover damages for personal injuries suffered by reason of a fall upon a sidewalk of a street in the city of Butte at a point where snow and ice had formed causing a slippery and slanting surface. Plaintiff had judgment,

and defendant appeals from it and an order denying its motion for new trial.

The sufficiency of the complaint was questioned both by general demurrer and by objection to the introduction of any evidence, at the beginning of the trial.

The principal grounds upon which the defendant seeks a reversal of the judgment is that by neither the allegations nor the proof does the record make it appear that the defendant had notice, either actual or constructive, of the existence of the ice and snow in front of the vacant lot in question for a time long enough to enable it to learn of the condition of the walk and to remove the danger after notice had been imparted to it.

[1] The plaintiff was permitted to amend her complaint. Of this the defendant does not complain in this court. After the amendment it charged, in substance, that at the date of the accident, and for a long time prior thereto, namely, more than five days, the defendant had the care, regulation, supervision, and control of the particular street and sidewalk in question, and had knowledge of its unsafe condition, or by the exercise of reasonable care upon its part, or that of its officers in authority, could have ascertained its condition and the danger incident thereto, and that at all the times mentioned it did have full knowledge thereof. Tested by the rules laid down by this court in a case in which similar facts were pleaded as in the complaint in the present case, the averments were sufficient in all respects. *Murray v. City of Butte*, 51 Mont. 258, 151 Pac. 1051.

[2, 3] There was evidence given by witnesses for both plaintiff and defendant tending to show that the plaintiff was in the exercise of due care when she fell and sustained the injuries complained of; that the condition of the place on the sidewalk where the accident happened was very bad on account of the ice and snow which had been permitted to accumulate and remain there; that it formed a slippery and slanting surface extending out to the edge of the sidewalk toward the street where she fell and was injured; that it had existed for a period much longer than five days; that defendant had both actual and constructive notice thereof; that it was a portion of the city patrolled by policemen in the employ of the defendant, and sufficient to show that in the proper exercise of its municipal functions the city ought to have known of it, and that it failed to remove the danger arising from such accumulation. Of evidence enough like that shown in the present case to make that case decisive of the principal issues now to be determined, Mr. Justice Holloway uses this language:

"The evidence tends to show due care on the part of plaintiff, and we think is amply suffi-

cient to make out a case for the jury, upon the theory that, if the ice is permitted to accumulate upon the walk and to form a smooth, slippery surface at an angle or slanting to the plane surface of the walk, so that it becomes difficult and dangerous for pedestrians to pass over it while exercising ordinary care, then the city is liable for injuries caused by such obstruction to travel, provided it had actual knowledge of the condition, or by reason of lapse of time ought to have had knowledge of it, and fails, after such knowledge, to remove the obstruction within a reasonable time." *Townsend v. City of Butte*, 41 Mont. 410, 109 Pac. 969.

[4] The third assignment of error, and the only other question of sufficient moment to require consideration, arose upon a motion to strike out the statement of a witness who told of a fall she had experienced in front of the vacant lot in question, because it was not "the same place or the same site in which the injuries were received by this plaintiff." The trial court's remark that the witness had testified that "the snow and ice was in front of the whole lot" is supported by the record, and shows clearly that the court committed no error.

There being no error in the record, the judgment and order are affirmed.

Affirmed.

FARR, HOLLOWAY, and GALEN, JJ., and ROY E. AYERS, District Judge, sitting in place of BRANTLY, C. J., disqualified, concur.

(Mont. 587)

WILBER v. WILBER. (No. 4812.)

(Supreme Court of Montana. June 26, 1922.)

1. Appeal and error \S 854(6)—General order granting new trial is sustained, if any ground is valid.

Where the order granting a new trial is general in terms, it must be sustained, if it can be upon any ground specified in the notice of intention and urged on the trial court.

2. New trial \S 76(2)—Verdict for damages exceeding the claim of plaintiff held to sustain new trial.

Where the complaint for claim and delivery of personal property stated the value of each item, and the evidence of plaintiff, considered in the light most favorable to her, fixed the total value of the property at less than the sum claimed, a verdict by the jury, fixing the value at an amount in excess of the amount claimed in the complaint, was without support in the pleadings and evidence, and justified the granting of a new trial.

3. Replevin \S 79—Interest on value and damages for detention cannot both be allowed.

The successful party in an action for claim and delivery of personal property is not entitled to both interest and damages for wrong-

ful detention, so that, where the jury awarded damages for the detention, a verdict fixing the value in excess of that shown by the pleadings and evidence cannot be sustained, on the theory that it included interest.

Appeal from District Court, Hill County; Frank E. Carlton, Judge.

Action by Jeannette G. Wilber against Eunice H. Wilber to recover possession of specific personal property. From an order granting a new trial, after verdict and judgment for the plaintiff, plaintiff appeals. Affirmed.

C. R. Stranahan, of Havre, for appellant.
Freeman, Thelen & Frary, of Great Falls, for respondent.

HOLLOWAY, J. [1] This is an appeal by plaintiff from an order granting a new trial in an action in claim and delivery to recover possession of specific personal property—horses, cattle, and farm machinery—or, in case return thereof cannot be had, then for the value, alleged to be \$2,195. The order granting the new trial is general in terms, and, under the rule uniformly observed in this state, it must be sustained, if it can be upon any ground specified in the notice of intention and urged upon the trial court. The notice of intention enumerates all the statutory grounds, but, according to counsel for defendant, reliance was had upon four of them only: (1) Insufficiency of the evidence to justify the verdict; (2) errors in the refusal of offered instructions; (3) misconduct of a juror; and (4) excessive damages appearing to have been given under the influence of passion and prejudice. Consideration will be given to the last one only.

[2] In the complaint the property is described minutely and a value is affixed to every item, the total value for all the property claimed being \$2,195. The evidence introduced by plaintiff, considered in the light most favorable to her, fixed the total value at \$1,983, and that is the utmost for which a verdict could be justified, but notwithstanding the value claimed in the complaint, or the lower value as shown by the evidence, the jury fixed the value of the property at \$2,686.20, and judgment was entered accordingly. Counsel for plaintiff does not attempt to justify the verdict, and apparently it is indefensible.

[3] The value of the property, as stated in the complaint, was put in issue by the answer, and it became necessary for the jury to find the value, and it was permissible to assess the damages sustained by plaintiff, but the value and damages are stated separately in the verdict, as they should be. Section 9363, Rev. Codes 1921. The excess cannot be accounted for upon the theory that the jury determined the value to be a less amount and added interest thereon from the time the

property was taken by defendant. Interest may be allowed as damages for the wrongful detention of property (*Webster v. Sherman*, 38 Mont. 448, 84 Pac. 878), but the successful party is not entitled to interest and to damages for wrongful detention in addition thereto (*Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684). If the jury included interest as damages, then they made a double award, for they found specifically by the verdict that plaintiff was entitled to \$50 damages for the wrongful detention of the property. It is impossible to determine upon what theory the jury arrived at the value as fixed in their verdict; indeed, there does not appear to be any theory upon which it can be sustained, and for this reason alone a new trial is necessary, and the order granting it is affirmed.

Affirmed.

FARR, COOPER, and GALEN, JJ., and ROY E. AYERS, District Judge, sitting in place of Mr. Chief Justice BRANTLY, disqualified, concur.

(54 Mont. 113)

WHEATLAND COUNTY v. VAN et ux.
(No. 4790.)

(Supreme Court of Montana. July 3, 1922.)

Bail ⇨87—Action on bail bond must be by the state.

An action on a bail bond in the form prescribed by Rev. Codes 1921, §§ 12141, 12142, and 12173, in which the state is named as obligee, can be maintained only by the state, though the money recovered goes to the county.

Appeal from District Court, Wheatland County; E. H. Goodman, Judge.

Action by the County of Wheatland, a political subdivision of the state of Montana, by I. S. McQuitty and others, against Oliver Van and wife. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to dismiss complaint.

W. C. Husband, of Harlowton, and Loud & Leavitt, of Miles City, for appellants.

Willington D. Rankin, Atty. Gen., and L. A. Foot, Asst. Atty. Gen., for respondent.

GALEN, J. This is an action by Wheatland county against the defendants, to recover the sum of \$2,000 upon a bail bond executed by the defendants as sureties to the state of Montana, in a criminal action, wherein the state was plaintiff and Roderick K. McLeod was defendant, McLeod having been charged by information with the crime of arson. The bail bond is in usual form, and by its terms the defendants, as such sureties, undertook and agreed to pay to the state of Montana the sum of \$2,000 should the accused, McLeod, fail to appear and an-

swer the charge. After issues joined by the pleadings, the cause was submitted to the court for decision upon an agreed statement of facts. The court thereafter made its findings of fact and conclusions of law, upon which judgment was entered in favor of the plaintiff. The appeal is from the judgment.

The determinative question in the case is whether the judgment in favor of the county may stand.

The bond made the basis of this action is as follows:

"An information having been filed on the 11th day of July, A. D. 1917, in the district court of the county of Wheatland, state of Montana, charging Roderick K. McLeod with the crime of arson in the first degree, and he having been admitted to bail in the sum of two thousand (\$2,000.00) dollars:

"We, Roderick K. McLeod, as principal, and Oliver Van, by occupation a rancher, and Anna Van, by occupation a rancher and housekeeper, residents of the county of Prairie, state of Montana hereby undertake that the above-named Roderick K. McLeod will appear and answer the above-mentioned information in whatever court it may be prosecuted, and will at all times render himself amenable to the orders and process of the court, and, if convicted, will appear for judgment and render himself in execution thereof, or, if he fails to perform either of these conditions, that we will pay to the state of Montana, the sum of two thousand dollars (\$2,000.00).

"Dated this 28th day of July, A. D. 1917.

"Roderick K. McLeod,
"Principal.

"Oliver Van,
"Anna Van,
"Sureties."

This form follows the language prescribed by statute (section 12141, R. C. M. 1921), and the justification thereto was made as required (Id. § 12142). The law prescribes the form of the bond (Id. §§ 12141 and 12173), and the obligee therein is made "the state of Montana." The bond sued upon runs to the state of Montana, as required; but it is contended by counsel for the respondent that the county of Wheatland, being the real party in interest, is the proper party plaintiff. With this contention we do not agree, although some courts have so decided, and section 9067, R. C. M. 1921, requires that "every action must be prosecuted in the name of the real party in interest," and by the provisions of section 12433, Id., the county, rather than the state, is the sole beneficiary.

There are cases holding that the county, rather than the state, under like form of bond and statutory provisions, is the proper party plaintiff (*Mendocino County v. Lamar*, 30 Cal. 628; *San Francisco v. Randall*, 54 Cal. 408; *People v. Haggin*, 57 Cal. 579; *Mendocino County v. Morris*, 32 Cal. 148; *Shelby County v. Simmonds*, 33 Iowa, 345; *Malheur County v. Carter*, 52 Or. 616, 98

Pac. 489; and *Elrage v. Greenlee County*, 16 Ariz. 159, 141 Pac. 375; others holding that the action may be maintained in the name of either the state or county (*People v. De Pelanconi*, 63 Cal. 409); but we see no reason to change the early established rule in this state that the action should be instituted by the state as plaintiff (*Territory v. Hildebrand*, 2 Mont. 426); this doctrine being also approved by other courts (*People v. Smith*, 18 Cal. 498; *People v. Love*, 19 Cal. 677; *People v. Penniman*, 37 Cal. 271; *Chandler v. Commissioners*, 2 Ohio Dec. 112; *State v. Wettstein*, 64 Wis. 234, 243, 25 N. W. 34; 6 C. J. 1061). As was stated by Mr. Justice Knowles, speaking for this court in territorial days in the *Hildebrand Case*, and we think correctly:

"It is true that the penalties recovered on any forfeited recognizance go to the county. The county may receive a benefit from the action, but it does not follow that the action should be prosecuted in the name of the county commissioners."

It is an action on contract. The bond on its face discloses the party entitled to maintain an action thereon in the event of breach. Although the money recovered goes to the county, yet the contract is with the state, not the county. What disposition is made by the state of the amount recovered is a matter of no concern as regards an action to recover on the bond. The state is expressly made the trustee of the money recovered on such obligations, and the law prescribes its disposition. It is merely a matter of state administration. There is no privity of contract between the county and the sureties on the bond, and therefore the judgment in favor of the county cannot stand.

The judgment is reversed, and the cause remanded, with directions to dismiss the complaint.

Reversed and remanded.

FARR, COOPER, and HOLLOWAY, JJ., and ROY E. AYERS, District Judge, sitting in place of BRANTLY, C. J., disqualified, concur.

(64 Mont. 110)

STATE ex rel. DECK v. DISTRICT COURT OF EIGHTH JUDICIAL DIST. IN AND FOR CASCADE COUNTY et al. (No. 5088.)

(Supreme Court of Montana. July 3, 1922.)

I. Certiorari \S 5(1)—Refused where appeal exists.

Under Rev. Codes 1921, \S 9837, a writ of review will not issue where a remedy by appeal exists.

2. Certiorari \S 5(1)—Refused, where error within court's jurisdiction and remedy was by appeal.

A writ of review will not issue to review an order vacating an order setting aside a default judgment, as the error was within the court's jurisdiction and defendant had a remedy by appeal.

3. Appeal and error \S 82(3)—Order vacating order setting aside judgment held "special order" within appeal statute.

An order vacating an order setting aside a default judgment is a special order, within Rev. Codes 1921, \S 9732, authorizing an appeal from any special order made after final judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Order.]

Original writ of review by the State, on the relation of Rupon Deck, against the District Court of the Eighth Judicial District in and for Cascade County and H. H. Ewing, Judge, etc. Writ dismissed.

F. A. Ewald, of Great Falls, for relator.

T. F. McCue, of Great Falls, for respondents.

GALEN, J. In this case a writ of review was issued by this court. It appears that the Stone-Ordean-Wells Company brought an action on January 7, 1921, against the relator, Rupon Deck, in the district court of Cascade county, to collect \$206.34 claimed to be due it on open account. A summons and writ of attachment were thereupon on that date regularly issued, and the summons was served on January 13, 1921. On February 1, 1921, the plaintiff's attorney filed a praecipe, directed to the clerk of the court, requesting the entry of defendant's default for failure of appearance; his default was thereupon entered, and on the same day judgment in plaintiff's favor was entered for \$228.29, together with interest and costs. Execution was issued on the same day, and from the sheriff's return thereon, filed February 21, 1921, it appears that he "levied * * * upon the automobile attached in this case," and sold the same, fully satisfying the judgment. Thereafter, on April 7, 1921, the defendant made and filed a motion to set aside and vacate the judgment on the ground that it was prematurely entered, and asking that he be permitted to file an answer to plaintiff's complaint. Affidavits in support of the motion and counter affidavits in opposition were made and filed, and on June 8, 1921, the court vacated and set aside the judgment for having been prematurely entered, and permitted the defendant to file his answer. Later, on July 14, 1921, the plaintiff served the defendant and filed a notice of motion to vacate and set aside the order of June 8, 1921, whereby the judgment was set aside and the defendant permitted to

answer. Thereafter, by order dated August 23, 1921, the court set aside its order of June 8, 1921.

[1] The decisive question is whether a writ of review is the proper remedy. The writ will not issue when a remedy by appeal exists. This is the mandatory language of the statute (section 9837, R. C. M. 1921), and the settled rule in this court. *State ex rel. King v. District Court*, 24 Mont. 494, 62 Pac. 820; *State ex rel. Prescott v. District Court*, 27 Mont. 179, 70 Pac. 516; *State ex rel. Reynolds v. Laurendeau*, 27 Mont. 522, 71 Pac. 754; *State ex rel. Davis v. District Court*, 29 Mont. 153, 74 Pac. 200; *State ex rel. Griesom v. Justice Court*, 31 Mont. 258, 78 Pac. 498; *State ex rel. Gattan v. District Court*, 39 Mont. 134, 101 Pac. 961; *State ex rel. Beadle v. Smith*, 42 Mont. 492, 113 Pac. 294.

[2] Where there is an appeal or other plain, speedy, and adequate remedy, a writ of review is not proper, and where an appeal is authorized, the fact that it is not speedy or adequate is of no consequence. *State ex rel. King v. District Court supra*; *State ex rel. Davis v. District Court supra*; *State ex rel. Reynolds v. Laurendeau supra*. The writ cannot be used for the purpose of correcting errors committed within jurisdiction. *State ex rel. King v. District Court supra*; *State ex rel. Gattan v. District Court supra*.

In this case the error committed was within jurisdiction, and the defendant had an adequate remedy by appeal. As stated by this court, speaking through Mr. Justice Reynolds, in the case of *Batchoff v. Butte Pac. Cop. Co.*, on rehearing, 60 Mont. 189, 198 Pac. 132:

"While under the facts stated in the opinion it was error to prematurely enter the judgment, yet such entry was not without jurisdiction, but was error within jurisdiction. It was voidable but not void. 23 Cyc. 745; 12 Cyc. 755; 2 Freeman on Judgments, para. 532, 542; *Cook v. Mix*, 10 Conn. 585; *Drew v. Claypool*, 61 Mich. 233, 28 N. W. 78; *Anheuser-Busch Brewing Assn. v. McGowan*, 49 La. Ann. 630, 21 South. 766; *Mitchell v. Aten*, 37 Kan. 83, 14 Pac. 497, 1 Am. St. Rep. 231; *People v. Dodge*, 104 Cal. 487, 38 Pac. 203; *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621; *Remnant v. Hoffman* [Cal.] 11 Pac. 319; *Gwillim v. First Nat. Bank of Colorado Springs*, 13 Colo. 278, 22 Pac. 458; *Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123."

[3] The statute plainly authorizes an appeal "from any special order made after final judgment." Section 9732, R. C. M. 1921. An order setting aside or refusing to vacate a default judgment is a special order made after final judgment within the meaning of the statute (*Canning v. Fried*, 48 Mont. 560, 139 Pac. 448; *Foster v. Coyle*, 59 Mont. 444, 197 Pac. 747); and the same is true of an

order made vacating an order setting aside a default judgment, as was done in this case. Defendant's remedy in each instance was by appeal.

The writ is dismissed.

FARR, COOPER, and HOLLOWAY, JJ., concur.

ROY E. AYERS, District Judge, sitting in place of Mr. Chief Justice BRANTLY, disqualified.

(106 Or. 531)

Application of RIGGS et al.

Supreme Court of Oregon. July 18, 1922.)

Appeal and error ~~629~~—Supreme Court will allow time in which to file abstract after filing of transcript, where delay will not injure other party.

Though Or. L. § 554, requires appellant to file a transcript, and also to file and serve on respondent a printed abstract of so much of the record as may be necessary to a full understanding of the questions presented, the Supreme Court will not affirm a decree of the lower court for failure to file an abstract, but will allow time in which to file an abstract where appellant has filed a transcript covering the whole case and a brief pointing out alleged errors, where respondent will not be injured by the delay, and where the jurisdiction of the court is not affected.

In Banc.

Appeal from Circuit Court, Deschutes County; T. E. J. Duffy, Judge.

In the matter of the application of J. Alvin Riggs and others, as the Board of Directors of the Central Oregon Irrigation District. On motion to affirm a decree. Denied. See, also, 207 Pac. 175.

Harrison Allen and John B. Latourette, both of Portland, and H. H. De Armond, of Bend, for the motion.

Paul C. King and R. S. Hamilton, both of Bend, opposed.

McCOURT, J. This is a proceeding brought by the members of the board of directors of Central Oregon Irrigation district and by the district, to secure a judgment of confirmation of certain proceedings of the said board and of the said district, providing for and authorizing the issue and sale of the bonds of the district. A number of land-owners within the district, for themselves and all others similarly situated whose lands were attempted to be excluded from the district by order of the board of directors, dated the 10th day of November, 1921, have appealed from the decree of the circuit court, validating and confirming the proceedings for the organization of the district and au-

thorizing the issue and sale of bonds of the district.

The petitioners have interposed a motion for an order affirming a decree of the circuit court, based upon the failure of the defendants to serve and file upon respondent a printed abstract of so much of the record as may be necessary to a full understanding of the questions presented for decision, as required by rules 6 (202 Pac. xiii) and 11 (173 Pac. ix) of the Supreme Court (100 Or. 744, 747).

The defendants filed in this court on May 15, 1922, a transcript consisting of the judgment roll in the circuit court, made up of all of the original pleadings and orders therein, and a transcript of the evidence introduced upon the hearing in the circuit court and all the original exhibits introduced in the cause, save and except those for which copies were substituted under the order of the court. The defendants did not file a printed abstract of record, nor any assignment of errors, but on June 12, 1922, they filed their printed brief, which points out the alleged material defects in the record of the proceedings conducted by the petitioners, as shown by the record.

Defendants have filed a motion for leave to file a printed abstract, in which they propose to incorporate a formal assignment of errors, together with so much of the record as may be necessary to a full understanding of the questions presented for decision, and assert that their failure to file a printed abstract in the first instance was due to a misconstruction placed upon section 554, Or. L., by the attorneys for defendants. They aver in substance that they construed section 554, Or. L., as requiring a transcript or a printed abstract, but not both, and that, inasmuch as the entire record had been brought to this court, a printed abstract would not be required. This court acquired jurisdiction of the cause upon the filing of the transcript. In the case of *Fleischner v. Bank of McMinnville*, 36 Or. 553, 54 Pac. 884, (60 Pac. 603, 61 Pac. 345) the court said;

"But the question presented is not jurisdictional, and the abstract being required in certain form, and containing certain matter for the benefit and assistance of the court, and to relieve it as much as possible from the labor of searching in many instances through cumbersome records, and to enable it to ascertain at a glance the errors relied upon, it may, under certain contingencies, be excused entirely, or the court may dismiss the cause for nonobservance of requirements touching it. Nevertheless all parties who can reasonably comply with the rules governing its preparation and service should be required to conform to them."

The court has in several instances allowed parties to amend a printed abstract by adding thereto assignments of error, where respondent has not been affected by the omis-

sion, and to incorporate therein similar assignments of error; it appearing that the omission was due to the inadvertence or excusable mistake of appellant. *Salene v. Isherwood*, 74 Or. 35, 40, 144 Pac. 1175; *Skinner's Will*, 40 Or. 571, 575, 62 Pac. 523, 67 Pac. 951; *Robinson v. Phegley*, 93 Or. 299, 303, 177 Pac. 942, 178 Pac. 799, 182 Pac. 373. The failure of the defendants in this case to file a printed abstract and assignments of error has not materially delayed or injured the petitioner, and in view of the character of the proceeding we think it would not be in the interest of justice to affirm the decree upon account of the omission to observe a rule of procedure not going to the jurisdiction of the court, and not affecting the merits of the proceeding.

The motion to affirm the decree is denied, and the motion for leave to file the printed abstract is allowed. The printed abstract shall be served and filed on or before the 1st day of August, 1922, and respondents shall have to and including the 20th day of August, 1922, within which to serve and file their brief herein.

LOVELL et al. v. POTTS et al.

(Supreme Court of Oregon. July 18, 1922.)

Appeal and error § 624—Trial judge, disqualified because of prejudice, authorized to extend time for filing of transcript.

A judge, who had been disqualified to try a case, under Or. L. §§ 45-1 to 45-4, providing that no judge shall sit to hear or try any suit where he is prejudiced against a party or attorney, had jurisdiction to grant an order extending time for filing of the transcript on appeal under section 548, as the purpose of this disqualification statute is to prevent a prejudiced judge from sitting at the trial, and not to affect a case on appeal, especially since, under section 554, par. 2, a justice of the Supreme Court could have made such an order.

In Banc.

Appeal from Circuit Court, Clatsop County; J. U. Campbell, Judge.

Action by S. W. Lovell and another against William H. Potts and another. Judgment for plaintiffs, and defendants appeal. On motion to dismiss the appeal. Motion denied.

James L. Hope, of Astoria, for the motion. Edward E. Gray and C. W. Robison, both of Astoria, opposed.

BROWN, J. This is a motion to dismiss appeal and affirm judgment of the lower court. For grounds of motion, it is averred:

"That the judgment in the above-entitled court and cause was entered on July 14, 1921; that the notice of appeal was served and filed September 7, 1921; that the undertaking on appeal was served and filed September 15, 1921; that defendants' and appellants' time in which to file their transcript on appeal in the Supreme Court expired on the 20th day of November, 1921; that previous thereto, and on June 25, 1921, a motion was filed by W. H. Potts, one of the defendants, supported by his affidavit, alleging prejudice on the part of Hon. J. A. Eakin, judge of the circuit court for Clatsop county, state of Oregon, and that thereafter Hon. J. A. Eakin, judge as aforesaid, invited and requested Hon. J. U. Campbell, judge of the Fifth judicial district of the state of Oregon, to hear and sit at the trial of the above-entitled cause; and that said Hon. J. U. Campbell did sit and was the judge at the trial of the above-entitled cause.

"That on October 15, 1921, an order was made, signed by J. A. Eakin, Judge, attempting to extend the time within which to file appellants' transcript on appeal in the above-entitled court from October 20, 1921, to December 1, 1921; that on November 28, 1921, based upon a motion, Hon. J. A. Eakin made a further order attempting to extend the time within which to file the transcript on appeal in the above-entitled cause from December 1, 1921, to February 1, 1922; that the transcript on appeal in the above-entitled cause was filed in the above-entitled court on January 25, 1922, containing a bill of exceptions settled and certified to by Hon. J. U. Campbell, Judge."

One of the defendants having filed an affidavit of prejudice, as prescribed by chapter 160, General Laws of 1919 (Sections 40—1 to 45—4, inclusive, Or. L.), based thereon the defendants urged that Hon. J. A. Eakin, judge of the circuit court of the state of Oregon in and for Clatsop county, was prejudiced and by reason thereof was disqualified to act in the trial. The effect of this affidavit of prejudice was to remove from Judge Eakin all jurisdiction to try or hear the cause. The record before us discloses that Judge Eakin obeyed the command of the statute, and did not "sit to hear or try" the cause, but that he called in Judge Campbell, who did "sit to hear and try" the action.

After presiding at the trial, Judge Campbell returned home. He certified to the bill of exceptions. The parties who made the affidavit of prejudice sought and obtained from the circuit court of the state of Oregon in and for Clatsop county, Hon. J. A. Eakin, judge presiding, an order of extension of time within which to file their transcript on appeal in this court. The plaintiffs now insist that the order made by Judge Eakin was void for want of jurisdiction by reason of his disqualification.

Section 45—1, Or. L., provides:

"No judge of a circuit court of the state of Oregon shall sit to hear or try any suit, action or proceeding when it shall be established, as hereinafter provided, that such judge is preju-

diced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case, the presiding judge shall forthwith transfer the suit or action to another department of the same court, or call in a judge from some other court, or apply to the chief justice of the Supreme Court to send a judge to try the case. * * *

From the foregoing provision of the statute, it appears that the prohibition contained in the statute disqualified Judge Eakin "to sit" in the trial of the case. It is likewise apparent from the statute that Judge Campbell was authorized to "try the case." In *Sprague v. City of Astoria*, 204 Pac. 956, 957, we wrote:

"The term 'trial' is defined thus: 'A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.' Section 113, Or. L.; *Mulkey v. Day*, 49 Or. 312, 314, 89 Pac. 957; *Hillsboro Nat. Bank v. Garbarino*, 82 Or. 405, 409, 161 Pac. 703; *Warm Springs Irrigation Dist. Co. v. Pac. Live Stock Co.*, 89 Or. 19, 22, 173 Pac. 265."

And:

"The meaning of the word 'hearing' * * * is to be determined from the character of its use in the statute. * * * In equity, 'hearing' is a term with a well-understood content. Technically, it is 'the trial of the case, including the introduction of evidence, the argument of the solicitors, and the decree of the chancellor.' [Citations.] * * * As applied to courts, the word is said to be 'generally understood as meaning a judicial examination of the issues between the parties, whether of law or of fact.' [Citations.]"

Is an appeal a part of the trial? It was said in *Kearney v. Snodgrass*, 12 Or. 311, 314, 7 Pac. 309, 311:

"Until the right of appeal is created by statute, it does not exist as a strict legal right."

In *Fisk v. Henarie*, 15 Or. 89, 90, 13 Pac. 760, Mr. Justice Strahan wrote:

"The right to an appeal depends entirely upon the statute. If the statute does not confer it, it does not exist."

In *City of Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28, Mr. Justice Burnett said:

"An appeal is not a matter of primary right. It is a privilege, and he who would enjoy that privilege must show some statute conferring it upon him."

For other expressions relating to the right of appeal, see authorities of this court collected in *Smith Securities Co. v. Multnomah Co.*, 98 Or. 418, 192 Pac. 654, 194 Pac. 430, 431.

The order of extension could have been made, not only by the trial court or the judge thereof, but also by the Supreme Court or a justice thereof. Paragraph 2, § 554, Or. L. Surely it could not be argued, in the event of making such an order, that this

court, or one of its justices, had taken part in the trial. Nor can it be rightly asserted that the court that did make the order was without jurisdiction because of the disqualification of Judge Eakin to take part in the trial of the cause.

To appeal a case is to remove it to a higher court for review for errors of law occurring in the trial in the court below, or, as in equity cases, for retrial. An appeal may be taken from a judgment or decree, and reviewed as prescribed by the statute of this state, and not otherwise. Section 548, Or. L. The alleged bias of Judge Eakin can in no way affect this case upon appeal. The legitimate purpose of that statute is to remove a prejudiced judge from sitting at the trial. It cannot be invoked by enlarging the meaning of the statute to defeat a review of a cause in this court.

We have read and considered all the cases from other jurisdictions construing like statutes. However, none of the decisions are controlling here.

In our judgment, the language of this act is plain, and means just what it says, and not something more.

The motion is denied,

(29 Wyo. 33)

BOCK v. NEFSY et al.

(Supreme Court of Wyoming. July 20, 1922.)

Appeal and error \S 78(3)—Order sustaining demurrer held not appealable before "judgment"; "final order."

An order sustaining a demurrer is not a judgment or a final order within Comp. St. 1920, §§ 6369, 6371; hence, before entry of judgment, an appeal will not lie under section 6401, providing that a judgment or order may be reviewed by direct appeal, and that no writ of error is necessary, as the writ of error referred to is the petition of error under section 6373, since under section 6392 writs of error have been abolished.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order; Judgment (In Law).]

Appeal from District Court, Weston County; James H. Burgess, Judge.

Action by Eugene A. Bock against John Nefsy and another. Judgment for defendants, and plaintiff appeals. Appeal dismissed on motion.

Martin & Mason, of Hot Springs, S. D., and Greenwood & Dunbar, of Newcastle, for appellant.

C. A. Kutcher, of Sheridan, and Henry Frawley, of Deadwood, S. D., for respondents.

KIMBALL, J. This case is here by direct appeal, and the respondent moves to dismiss the appeal because there is no judgment or final order to support it.

The record discloses that a demurrer to plaintiff's amended petition was sustained, but no judgment was entered. The plaintiff undertook to appeal to this court from the order sustaining the demurrer.

By section 6401, Wyo. C. S. 1920, the first section of the direct appeal statute, it is provided that:

"No writ of error shall be necessary to present for review in the Supreme Court any judgment or order heretofore removable thereto by such writ of error, but any such judgment or order may be therein reviewed by direct appeal, and the words 'writ of error,' where used in the laws of this state, shall be held to mean and include 'appeal.'"

Writs of error to reverse, vacate, or modify judgments or final orders in civil cases have been unknown in our practice for many years (section 6392, Wyo. C. S. 1920), and to give effect to the language of the foregoing section it is understood that the Legislature in using the term "writ of error" intended to refer to that proceeding which is commenced here by the filing of a petition in error and the issuance and service of a summons thereon. Section 6373, Wyo. C. S. 1920. It is clear that it was intended by the direct appeal statute to provide another method for bringing to this court for review the same class of cases which theretofore could be brought here by such proceedings in error. It has been decided several times that an order sustaining a demurrer is neither a judgment nor a final order within the meaning of sections 6369 and 6371, and that a proceeding in error will not lie therefrom. *Menardi v. Omalley*, 3 Wyo. 327, 23 Pac. 68; *Turner v. Hamilton*, 10 Wyo. 177, 67 Pac. 1117; *Greenawalt v. Imp. Co.*, 16 Wyo. 228, 92 Pac. 1008; *Owen v. S. & E. Ry. Co.*, 19 Wyo. 409, 118 Pac. 652.

It follows that an appeal cannot be taken from such an order.

The appeal is dismissed.

BLUME, J., concurs.

POTTER, C. J., being ill, did not sit.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(139 Cal. 243)

CLUNIN v. FIRST FEDERAL TRUST CO.
(S. F. 9560.)(Supreme Court of California. July 10, 1922.
Rehearing Denied Aug. 3, 1922.)

1. Limitation of actions §66(12) — Where money payable on demand, statute begins at date of execution.

Where a promise to pay money is payable on demand, the statute of limitations begins to run at the date of its execution.

2. Limitation of actions §148(3)—Notation on check stubs not communicated to creditor held not acknowledgment of debt to toll statute.

In view of Code Civ. Proc. § 360, providing that no acknowledgment or promise is sufficient evidence of a new contract to toll limitations unless it is in writing, signed by the party to be charged, where remittances for interest on notes were made by checks, some before and some after the notes were barred, notations on the check stubs showing purposes for which the checks were executed, never having been communicated to the creditor, did not constitute an acknowledgment or promise sufficient to toll the statute.

3. Limitation of actions §163(4)—Part payment not an exception to rule requiring written acknowledgment of debt to toll statute.

A promise implied from the fact of part payment cannot be made an exception to the rule, under Code Civ. Proc. § 360, excluding all acknowledgments and promises not in writing.

4. Limitation of actions §146(3)—Written acknowledgment of debt to toll statute must refer and admit existence of debt which debtor willing to pay.

No writing is sufficient as an acknowledgment under Code Civ. Proc. § 360, unless it contains some reference to a debt, which, either of itself or with the aid of evidence of extrinsic facts in explanation, permissible under section 1860, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay; hence checks covering interest on notes, but not referring to any debt nor containing language subject to explanation as referring to a debt, were not sufficient acknowledgment of the debt evidenced by the notes to toll limitations.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Mrs. Mary Clunin against the First Federal Trust Company, executor of the estate of Jeremiah Lynch, deceased. From judgment for defendant, plaintiff appeals. Affirmed.

Charles A. Shurtleff, of San Francisco, for appellant.

Cushing & Cushing, of San Francisco, for respondent.

(207 P.)

SHAW, C. J. The plaintiff appeals from the judgment. The action was upon a promissory note for \$3,000 executed by Jeremiah Lynch to the plaintiff on April 20, 1908, payable on demand.

By demurrer to the complaint, and also by way of answer, the defendant interposed the defense that the action was barred by the statute of limitations. The court found in favor of the defendant on this defense, and rendered judgment accordingly.

[1] Where a promise to pay money is payable on demand the statute of limitations begins to run thereon at the date of its execution. *O'Neil v. Magner*, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878. The period of limitation is four years (Code Civ. Proc. § 337), and consequently, unless the time is extended in some manner, an action on the note became barred after April 20, 1913. This action was not begun until May 31, 1918.

[2] Section 360 of the Code of Civil Procedure provides that—

"No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

On behalf of the plaintiff it is claimed that the case is taken out of the operation of the statute of limitations by certain writings executed by Jeremiah Lynch and proven at the trial. These writings consist of checks signed by Jeremiah Lynch, payable to the order of plaintiff, together with the memoranda made by Lynch on the stubs to which said checks were attached at the time they were made, showing the amount of the check and the purposes for which it was executed. Some of these checks and memoranda were made prior to the expiration of the period of limitation after the date of the note, and some of them were made after the expiration of that period. As they are all of the same character, it will not be necessary to state more than one of them. The first check is as follows:

"San Francisco, 15th April, 1912.

"The Bank of California, National Association, San Francisco: Pay to the order of Mrs. M. Clunin \$196, one hundred and ninety-six dollars.
Jeremiah Lynch."

The stub opposite this check was as follows:

"No. 1076
Date 15th April 1912
To Mrs. M. Clunin
Quart. Annuity to 1 Apr 150
Int. on 8000# at 6% three months 45
Sundry 1"

Similar checks, for which similar stubs were entered in the check book, were introduced in evidence bearing date as late as April 14, 1917. Consequently, if these transactions operated as an acknowledgment or promise sufficient to take the case out of the operation of the statute of limitations within the meaning of section 360, Code of Civil Procedure, the action was not barred. These checks were transmitted to the plaintiff by said Jeremiah Lynch. It does not appear that they were accompanied by any letter or other writing referring to the purpose for which the checks were executed. The stubs to which the checks were originally attached were separated from the checks before they were sent to Mrs. Clunin, and were not in any manner communicated to her by the deceased.

So far as the stubs are concerned, it is well established in this state that they do not constitute an acknowledgment or a promise sufficient to take the case out of the statute of limitations, since they were never communicated to the creditor, Mrs. Clunin. In *Biddel v. Brizzolara*, 64 Cal. 355, 30 Pac. 609, it being on the second appeal in that case, the court said on this subject:

"It is very certain that an actual promise can only be made to the creditor, and it follows that the acknowledgment from which the promise is to be inferred must be made to the creditor."

This proposition is thoroughly established by the authorities and we have no decision to the contrary.

It is earnestly insisted by counsel for the appellant that the execution of the checks and the sending of them to Mrs. Clunin constituted a sufficient acknowledgment or promise to toll the statute. It will be observed that the checks of themselves make no reference to the existence of any debt, and contain no promise of any sort to pay money or in discharge of a debt of any character. They all include in the amount stated a sum which the stubs show was intended to pay quarterly interest on a \$3,000 debt, but that fact nowhere appears upon the check itself; none of them was for that exact sum; they all include sums for other purposes.

The law is well established in this state by numerous decisions that the acknowledgment or promise referred to in section 360 must be in writing, and that the writing, whether in the form of a promise or not, must contain some reference to an existing debt owing to the creditor, which the debtor is willing to pay. It must, of itself acknowledge the debt. The first decisions upon the subject, those in *Fairbanks v. Dawson*, 9 Cal. 89, and *Barron v. Kennedy*, 17 Cal. 574, showed some uncertainty with respect to the character of the writing by which the acknowledgment should be shown and concerning the effect of the statute then in force, which was

substantially the same in language as section 360, but in later cases the law has been crystallized into a clear statement of the rule. In *McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 170, where the court was considering the effect of a letter as an acknowledgment of a debt, it was said:

"The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay."

In *Biddel v. Brizzolara*, 56 Cal. 380, the court was considering a plea of the statute of limitations upon a promissory note secured by mortgage on real estate and the effect of an agreement executed by the maker of the note and a third person, wherein it was recited that the third person "assumes a mortgage now on said property held by Philip Biddel, principal and interest amounting to \$6,000." The court said:

"The 'acknowledgment' must be a direct and unqualified admission of an existing debt which the party is willing to pay."

And in connection with the quotation it gives a passage from *Bell v. Morrison*, 1 Pet. 362, 7 L. Ed. 174, containing the following:

"Such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay."

In *Pierce v. Merrill*, 128 Cal. 476, 61 Pac. 68, 79 Am. St. Rep. 63, the last sentence of the above quotation from *McCormick v. Brown* is quoted and followed. The same idea has been stated in slightly different language as follows:

"The acknowledgment must be a direct, unqualified, and unconditional admission of a debt which a party is liable and is willing to pay." *Curtis v. Sacramento*, 70 Cal. 414, 11 Pac. 748.

"The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same." *S. P. Co. v. Prosser*, 122 Cal. 415, 52 Pac. 837, 55 Pac. 145.

"The acknowledgment of a debt in contemplation of this statute must be a distinct, unqualified, unconditional recognition of an obligation for which the person making such admission is liable." *Powell v. Petch*, 166 Cal. 331, 136 Pac. 56.

[3] There are expressions in some of the opinions of this court which have apparently been misunderstood, and we deem it proper here to give some explanation and qualification thereof. The remarks in *Barron v. Ken-*

nedy, 17 Cal. 574, seem to say that a part payment alone is sufficient to take the debt out of the statute, if it is not accompanied by some declaration qualifying the implied admission of the existence of the debt. In that immediate connection the necessity of a writing is not mentioned, except to say that it should be proven by a writing, but, as was explained in *Heinlin v. Castro*, 22 Cal. 100, the decision in the *Kennedy Case* was predicated upon the letters accompanying the transmission of the money and which showed that it was to be applied on a debt due to the plaintiff. This view of the case is further emphasized by the decision in *Pena v. Vance*, 21 Cal. 149. In that case the court was asked to reconsider the doctrine of the earlier cases, and upon this point the opinion says:

"On examination of the matter a second time, we are satisfied that the statute intended to exclude all acknowledgments and promises not in writing, and that a promise implied from the fact of part payment cannot with any propriety be made an exception."

In *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40, the letter held to be a sufficient acknowledgment under the statute, although it distinctly referred to an existing debt, did not describe the debt with any certainty, and it was held that the fact that there was but one debt in existence to which it could refer could be proven as an extrinsic fact to explain the uncertainty in the writing. This, of course, is expressly allowed by section 1860, Code of Civil Procedure, in any case of ambiguity in a writing.

Several decisions contain language apparently indicating that an acknowledgment made by an act or by conduct, although not in writing, may be sufficient to take the case out of the operation of the statute. The context, however, in each case shows that the act or conduct which the court was referring to was a writing which contained an acknowledgment of the debt sufficient to come within the rule stated in the foregoing decisions. Such expressions are found in *Fairbanks v. Dawson*, supra, *Tuggle v. Minor*, 76 Cal. 101, 18 Pac. 131, and in *Minifie v. Rowley* (Cal. Sup.) 202 Pac. on page 675.

[4] It is clear from all these decisions that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay. The checks introduced in evidence do not come up to this standard since they contain no reference whatever to any debt, or any language which can be said to be uncertain in its meaning and subject to explanation

by the aid of extrinsic circumstances so as to be made to refer to a debt.

Our conclusion is that the court below was correct in holding that the action is barred by the statute of limitations.

The judgment is affirmed.

We concur: WASTE, J.; LENNON, J.; SLOANE, J.; WILBUR, J.

SHURTLEFF, J., being disqualified, does not participate in the foregoing opinion.

(189 Cal. 326)

BALL et al. v. CALIFORNIA CONSERVING CO. (S. F. 9994.)

(Supreme Court of California. July 13, 1922. Rehearing Denied Aug. 10, 1922.)

1. **Brokers §60**—Broker held not entitled to commission on sale subject to buyer's approval of goods where not given, and contract canceled by agreement.

Where the memorandum of sale negotiated by a broker expressly provided that the goods must meet with the buyer's approval, and the buyer thereafter sent to the seller a sample as to the quality of goods he demanded, which the seller refused to furnish, whereupon the contract was canceled by agreement of the parties, the broker was not entitled to his commission.

2. **Brokers §64(2)**—Broker held to have contracted with reference to provision of sale contract allowing pro rata delivery.

Where the memorandum of a sale contract negotiated by a broker stated the terms were to be according to the regular California vegetable contract, and such regular contract included a term that, in case of damage to crop, or for any cause whatsoever, the seller was unable to make full delivery, the buyer would accept pro rata delivery upon all goods packed short, the broker must be held to have contracted with reference to that provision of the contract.

3. **Brokers §69**—Held entitled under contract to commission only on goods delivered.

A broker who negotiated a contract for the sale of goods which provided that, in the case of inability to make full delivery for crop failure or other cause, the buyer agreed to accept pro rata delivery of the quantities specified, the broker was entitled to a commission for the sale only of the quantity of goods actually delivered where that was 22 per cent. of the quantity contracted for.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by F. M. Ball and another, as trustees of F. M. Ball & Co., a dissolved corporation, against the California Conserving Com-

pany, a corporation, to recover a broker's commission. Judgment for plaintiffs, and defendant appeals. Reversed.

Goldman & Altman, of San Francisco, for appellant.

E. J. Torregano, Vincent Surr, and Goldman, Nye & Surr, all of San Francisco, for respondents.

RICHARDS, Justice pro tem. Defendant appeals from a judgment recovered against it in an action instituted by F. M. Ball & Co., a corporation, for commissions for negotiating three sales of what is commercially known as "tomato paste." The complaint contained two counts covering each sale, one predicated upon the agreed compensation and the other upon the reasonable value of the services. The answer, by its failure to deny the same, admitted the allegations of the complaint touching the incorporation of the respective parties to the action, but denied the remaining allegations of each count. The findings were that the allegations of the complaint were true, and, based thereon and upon the conclusion of law, the trial court rendered judgment for plaintiff in the amount prayed for, with interest from the date of sales declared upon in the several counts of the complaint.

Three separate transactions were involved: The first was a sale of tomato paste to A. Russo & Co. of Chicago, upon which the court found and adjudged that plaintiff was entitled as a commission to \$687.50, with interest thereon from October, 1917, the date of the alleged sale, at the rate of 7 per cent. per annum. The remaining two sales were sales of paste to the Natwill Company of New York, upon which the court found and adjudged that plaintiff was entitled to recover as commissions the sum of \$452, with like interest respectively on \$212 thereof from February 2, 1918, and on \$240 thereof from March 22, 1918, the dates, respectively, of such sales. At the time the several orders were secured by plaintiff a sales memorandum was prepared in writing in each case, stating the amount and price of the goods sold. Each was accepted by the defendant. These documents were identical in form except as to the name of the purchaser, the date of the memorandum, the amount and time of shipment of goods. The price of the goods was the same in each case. These memoranda were in abbreviated form as to some of their provisions, among which was a clause reading: "Terms: reg. Cal. veg. contract." These memoranda each contained the following provision: "2½ per cent. brokerage to Ball-Lockhart." These memoranda also contained the following clause: "Subject this year's delivery meeting buyer's approval." Subsequent to the making and execution of these memoranda in abbreviated form a more amplified contract of sale was entered

into during the early part of the year 1918 between the defendant, as seller, and each of the purchasers, which, though executed by the defendant and the latter, was not presented to the plaintiff for either its approval or signature. The record seems to indicate that these later documents followed generally the form of the regular California vegetable contract used by sellers and purchasers of vegetable products. In each of these amplified contracts there was this provision:

"Quality of tomato paste to be superior to last year's crop sold to us by Pacific Vinegar and Pickle Works."

There was also, under the subhead of "terms and conditions," the further provision reading as follows:

"In case of damage to crop, or for any cause or causes whatsoever, the seller is unable to make full delivery of any of the varieties of goods named, the buyer agrees to accept pro rata delivery upon all goods packed short."

These later contracts contained no reference to the broker or its commission, and, as we have seen, were not presented to it, or signed by it. (The Pacific Vinegar & Pickle Works above referred to was the predecessor of the defendant.)

[1] Directing our attention first to the sale to Russo & Co., it appears that on March 29, 1918, after the execution of the amplified contract with it, Russo & Co. wrote the defendant as follows:

"Under separate mail we are sending you a sample of six cans of California tomato paste. The tomato paste received from you last year does not come up to this high grade standard. We wish to state that we must have quality same as sample which we have sent you."

To this letter the defendant, on April 3, 1918, replied:

"The article which we supplied to the trade last year gave universal satisfaction, and it will be made in the same way and of the same standard and grade this year. We take it from your letter that this being the case you will want to cancel your contract with us. If our understanding is correct we then ask you to definitely advise us one way or the other by return mail please."

Russo & Co., on the 8th of the same month, answered:

"If acceptable to you we cancel our contract #94 covering 1,800 cases 200/6 oz. tins of tomato paste. You will, therefore, acknowledge receipt of our cancellation by return mail."

Russo & Co., not content to transmit a reply to this letter through the usual course of mail, on April 16, 1918, wired defendant:

"Please wire at our expense cancellation of our contract"

—to which request defendant replied by wire:

"We accept your cancellation of tomato paste contract."

Appellant herein contends that, as to the Russo & Co. sale, the goods offered by the seller did not meet with the buyer's approval, and hence that, the condition in the contract of sale in that respect not having been fulfilled, and the contract for that reason having been canceled, the plaintiff was not entitled to recover any commissions upon such sale.

We see no answer to this contention. The memorandum of sale upon which the plaintiff relies for a recovery contains the express provision that the goods must meet the buyer's approval. This provision renders it an executory contract of sale upon a condition subsequent, without the fulfillment of which there could have been no completed sale under said contract. The right of the broker to recover commissions must be held to have depended upon a completed sale; and, this not having been consummated, it follows that the right of the plaintiff to recover his commissions under the contract with Russo & Co. must fail.

[2] As to the right of the plaintiff to recover its commissions upon the sales of the Natwill Company, another question is presented. The memorandum of sale in each of said contracts, as we have seen, contains the abbreviated clause reading as follows: "Terms: reg. Cal. veg. contract." This abbreviated clause is conceded, when amplified, to mean: "Terms: Regular California vegetable contract," and this clause thus amplified, when contained in the preliminary agreement between the seller and the buyer, upon which the plaintiff relies for its right to its commissions, must be interpreted as meaning that the parties to said preliminary agreement were contracting with reference to and under the provision of the usual amplified contract for vegetable products in general use among the sellers and buyers of such products at the time, and hence it will be assumed that, when the buyer and seller executed the enlarged contract a few weeks later, such enlarged contract was the regular California vegetable contract which was in the contemplation of all of the parties to the preliminary memorandum of agreement upon which the plaintiff herein relies for the recovery of its commissions. If this assumption is correct, it would necessarily follow that the provisions of the later and enlarged contract are to be read into the preliminary agreement between the parties; and, this be-

ing so, it must be held, in the absence of a showing to the contrary, that the plaintiff at the time of the execution of the said contract was aware of the conditions embraced in the regular California vegetable contract, and hence was aware of the fact that such enlarged contract contained the provision that—

"In case of damage to crop, or for any cause or causes whatsoever, the seller is unable to make full delivery of any of the varieties of goods named, the buyer agrees to accept pro rata delivery upon all goods packed short."

Being thus aware of this condition in the enlarged contract the plaintiff must be held to have itself contracted with reference to it, and hence to have agreed that the amount of its commissions should depend upon the amount of the deliveries of the seller's product, which, as shown by the undisputed evidence herein, was but 22.2 per cent. of the amount of goods provided for in the preliminary contract between the parties.

[3] The foregoing conditions as to the amount of goods to be delivered and accepted, upon which the plaintiff's percentage of commissions was to be computed, appearing upon the face of these contracts, it was necessary for the plaintiff to show that there had been a full delivery of all of the goods provided for in the memorandum of agreement upon which it relies before it would be entitled to the full commissions which it claims. Not having shown this, but, on the contrary, the undisputed evidence being that the seller's pack and delivery was but 22.2 per cent. of the anticipated amount provided for in the preliminary memorandum, it follows that the plaintiff's commissions must be computed upon the actual amount of goods delivered under said contracts.

It follows from the foregoing that, as to the Russo & Co. contract, the plaintiff was not entitled to recover any commissions, and that, as to the two contracts with the Natwill Company, the amount of commissions recoverable by the plaintiff must be computed upon the basis of the actual deliveries made under said contracts, and that the trial court was in error in awarding the plaintiff judgment for commissions in an amount in excess of that indicated by the views above set forth.

Judgment reversed.

We concur: SHAW, C. J.; WASTE, J.; SLOANE, J.; LAWLOR, J.

(189 Cal. 317)

In re ROSS' ESTATE. (S. F. 9573.)

(Supreme Court of California. July 13, 1922.)

Appeal and error \Leftrightarrow 1218—Remittitur not recalled later than 30 days after judgment, in absence of fraud or mistake.

In the absence of fraud, and where the Supreme Court renders its judgment advisedly on the case as presented by the parties, it cannot, after expiration of the 30 days allowed by the Constitution, after which the judgment is final, recall the remittitur to reconsider the facts and reasons on which the judgment was given.

In Bank.

On motion to recall remittitur. Denied. For former opinion, see 202 Pac. 641.

George D. Collins, Jr., of San Francisco, for appellants.

Thomas G. Crothers, Wm. M. Abbott, K. W. Cannon, and I. M. Golden, all of San Francisco, for respondents.

SHAW, C. J. The respondents move to recall the remittitur, on the ground that it "does not conform to the final judgment of the court, upon the ground that the judgment appealed from was in all substantial particulars affirmed."

The appeal was taken from a decree of partial distribution of the estate of Catherine Ross, deceased. That decree was that the property distributed was a part of the community property of John Ross, deceased, and the deceased, Catherine Ross, during their marriage, that, upon his death, it was distributed to her and that, upon her death, thereafter one-half of such community property descended to the relatives of John Ross, deceased, and the other half to the children of Elizabeth H. Donohue as the next of kin of Catherine Ross. Catherine Ross had two sisters, who died prior to her death, namely, Elizabeth H. Donohue and Bridget H. Quinn, both of whom left descendants who are now living. The decree gave no part of the property to the descendants of Bridget H. Quinn, and some of them appealed therefrom. It was upon the decision of this appeal that the remittitur was issued. The decision of this court was that, as descendants of Bridget H. Quinn, the appellants were entitled to a share in the one-half of the community property included in the distribution to the Donohue children. To that extent the decree was reversed. The briefs show that the heirs of John Ross and the children of Mrs. Donohue filed a joint brief in opposition to the claims of the appellants. Nothing was said to the effect that the John Ross heirs had no interest in the controversy between the descendants of the two sisters of Catherine Ross over the one-half of her property, nor with respect to the John Ross heirs being exempt from costs of appeal. This court, up-

on this condition of the matter, made a general order reversing the case in favor of the appellants. As the respondents made common cause against the appellants the court saw no reason for making a distinction between them on the matter of costs. The error, if any, was due to the oversight of the parties and not that of the court or of the clerk.

In the absence of fraud, and where this court renders its judgment advisedly upon the case as presented by the parties, this court has no power after the expiration of the 30 days allowed by the Constitution and after which our judgment is final, to recall the remittitur for the purpose of reconsidering the facts and reasons upon which the judgment was given. *Oakland v. Pacific, etc., Co.*, 172 Cal. 332-337, 156 Pac. 468, Ann. Cas. 1917E, 259; *Estate of Levinson*, 108 Cal. 459, 41 Pac. 483; 42 Pac. 479; *Granger v. Sheriff*, 140 Cal. 195, 73 Pac. 816; *Herrlich v. McDonald*, 83 Cal. 505, 23 Pac. 710; *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008; *Martin v. Wagner*, 124 Cal. 204, 56 Pac. 1023; *Richardson v. Chicago, etc., Co.*, 135 Cal. 311, 67 Pac. 769. This judgment was given on December 2, 1921, and became final on January 1, 1922. In that interval, if the heirs of John Ross had applied therefor, the court might have altered its judgment as to costs. This motion was instituted on March 1, 1922. It was then too late for the court to aid in the matter, even if it were so disposed. The motion is denied.

We concur: SHURTLEFF, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; WASTE, J.; RICHARDS, Justice pro tem.

(58 Cal. App. 96)

CALLAGHAN v. OLSEN et al. (Civ. 4067.)

(District Court of Appeal, First District, Division 1, California. June 5, 1922.)

1. Appeal and error \Leftrightarrow 671 (3)—Where appeal is on judgment roll alone, only sufficiency of findings to support the judgment will be considered.

Where an appeal is taken on the judgment roll alone, only sufficiency of the findings to support the judgment will be considered.

2. Principal and surety \Leftrightarrow 99—Surety for rent for certain months not released by acceptance of amount less than rent for previous months.

Where defendant was surety for the payment of rent for certain months, the fact that a landlord's agent accepted a less amount than that specified for certain months previous to those for whose rent defendant was a surety did not amount to an alteration of the principal obligation, so as to release defendant, in pursuance of Civ. Code, § 2819, nor did it operate as a release on the ground that the landlord thereby waived certain remedies in unlawful detainer to which he might have resorted.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by P. P. Callaghan against George L. Olsen and another. From judgment for plaintiff, defendant A. Davidson appeals. Affirmed.

Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellant.

Stanislaus A. Riley, of San Francisco, for respondent.

PREWETT, Justice pro tem. Action on a guaranty. The respondent leased to defendant Olsen certain real property for a period of 12 months at an agreed monthly rental of \$400. At the same time, and as a part of the same transaction, the appellant executed to the respondent a certain written guaranty, wherein he did—

"covenant, promise and agree to and with the party of the second part (the respondent) that the said George L. Olsen shall well and truly pay the rents reserved for the last three months, to wit, for the three months commencing December 1, 1915, and ending February 29, 1916, to perform and execute all covenants therein contained on his part and that in his failure to do so in any particular we will forthwith pay * * * the said rents that may be or become due under said lease for the last three months thereof, to wit, for the months commencing December 1, 1915, and ending February 29, 1916, and all damages that may happen or accrue by reason of such failure not exceeding the aggregate sum of \$1,200."

[1] The defendant Olsen failed to pay the rent for the last three months of the term, and the respondent thereupon brought this action against both parties to recover the same. The trial court rendered judgment as prayed for, and the appellant appeals upon the judgment roll alone. This eliminates all points save the sufficiency of the findings to support the judgment.

The appellant directs our attention to the following finding made by the trial court:

"That for several months during the tenancy of said defendant Olsen, said defendant paid to the agent of the plaintiff and the said agent received and accepted in payment of the rent for said months a sum less than the stipulated rate of rental under said lease; that none of said months is embraced within the period from December 1, 1915, to and including February 29, 1916 (being the period for which the rental herein sued for accrued and became due). That there is no evidence showing that the plaintiff had actual knowledge of the payment and acceptance of said reduced sums. That there was no written agreement between defendant Olsen and plaintiff either in person or by agent for any reduction of said rent or for the modification of any term of said lease; that there was not at any time any written authorization from plaintiff to reduce said rent or to modify any term of said lease."

[2] It is insisted that the acceptance by the respondent of a smaller sum than the agreed rate of rental was an alteration of the principal obligation in a material respect, and that the effect thereof was to release the guarantor. No fault can be found with the soundness of the rule upon which this contention is based (Civ. Code, § 2819), but it has no application to the present case. The appellant does not question the rule that future rentals are not reduced by the acceptance of less than the stipulated sums for a portion of the leased term. In fact, the question is scarcely open for discussion, in view of the many California authorities bearing upon it. In *Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203, for a period of nine months the landlord accepted less sums than the stipulated rental, and receipted in full for the said months. The surety in that case, as here, raised the point that these payments of less sums and their acceptance by the landlord operated, by changing the terms of the lease, to release the surety. The Supreme Court, in commenting upon this claim, uses the following language.

"They are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms has been made in writing."

From *James Eva Estate v. Mecca Co.*, 40 Cal. App. 515, 181 Pac. 415, we quote:

"The final contention of appellant is that the guarantor was discharged from liability for the reason that the principal obligation of the lessee was changed and altered in a material respect without the consent of the guarantor. The change in the principal obligation relied upon is the fact that the lessor made a rebate, for certain months, from the amount of rent specified in the lease," etc.

To this claim the court replied, in effect, that concessions of the kind in question are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent. From a number of cases affirming the same doctrine, we will notice but one other. In *Dodge v. Chapman*, 42 Cal. App. 614, 183 Pac. 966, the court gives a very extended and valuable analysis of the point. In one place it says:

"The agreement, then, to receive for a limited time a reduced monthly rental was not in writing, and was supported by no consideration. As an agreement in modification of the lease, it therefore was without * * * effect. * * * Conceding that the obligation to pay the stipulated monthly rental was satisfied by these payments, yet the contract was not altered any more than it would have been if the full amount had been paid. It was no concern of the sureties how these payments were made. The landlord could have taken his pay in 'chips and whetstones' if he saw fit."

While the appellant could scarcely question, and perhaps does not question, the force of these authorities, he insists that an agreement by a surety to pay the last installments of a term is affected by the acceptance of less than the stipulated sums. He argues that the landlord thereby waives certain remedies in unlawful detainer to which he might have resorted. But, at most, he no more waives them than he does when he accepts payment at the full stipulated figure. In either case the transaction as to the past month is closed, and with it every remedy to which he might have resorted. Indeed, it is difficult to discover how the landlord waived anything save the concession which he made in accepting a less sum than the agreed amount. We have seen that such a concession does not operate to release either the principal or surety.

The only remaining point urged by appellant is the alleged failure of the court to find whether or not there was an agreement between respondent and defendant Olsen for a modification of the terms of the lease. Counsel, however, have overlooked finding 21, wherein the court expressly finds that no such alteration was ever made.

We find no error in the record, and the judgment is accordingly affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

(57 Cal. App. 647)

MAYNES v. GALLIANO. (Civ. 4088.)

(District Court of Appeal, First District, Division 2, California. May 10, 1922. Hearing Denied by Supreme Court July 6, 1922.)

1. Contracts §354—Finding against plaintiff in language of complaint is sufficient.

Where the complaint was on the common counts, and alleged defendants were indebted to plaintiff for services rendered to defendants by plaintiff's assignor, for which services defendants promised in writing to pay, a finding of the trial court in the exact language that those allegations of the complaint were not true is sufficient to support a judgment for defendants.

On Hearing in Supreme Court.

2. Contracts §332(2)—Complaint on common counts held to state cause of action on written contract.

A complaint alleging that defendants were indebted to plaintiff in a stated sum for services rendered to defendants by plaintiff's assignor, for which defendants promised in writing to pay, though in the form of a common count for services rendered, in effect stated a cause of action on the written contract.

3. Brokers §40—Authority to sell lease held not to give commission for sale of subsequent renewal.

Exclusive authority to brokers to sell a lease does not give them authority to sell a

renewal of the lease thereafter obtained by their principal, so that they are not entitled to their commission after the renewal lease was sold to one who had refused to purchase through them the original lease, because it would expire too soon, even though the owner had not taken the steps necessary to terminate the exclusive agency.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by W. A. Maynes against J. B. Galliano to recover for services rendered. Judgment for defendant, and plaintiff appeals. Affirmed.

Dunn, White & Aiken, of Oakland, for appellant.

Snook & Brown, of Oakland (George M. Naus, of Oakland, of counsel), for respondent.

NOURSE, J. This is an appeal from a judgment in favor of defendant in an action upon a common count for services rendered. The complaint alleged:

"That the defendants above named are indebted to the plaintiff in the sum of one thousand (\$1,000.00) dollars for services rendered to the defendants by Lubeck's Investment Company, a corporation, within two years last past, for which services the said defendants promised in writing to pay the said Lubeck's Investment Company the said sum of one thousand dollars."

The trial court found, in the exact language quoted, that these allegations of the complaint were not true. The facts appearing at the trial were that defendant and plaintiff's assignor entered into a written contract, whereby the assignor was given the exclusive right to sell certain property belonging to the defendant for the period of one day, or until written notice of revocation was received. By the terms of the contract the defendant agreed to pay plaintiff's assignor all over the sum of \$4,500 for which the property was sold, but, in any event, a minimum compensation of \$500, if—

"before the termination of this agreement a deposit or notice of sale or of intended sale, or agreement, or bill of sale, lease, conveyance, or mortgage, is made of or on said property, or any part thereof, or if the whole or any part of the consideration is paid, or is deposited in escrow, or if, at any time before or after such termination, a sale or transfer of said property or any part thereof is made to any one to whose attention same was brought by said agent during the life of this contract, or if such a person accepts a position with me or enters my employ in respect to the above property or any part thereof, or if any such person to whose attention same was brought as aforesaid by said agent, in any manner or mode, secures any interest in or lien or claim upon, or takes possession of, the said property or any part thereof, directly or indirectly, or by virtue of

one or more transfers within two months after the termination of this contract. Notice of withdrawal must be given by registered mail or by writing receipted for by said agent."

The contract was dated July 15, 1919. It appears that in December of that year the purchaser read an advertisement for the sale of the property published by the plaintiff's assignor, and in response thereto called upon the local agent of plaintiff's assignor and made inquiries regarding the sale of the property. It appears that this agent gave to the purchaser some information which he had regarding this property and similar properties which he had listed for sale. The purchaser informed the agent that he was not interested in this property, because the term of the lease was too short and he was not satisfied with the location. Defendant had no knowledge that even such an inquiry had been made until the middle of May, 1920, when the property had been sold through the efforts of another broker. It appears that when the contract was made the defendant's lease ran only until July, 1920; that on December 24, 1919, he obtained a new lease for a term of five years, beginning July 1, 1920. It does not appear that plaintiff's assignor had knowledge of the new lease, but, in any event, he made no effort to interest the subsequent purchaser in the property after this condition was changed. It is in the testimony that plaintiff's assignor took some "prospects" to view the property, but did not take the one who subsequently purchased it. On March 10, 1920, the defendant informed the agent that his property was off the market, and requested the agent not to come around any more, because the property was not for sale. Defendant testified that in reply to this the agent said: "All right; * * * we won't come again." Nothing further was heard from plaintiff's assignor regarding the property or the contract. Defendant, assuming from the statement of the agent that the contract was abandoned, again offered it for sale through another agent, by whom the sale was made on May 18th of that year. Plaintiff attacks the judgment upon the grounds that the exclusive right to sell conferred upon his assignor could not by the terms of the contract be terminated, except upon 10 days' notice in writing, and no such notice was given, and insists that, because the contract was not terminated in the manner provided therein, plaintiff was entitled to judgment.

[1] The finding of the trial court in the terms of the complaint is sufficient to support the judgment. Appellant having elected to sue upon a common count, and not upon the contract, it was essential, of course, to prove rendition of the services and a promise to pay for them. In finding that the respondent is not indebted to appellant in any sum for services rendered, the trial court

must be presumed to have found that no services were rendered. If this is so, the appellant, of course, is not entitled to judgment. In reaching this conclusion, the trial court had before it the testimony relating to the advertising of the property for sale in December, 1919, the inquiries made by the purchaser at that time and his refusal to further consider the property, and the fact that after a new lease had been obtained, and the property was presented to him through an independent source, he for the first time became interested. In reaching the conclusion that no services were rendered, the court no doubt found that the advertising in the newspaper had no connection with the subsequent sale. The contract was manifestly drawn with great cunning, to enable the agent to insist upon payment without turning a hand for the benefit of the owner. We are not prepared to say what should have been the result if the suit had been on the contract. But in this action on a common count for services rendered we cannot say that the evidence is insufficient to support the finding of the trial court. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Rehearing.

PER CURIAM. [2] The petition for a rehearing of this cause in the Supreme Court is denied. We are of the opinion that the fact that the complaint was in the form of a common count for services rendered, instead of a special declaration on the contract introduced in evidence, is immaterial to the decision, and we do not approve the opinion of the District Court of Appeal so far as it leaves that question open. The only support of the common count was the contract introduced in evidence, and in effect the complaint stated a cause of action on that contract.

[3] We regard the essential fact upon which the judgment should be affirmed to be that the contract of agency to sell the interest of the defendant in the property related exclusively to a lease which expired on July 1, 1920. The purchaser from the defendant positively refused to buy that lease, and the efforts of the plaintiff did not bring about a sale thereof. Consequently the plaintiff's services produced no benefit to the defendant. The purchaser refused to negotiate until after defendant had procured an additional lease beginning July 1, 1920, and running five years, and it was the procurement of that lease which induced the sale and not the efforts of the plaintiff.

SHAW, C. J., LAWLOR, WILBUR, SLOANE, and WASTE, JJ., and RICHARDS, Justice pro tem.

(58 Cal. App. 143)

BURKS v. BRONSON et al. (Civ. 3885.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1922.)

1. Judgment \Leftrightarrow 203—Court cannot render another judgment after rendering judgment of nonsuit.

Where the court in an action for specific performance rendered a judgment of nonsuit, such judgment was final, and the court had no jurisdiction to later render a judgment dismissing the complaint.

2. Appeal and error \Leftrightarrow 882(2)—Rule that party cannot assign as error a ruling which he requested does not apply where trial court lacked jurisdiction.

The rule that a party cannot assign as error a ruling which he invited the trial court to make does not apply where the trial court lacked jurisdiction to make the ruling.

3. Appeal and error \Leftrightarrow 790(3)—Appeal will be dismissed where controverted question has been determined by another order in same action.

An appeal will be dismissed where the question in controversy has been determined by another order in the same action or by another action.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Dana Burks against L. B. Bronson and another. From a judgment dismissing the complaint, plaintiff appeals. Appeal dismissed.

Claud B. Andrews, of Los Angeles, and Charles D. Swanner, of Santa Ana, for appellant.

Clyde Bishop, of Santa Ana, and Goodwin & Morgrage, of Los Angeles, for respondents.

CRAIG, J. This action is one for specific performance of a contract for the sale of a lot. The defendants and respondents ask that the appeal be dismissed and base their contention in this regard upon the following facts:

Upon the date of the trial, to wit, February 23, 1921, and when the plaintiff had closed his case, a motion for a nonsuit was made by the defendants, was ordered granted by the court; on the same day this order was entered on the minutes and noted in the register of actions by the clerk. From this judgment no appeal has been taken. On March 22, 1921, the trial court entered a second judgment, this being one to dismiss the action. From this judgment the plaintiff has appealed, and it is this appeal which we are now asked to dismiss.

[1] The judgment of nonsuit was a final judgment. *Clark v. Superior Court*, 37 Cal. App. 732, 174 Pac. 681. This being so, the court was without jurisdiction to make any other judgment. *Darlington v. Butler*, 3 Cal. App. 448, 86 Pac. 194.

[2] From the dilemma of this situation the appellants seek to be relieved by invoking the rule that a party cannot successfully assign as error a ruling which he has himself invited the trial court to make. Several decisions are cited in support of this proposition. In none of the cases referred to was the error committed of such a character as to render the action of the court void because of want of jurisdiction. Lack of jurisdiction is not waived under the rule relied upon by appellant. 4 *Corpus Juris*, 586.

[3] It will be observed, further, that in the instant case a second reason exists for dismissal of the appeal aside from the fact that the judgment of dismissal is void. Suppose we were to hold that since respondent invited the trial court to commit the error of entering a second judgment he should not be heard to assert its invalidity. It yet remains a fact, as shown by the record on appeal, that a judgment of nonsuit was regularly entered. A reversal of the judgment of dismissal would not affect the force or finality of the judgment of nonsuit. It would therefore be a useless thing for this court to pass upon the merit of the appeal or to order a reversal of the judgment of dismissal. The questions presented would be entirely moot. Under such circumstances the appeal should be dismissed. *Mendocino County v. Peters*, 2 Cal. App. 34, 82 Pac. 1124. It is a settled principle that an appeal will be dismissed where the question in controversy has been determined either by another action or by another order in the same action. *Amorisia v. Rando* (Sup.) 88 N. Y. Supp. 356.

The appeal is dismissed.

We concur: **FINLAYSON, P. J.;**
WORKS, J.

(58 Cal. App. 134)

HARBOUGH v. ENLARGED BAXTER CREEK IRR. DIST. (Civ. 2364.)

(District Court of Appeal, Third District, California. June 16, 1922.)

Waters and water courses \Leftrightarrow 225—In suit to restrain inclusion of land, complaint which failed to allege under what law irrigation district was organized held insufficient.

A complaint, in an action to restrain an irrigation district from including plaintiff's land in an enlargement thereof, which failed to allege under what law the irrigation district was organized, whether plaintiff's land was a part of the original district or subsequently included therein in the enlargement thereof, whether the enlargement was affected by the reorganization of the district or by a change of its boundaries, and whether plaintiff's objection to the inclusion of his land was made in the manner prescribed by law or whether he was granted a hearing and his objection overruled contrary to the facts proved at the hearing, was insufficient to authorize a temporary injunction.

Appeal from Superior Court, Lassen County; George H. Thompson, Judge.

Application for injunction by P. E. Harbough against the Enlarged Baxter Creek Irrigation District. From an order denying an application for temporary injunction, plaintiff appeals. Affirmed.

F. A. Kelley, of Susanville, for appellant.
Pardee, Hardy & Pardee, of Susanville, for respondent.

FINCH, P. J. Plaintiff applied to the trial court for a temporary injunction, basing his application on the complaint alone. This appeal is from the order denying the application. The allegations of the complaint are as follows:

"That said defendants are a corporation duly organized and existing under and by virtue of the laws of the state of California.

"That for several years last past plaintiff has been and now is the owner of the following described lands, situate, lying and being in said county and state, and more particularly described as follows, to wit: S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 13, township 29 north of range 13 east M. D. B. and M.

"That said defendants have enlarged or are attempting to enlarge said irrigation district and have incorporated and embraced all of said lands of plaintiff therein, but that plaintiff objected to any and all of his said lands being incorporated or included in said district and now objects to any or all of his said lands being included in said district upon the following grounds and reasons: That all of his lands are so situated and lie in such a shape that he would not receive any benefits in irrigation or otherwise from the proposed enlargement of said irrigation district; that plaintiff has never voted at any election for said proposed bonds and has from the commencement objected to his lands or any part thereof being included or incorporated into said irrigation district, but the defendants, disregarding his objections and requests, have included all of plaintiff's lands within said district.

"That said defendants have voted bonds covering all of said lands of plaintiff, and, unless enjoined and restrained, will sell all of said bonds covering all of the lands of plaintiff and thereby cast a cloud upon plaintiff's title to all of his said lands and will cause a multiplicity of lawsuits to divest and clear the title to said lands and thereby will cause irreparable injury to plaintiff by reason of the sale of such bonded indebtedness."

It seems clear that the complaint does not state facts sufficient to authorize an injunction. Without attempting to point out all the defects of the complaint, it may be said that it does not appear under what law the district was organized, whether the plaintiff's land was a part of the original district or subsequently included therein in the alleged enlargement thereof, whether the enlargement was effected by a reorganization of the district or by a change of its bound-

aries, whether plaintiff's objection to the inclusion of his land was made in the manner provided by law, or whether he was granted a hearing and his objection overruled contrary to the facts proved at the hearing. The granting of a temporary injunction is usually within the sound discretion of the court, and it certainly cannot be said in this case that the trial court abused its discretion.

The court sustained defendant's demurrer to the complaint and granted plaintiff 15 days within which to amend. Plaintiff attempted to appeal from the order sustaining the demurrer. Since the order is not appealable, the appeal therefrom is dismissed.

The order denying the application for a temporary injunction is affirmed.

We concur: BURNETT, J.; HART, J.

(57 Cal. App. 680)

JENSEN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 4171.)

(District Court of Appeal, First District, Division 2, California. May 18, 1922.)

Master and servant \S 367—Brick mason held contractor's "employee" within Compensation Act, and not independent contractor.

A brick mason, employed by a building contractor furnishing all the materials to build fireplaces of a specified size, who furnished his own tools and engaged the men working with him and charged only union scale of wages and the usual foreman's fee, held an "employee" within the Workmen's Compensation Act, and not an independent contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Application of Antone Jensen against the Industrial Accident Commission of the State of California and another for certiorari to review an order awarding compensation for injuries under Workmen's Compensation Act (St. 1917, p. 831). Award affirmed.

Ralph C. McComish and Fry & Jenkins, all of San Jose, for petitioner.

A. E. Graupner, of San Francisco, for respondent Industrial Accident Commission.

C. W. Davison, of San Jose, for respondent Scott.

LANGDON, P. J. This matter comes before us upon a writ of review. We are asked to annul an award of the Industrial Accident Commission granting to G. E. Scott, the applicant before said Commission, \$2,686.24 for injury to his eye, sustained while he was plastering a chimney, together with an allowance for medical expenses, etc.

The only question before us is as to the status of Scott and the relation between him and petitioner with respect to the work out of which the injury grew. The Industrial Accident Commission has concluded that Scott was an employee of Jensen, our petitioner. Petitioner, however, contends that Scott was either an independent contractor, or an employee of Dr. Tooker, the owner of the house in Los Gatos upon which the work was being done. Dr. Tooker was before the Industrial Accident Commission, contending that Scott was an employee of Jensen and that no liability of any kind arose on the part of said Tooker. This view was accepted by the Commission, which held Dr. Tooker free from liability and awarded Scott compensation as an employee of Jensen.

The record shows that Dr. Tooker requested Jensen to furnish him with an estimate of the cost of the alterations and repairs which he desired to have made to his home; that Jensen submitted an estimate of the cost, which was apparently satisfactory to Dr. Tooker, and thereupon Dr. Tooker directed Jensen to proceed with the work upon the basis that Dr. Tooker would pay Jensen the cost of labor and material, plus 10 per cent. Dr. Tooker testified that he had no direct relation to Scott and had nothing whatever to do with his employment, or the direction of his work. This testimony is corroborated by Scott.

Jensen was a contractor and builder. He testified that, in the course of the work, it became necessary to build two fireplaces and chimneys. Jensen, not being a brick mason, employed Scott to do this work. He had no specific agreement as to the terms of payment for this bricklaying work, but he furnished Scott with all materials for the work. Mr. Jensen testified:

"I just gave him the size of the fireplaces, what was needed, and then he built the chimneys accordingly. I know I left that entirely to Mr. Scott. I knew he knew what was to be done. I gave him the size of the fireplaces that I wanted, and he built the chimneys accordingly."

Mr. Scott furnished his own personal tools, as he stated was the custom with all bricklayers, and Mr. Jensen furnished all materials, the mixing block, and "hod to take the stuff in." Jensen had requested Scott to engage the men necessary to do this work, and accordingly Scott did so and acted as superintendent of the operations on the brickwork, as well as working manually himself. He stated that it was customary for a foreman to collect from the contractor the wages of his men and to pay the men directly. Ac-

cordingly, Scott charged Jensen for his services and the services of the men working with him as follows: \$12 a day for Scott as foreman; \$11 a day for one journeyman bricklayer; \$8.50 a day for two helpers; and \$1 a day per man paid to another person for transporting all of the men to and from San Jose each day.

Scott charged no percentage and received no other compensation for his work than the union scale of wages, which was \$11 a day, plus the usual charge of \$1 a day for the duties performed by him as foreman. He stated that in the absence of an express agreement between himself and Jensen as to compensation, he assumed that the wages would be the union scale of wages. This was also what was in the mind of Mr. Jensen, evidently, because he made no objection to Scott's charges based upon said union scale of wages for himself and the men working with him.

While Scott was engaged in plastering a flue, mortar splashed in his eye, burning it badly and causing a permanent injury, according to the medical testimony before the Commission.

Scott stated that he sometimes did work by the "job" and sometimes by the day. While it is true that in this instance he engaged the men who were working with him, he was told to do so by Mr. Jensen.

We think, under these facts, the finding of the Industrial Accident Commission that Scott was an employee of Jensen and not an independent contractor at the time of his injury is sustained by the evidence.

Petitioner directs our attention to the evidence in the record that Scott was not a member of the brick mason's union and that the rules of the said union prohibited union men from working with a nonunion journeyman bricklayer; that under the rules of said union its members could only work with Scott if Scott was acting as a contractor. The men who worked with Scott were union men and understood these rules. However, all the witnesses stated that these rules were often violated, and their existence and observance were not matters binding upon the Industrial Accident Commission in reaching its conclusions. The testimony regarding these matters was doubtless given due weight, but was found not to offset the other matters in the record which support the finding of the Commission regarding the status of Scott.

The award of the Industrial Accident Commission is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(58 Cal. App. 70)

LEWIS v. McNEAL. (Civ. 3893.)

(District Court of Appeal. Second District, Division 1, California. June 1, 1922. Hearing Denied by Supreme Court July 31, 1922.)

1. Payment ⇐65(6)—Defendant who admits original indebtedness required to prove payment.

In an action for services, defendant, having admitted the original indebtedness, had the burden of proving payment thereof, except in so far as admitted by the complaint.

2. Evidence ⇐354(17)—Creditor's books not admissible to show that payments had not been made.

In an action involving an issue as to whether certain payments had been made, books kept by the creditor held not admissible to show that payments had not been made, under Code Civ. Proc. § 1946, providing for admission of writings as "prima facie evidence of the facts stated therein" in certain cases.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Margaret I. Lewis, special administratrix of the estate of George E. Lewis, deceased, against Mabel McNeal. Judgment for plaintiff, and defendant appeals. Reversed.

Minor Moore, of Los Angeles, for appellant.

James H. Pope and A. G. Ritter, both of Los Angeles, for respondent.

SHAW, J. In this case plaintiff, as administratrix of the estate of George E. Lewis, her deceased husband, sued for the recovery of a balance alleged to be due his estate upon a contract made by defendant with deceased whereby he was employed to furnish labor and materials in the construction of a house of the admitted cost of \$8,394.50, upon which, as alleged in the complaint defendant paid \$5,587.86, leaving a balance unpaid of \$2,806.64. It was also alleged that defendant was indebted to plaintiff in said sum upon a mutual, open and current book account. By her answer defendant admitted her employment of deceased, and that he furnished material and labor and made expenditures in the construction of said house in the sum of \$8,394.50, all as stated in the complaint, but alleged that she had paid all of said sum due under the employment, save and except the sum of \$284.44, which was the balance due to plaintiff, and likewise denied any indebtedness in excess of \$284.44 upon the alleged open, mutual, and current book account. The court found the allegations of the complaint to be true, and that plaintiff was entitled to judgment as prayed for, from which judgment so entered defendant has appealed.

While defendant attacks the findings for want of sufficient support, her chief contention is that the court erred in the admission of evidence.

[1] Having admitted the original indebtedness of \$8,394.50, the burden of proving payment thereon of other than the sum of \$5,587.86, admitted in the complaint to have been made, devolved upon defendant. In her own behalf she testified that on September 15th she paid the sum of \$2,000 to George E. Lewis on account of said indebtedness, which payment was in cash from money which she had, some six weeks prior thereto, taken from her safe deposit vault and kept in her house until the time of making said payment; that it was paid to him in front of the Hollywood Bank, at which place she met Lewis, and upon receiving it she gave to him a typewritten statement, dated July 29th, showing the condition of her account, and which statement he had delivered to her about August 1st, and, going into the bank, while she went shopping, he indorsed thereon in his own handwriting, under date of September 15th, the payment of the \$2,000, and as so indorsed returned the same to her. She also testified that she on April 16, 1920, paid Lewis \$500 in cash, credit for which \$500 was given by him in the typewritten statement delivered to her on August 1st wherein he acknowledged payment of the gross sum of \$4,587. It is admitted that on July 21st defendant paid Lewis by check \$500, and on August 16th paid him \$500; that on said last date Lewis in his own handwriting made the following indorsements on said typewritten statement: "July 21, received by check \$500.00; August 16, received by check \$500.00"—and that thereafter, to wit, on October 26th, she gave Lewis a check for \$500, upon which she says was written, in the lower left-hand corner, "Balance due, \$305," which was intended to exhibit to him the balance due on her account. The contention of plaintiff is that the typewritten statement rendered under date of July 29th, and showing payment of \$4,587, was intended to include the \$500 paid on July 21st, and that the indorsement thereon as to such payment made by Lewis August 16th was an error and in fact a duplicate receipt of the \$500 paid in July; whereas defendant claims that, having erroneously omitted the same from the typewritten statement, he made the indorsement to cover it.

The subject of the controversy, then is, as to these two cash payments, one of \$500, claimed by defendant to have been paid in cash on April 16th, and the other of \$2,000, claimed by defendant to have been paid in cash on September 15th, to the making of which payments at the times mentioned she in positive terms testified. There is nothing to sustain plaintiff's contention that the in-

indorsement upon the typewritten statement of the payment of \$500 made on July 21st was an error, other than the fact that the typewritten statement rendered defendant was made after the date of said payment. Neither the typewritten statement with the indorsements thereon so made by Lewis nor the check for \$500 dated October 26th, which defendant claimed was indorsed, "Balance due, \$305," was produced at the trial. The defendant claimed that both documents had been lost, prior to which loss, however, she had exhibited them to plaintiff and her daughter, who had inspected the same, and both plaintiff and her daughter testified there was no indorsement, as claimed, upon the check dated October 26th, showing a balance due of \$305 only; and they also testified the indorsement upon the typewritten statement, under date of September 15th, "Received by cash \$2,000," was not in the handwriting of Lewis. The fact that all other payments save and except those in controversy were made by check, that defendant had lost not only the statement containing the disputed indorsement, but likewise the check of October 26th upon which she claimed to have indorsed the balance due to Lewis, together with the irregularity of defendant's act as stated in drawing the \$2,000 from her safe deposit box and keeping it in her house for some six weeks and then paying it to Lewis on the street, together with other circumstances connected with the transaction as related by her, when added to the testimony of plaintiff and her daughter, Mabel Lewis, to the effect that the purported receipt upon the typewritten statement was not in the handwriting of deceased, George E. Lewis, and the check dated October 26th for \$500, which had been seen by them at the time of its delivery, contained no indorsement showing a balance due of \$305, were well calculated to raise a doubt in the mind of the trial judge as to the truth of defendant's statements. While defendant's testimony as to such facts of payment was positive, and assuming it was not and owing to decedent's death could not be contradicted, the court by reason of the circumstances connected with the transaction, as shown by defendant's own testimony, in connection with that of plaintiff in denying that the indorsement was in the handwriting of deceased, might well have deemed it sufficient to discredit her story and justify the conclusion that defendant had not established the fact of payment. *Davis v. Judson*, 159 Cal. 129, 113 Pac. 147; *Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509; *Travis Glass Co. v. Ibbetson* (Cal. Sup.) 200 Pac. 595. As said in the case last cited:

"The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with

the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

Hence, if the court upon such conflicting testimony, considered in the light of the circumstances shown and the conduct of defendant in relating matters in connection with the transaction, had made the finding, this court, upon a review thereof, would not be warranted in holding it without support of sufficient evidence.

[2] Plaintiff, however, did not rest her case upon such testimony, but, over defendant's strenuous objections, introduced the day book kept by her deceased husband and a ledger to which the daughter, Mabel Lewis, had transcribed the entries therefrom, and wherein all payments claimed to have been made by defendant, other than the payment of \$500 on April 16th and \$2,000 on September 15th, were made to appear. Since defendant admitted the original indebtedness and plaintiff conceded the making of all payments other than the two in controversy, the books could have been pertinent to no facts other than those in controversy, and hence they must be deemed to have been received and by the court considered for the purpose of showing that defendant had not made the payments as she stated; in other words, to establish, not an affirmative fact shown by an entry in the books, but a negative fact from the absence thereof. Section 1946, Code of Civil Procedure, provides that:

"The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases: 1. When the entry was made against the interest of the person making it. 2. When it was made in a professional capacity and in the ordinary course of professional conduct. 3. When it was made in the performance of a duty specially enjoined by law."

While under this provision the entries in the books, not the absence thereof, would be evidence against his estate, they would constitute no evidence of negative facts as to which no entry was made, since the omission might have been due to mere negligence or forgetfulness and without motive, either good or bad. *Schwarze v. Roessler*, 40 Ill. App. 474. Not only is there no statutory provision under which the books were admissible, but it is the general rule that books of account are never deemed evidence to rebut a presumption by showing there is nothing contained

in them in reference to the claim set up by the adverse party. The entries made upon a proper showing are competent evidence of the facts shown thereby, but the fact that no entries were made by the deceased constitutes no proof of the omitted fact in dispute. *Lawhorn v. Carter*, 11 Bush (Ky.) 7; *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138; *Winner v. Bauman*, 28 Wis. 563; *Ladd & Bush v. Sears*, 9 Or. 244; *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Morse v. Potter*, 70 Mass. (4 Gray) 292; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84. The books were received, not as containing entries relating to the cash payments in controversy, but as showing from the omission thereof that the money was not paid as defendant said it was, and upon the assumed fact that, had it been paid, deceased would have entered it as a credit, it is argued that its absence therefrom is proof that it was not received, and apparently the court in reaching its conclusion entertained this view of the matter. In our opinion, the books were incompetent for such purpose, and the court should have sustained the objection to their admission.

Respondent insists the books were not received in evidence, for which reason her counsel claims that defendant is not entitled to have the question reviewed. There is no merit in this contention. While copies of the books themselves are not brought up in the record, plaintiff's witness, over defendant's objection that the same was incompetent, testified fully as to the contents of the books, reading, the entries; whereupon her counsel offered the ledger and day book in evidence, and an objection thereto by defendant was by the court overruled.

Our conclusion renders it unnecessary to discuss other objections urged by appellant in support of her contention.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(58 Cal. App. 84)

SOUTHERN CALIFORNIA COMMERCIAL CO. v. ALBERTI et al. (Civ. 3782.)

(District Court of Appeal, Second District, Division 1, California. June 2, 1922. Hearing Denied by Supreme Court July 31, 1922.)

1. Evidence §20(1)—Court may take judicial knowledge of method of final carrier's paying initial and intermediate carriers.

Where a consignee is to pay freight, a court may take judicial knowledge of the method usually employed for the final carrier to pay the initial and the intermediate carriers their part.

2. Carriers §193 — Payment by final carrier to initial and intermediate carriers held to constitute an assignment of their rights to the final carrier.

Where a final carrier was to collect freight due on a shipment from a consignee, payment by it to the initial and the intermediate carriers of their part of the freight by operation of law constituted an assignment to the final carrier of the right of the initial and intermediate carriers to recover for the services rendered by them.

3. Carriers §196—Defense of loss of goods through delay in transportation cannot be set up unless pleaded.

In an action by a carrier against a shipper to recover freight, failure to plead the defense that the goods were destroyed through negligence in transportation prevents setting up the defense.

4. Carriers §196—Evidence held sufficient to justify a finding that delivery was duly made at destination.

In an action by a carrier against a shipper to recover freight charges, evidence that a car was delivered at a place about a mile from its destination, the usual place of delivery of cars consigned to the destination, justified a finding that the car was duly delivered to the destination.

5. Carriers §194 — Consignor who consigns to himself primarily liable for freight.

Where a shipper consigned goods to himself, he was primarily liable to the carrier for the freight, and this obligation was not affected by the fact that the freight was not prepaid, nor by the shipper's transfer of the bill of lading, subject to the lien for freight charges, to a third party with whom the carrier had no contractual obligation.

6. Trial §397(4)—Finding as to allegation unsupported by affirmative evidence not necessary.

In an action by a carrier against a shipper to recover freight, where an allegation that the carrier permitted the buyer of the goods to inspect them contrary to directions of the shipper was supported by no affirmative evidence, a finding thereon was unnecessary.

7. Carriers §194—Permitting buyer to inspect goods held not to relieve consignor of liability for payment of freight.

Where goods were consigned to a shipper, the fact that a carrier permitted a buyer to inspect them contrary to directions of the shipper did not operate to relieve the shipper from the liability to pay freight.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Southern California Commercial Company against Alcardo Alberti and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. A. Massey, of Los Angeles, for appellants.

R. A. Morton and Mulford & Dryer, all of Los Angeles, for respondent.

SHAW, J. This action is by plaintiff as assignee of the Kansas City Southern Railway Company, which was the final carrier, to recover freight charges for the transportation of a carload of grapes from Los Angeles, Cal., to Frontenac, Kansas. Judgment for plaintiff, from which defendants appeal.

The issues tendered by the verified pleadings are simple. It is alleged in the complaint that on October 14, 1916, defendants delivered to the Los Angeles & Salt Lake Railway Company, in the county of Los Angeles, a carload of wine grapes under an agreement for the transportation thereof to Frontenac, Kan., where V. Brunetti should be notified of its arrival, and the same delivered to the order of defendants; that the carload of grapes was by said Salt Lake Railway Company and its connecting lines delivered to plaintiff's assignor, the Kansas City Southern Railway Company, by which as final carrier it, on October 23d, arrived at Frontenac, Kan., whereupon a notice in writing of such fact was duly given by the agent of such last-named railway company to V. Brunetti, who presented a bill of lading therefor, but refused to accept said carload of grapes or pay plaintiff's assignor as final carrier the lawful charges thereon; that upon such refusal of Brunetti, plaintiff's assignor immediately communicated with defendants, and requested instructions for the disposal of the goods, but they refused to instruct plaintiff's assignor in the premises, whereupon, for \$30, the grapes were lawfully sold for freight charges, which sum was credited upon the through freight charges for the transportation of said carload of grapes, which amounted to \$374.90; that plaintiff's assignor, as the final carrier, advanced to the initial and intermediate carriers their respective proportions of said freight charges; that the balance due thereon of \$344.90 has not been paid; that prior to the commencement of this action the Kansas City Southern Railway Company duly assigned to plaintiff all its right, title, and interest in and to its claim for said freight charges.

By their answer defendants denied that the grapes were transported, as alleged in the complaint, from Los Angeles county to Frontenac, or that Brunetti was notified of the arrival of the car at its destination, or that he refused to accept the same and pay the freight charges thereon, or that such charges were \$374.90 or any sum whatsoever, or that said sum, other than \$30, has not been paid, or that the final carrier, plaintiff's assignor, paid the intermediate carriers their proportion of said freight, or that the claim for such freight had been assigned to plain-

tiff; as to all of which issues the court, upon ample evidence establishing such facts, found adversely to defendants. Further answering, defendants, while admitting they ordered the car of grapes shipped to Frontenac and delivered to their order, alleged their act in so doing was not for their account, but for and on behalf of V. Brunetti, who as provided in the agreement, should not be permitted to inspect the grapes; that plaintiff's assignor did permit an inspection thereof by Brunetti, and that he paid said freight charges. The court made no finding as to whether or not plaintiff's assignor permitted an inspection of the grapes by Brunetti in violation of the terms of the agreement, as alleged.

[1, 2] There is no merit in appellants' contention that the evidence is insufficient to establish the alleged assignment. The evidence conclusively shows the proportion of the total freight charges earned by the initial and intermediate lines of road over which the car was transported, and that plaintiff's assignor paid the respective amounts earned to each of them, which was in accordance with the method usual in cases of this character, as the court may judicially know. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. Such act, by operation of law and in consideration of the payment so made, constituted an assignment to the final carrier of the rights of the initial and intermediate carriers to recover for the services rendered by them. *Hutchinson, Carriers*, § 828; *Bissel et al. v. Price*, 16 Ill. 408; *Chicago & A. R. Co. v. Hall*, 69 Ill. App. 497. The rule appears to be founded upon commercial necessities, and without the application of which both carriers and public concerned would be subjected to great inconvenience and unnecessary trouble and expense.

[3] Appellant's chief contention, and that to which the larger part of their argument is devoted, is that the agencies which undertook the transportation of the car of grapes were guilty of negligence, by reason of which fact the grapes were spoiled in transit and valueless when they reached their destination. A sufficient answer to this contention is that no issue as to delay of the carriers in transporting the car, negligence, or want of proper care in handling the grapes was tendered by the pleadings or tried by the court; hence the purported finding that the grapes upon the arrival of the car were, due to no fault of the carriers, in a condition of fermentation and decay, even if unsupported by the evidence, must be disregarded.

[4] That the evidence shows the car to have been delivered at Pittsburg, Kan., which is about one mile from Frontenac, and that the former was the usual place for the delivery of freight consigned to the latter

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place, justified the finding of the court that the car was duly delivered at Frontenac.

[5] The agreement was to deliver the car of grapes at Frontenac to the order of defendants as consignors thereof. As such consignors they were primarily liable for the freight charges, which, as to them, could be discharged only by payment. "The consignors with whom the contract of shipment is made is primarily liable for the payment of the freight charges, whether he is the owner of the goods or not" (10 Corpus Juris, p. 445; Hutchinson, Carriers, § 810; Railroad Co. v. MacCartney, 68 N. J. Law, 165, 52 Atl. 575; Wells Fargo & Co. v. Cuneo [D. C.] 241 Fed. 727; Atlas S. S. Co. v. Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398), and this obligation as to the carrier was not affected by the fact that the freight was not prepaid, nor by defendants' transfer of the bill of lading, subject to the lien thereof for freight charges, to a third party with whom the carrier had no contractual relation (Cincinnati, etc., R. Co. v. Vredenburg Sawmill Co., 13 Ala. App. 442, 69 South. 228).

[6] Finally, it is contended that the carrier permitted the consignee to inspect the grapes contrary to the express direction of defendants indorsed on the bill of lading, and as to which the court made no finding. A finding was unnecessary, for the reason there was no evidence in support of such affirmative allegation. Spader v. McNeil, 130 Cal. 500, 62 Pac. 828; De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

[7] Conceding, however, that the evidence shows the granting of such permission by plaintiff's assignor, such fact was immaterial, since, even though defendants might be entitled to recover damages for such act, it could not excuse them from their obligation to pay the freight charges. In 10 Corpus Juris, title "Carriers," page 253, it is said:

"The consignee has the right to examine the goods before accepting delivery; and this doctrine applies to interstate as well as intrastate shipments, there being nothing in the Carmack Amendment which restricts this right."

See, also, Earnest v. Delaware, L. & W. R. Co., 149 App. Div. 330, 134 N. Y. Supp. 823; Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., 164 Mich. 58, 128 N. W. 1099; Hutchinson, Carriers, § 733. Moreover, the direction was, "No inspection of car allowed by consignee." For aught that appears to the contrary, Brunetti, if he inspected the car, did so as agent of the consignors, who, as owners, had the right to examine it.

We find no merit in any of the points urged by appellants for a reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(District Court of Appeal, Second District, Division 2, California. May 25, 1922. Hearing Denied by Supreme Court July 24, 1922.)

1. Burglary \Rightarrow 41(1)—Evidence held sufficient to justify conviction.

In a prosecution for larceny and burglary, evidence held sufficient to justify verdict of guilty of burglary, although acquitting of larceny.

2. Burglary \Rightarrow 42(1)—Mere possession of stolen property not sufficient to fasten conviction of theft.

Mere possession of stolen property, even if unexplained, is not alone sufficient to fasten a conviction of the theft upon the possessor.

3. Jury \Rightarrow 133—Juror's voir dire, although having contradictions, supported denial of challenge.

Voir dire, although showing mess of contradictions, justified trial court's finding as to juror's proper qualification and supported denial of challenge for cause.

4. Jury \Rightarrow 103(14)—Juror's opinion from general discussion and newspaper report not disqualification per se.

Where a juror was examined on his voir dire, notwithstanding that the opinion, which some of the answers, when taken alone, indicated that he held concerning defendant's guilt, was based on general discussion and newspaper report, he was not disqualified to act if his examination showed that he would set aside his opinion and give defendant a fair trial upon the evidence.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

James Reed was convicted of burglary, and he appeals. Affirmed.

Morfoot & McCroskey, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

WORKS, J. Defendant and one Michael J. Malone were jointly informed against in two counts. One of these charged grand larceny and the other charged burglary, the two alleged offenses arising out of the same transaction. Defendant was tried alone and was acquitted on the grand larceny charge, but was convicted on the burglary charge. He appeals from the judgment of conviction and from an order denying his motion for a new trial of the cause.

Appellant contends that the evidence against him was insufficient to sustain the verdict holding him guilty of the burglary charge. There was no evidence directly connecting appellant with the burglarizing of the house which is shown by the record to have been feloniously entered by some per-

son, the testimony also showing that property of considerable value was taken from the place at the time. The evidence did show that appellant, a day or two after the burglary, attempted to sell certain of the stolen property then in his possession. The person to whom the offer was made communicated with the police, and appellant and Malone were arrested. No explanation was then given as to how appellant came into possession of the stolen articles, nor, in fact, did he present any evidence upon the subject at the trial. Upon the arrest being consummated, appellant asked the arresting officer if he could see the owner of the house which had been burglarized, saying in effect that he could locate all the stolen property and would return it if the owner would not prosecute him. He also denied to the police officers that he had attempted to sell any of the stolen articles. At the time of his arrest appellant gave his name as James Reed, but there was testimony at the trial to show that the appellation was not his true name.

[1] We are convinced that this array of evidence was amply sufficient to justify the verdict of guilty rendered against appellant.

[2] It is undoubtedly the law that the mere possession of stolen property, even if unexplained, is not alone sufficient to fasten a conviction of the theft upon the possessor (*People v. King*, 8 Cal. App. 329, 96 Pac. 916; *People v. Lang*, 142 Cal. 482, 78 Pac. 232); but the cases establishing that rule are also to the effect that the fact of such possession, if unexplained, is an item to be taken into consideration by the jury, together with other incriminating circumstances, in arriving at a verdict. When the facts shown in this case are compared with the facts of the two cases cited above, and are measured by the law as stated in those cases, there is no doubt left in our minds as to the propriety of the conviction of appellant.

Appellant takes the position that the evidence was insufficient to uphold the conviction of the crime of burglary because the jury declared his innocence of the charge of grand larceny. We cannot ascribe any weight to this argument. The jury might very well have convicted appellant on the larceny charge, but that it did not do so cannot operate to overturn the verdict finding appellant guilty of the other offense. The fact that the jury could split its verdict as it did upon the two charges, while it may inspire speculation in the minds of the curious, gives us no concern in determining the appeal. Having reached the conclusion that the evidence would have supported a verdict of guilty on both charges, we are bound to uphold the conviction which actually resulted upon one of them.

Several other points are stated by appellant, but only one of them is argued. That point, therefore, is the only remaining one

to which it is necessary to address ourselves under the many decisions of the courts of review of the state to the effect that points not argued on appeal are points not to be considered, none of which decisions need be cited.

[3] The question now to be determined is whether the trial court erred in denying a challenge for cause interposed by appellant as to one of the jurors who was sworn in the case and who sat in judgment against appellant. Appellant exercised all the peremptory challenges allowed him by law, and the question of the propriety of the denial of the challenge for cause is therefore directly before us. The juror as to whom this challenge was presented testified on his voir dire, in response to questions by counsel for appellant, that he had heard the case discussed; that he had read about the facts of the case in the newspapers; that he was inclined to think that what he read in the newspapers had created an impression on his mind or an opinion "about this case," his opinion being, "I thought if they had hold of the right man there couldn't be any doubt about his guilt," but that he did not know whether appellant was the right man. Then followed these questions and answers:

"Q. You realize it is a fact that these officers have brought him in here, and the district attorney's office filed an information against him? Do you think that they have got the right man by reason of that fact? A. I don't know until I hear the evidence. Q. Well, have you got any opinion at this time? A. Not as to his identity; no. * * * Q. Well, does that discussion that you had, does that leave you with any fixed impression about this case? A. Yes; I think it does.

"The Court: Did you discuss as to the guilt or innocence of this defendant? A. No; it was about the details of the alleged crime.

"The Court: Well, that is not controverted, the fact that the house was robbed—that is not controverted.

"Mr. Morfoot: No; there is no controversy about that. * * * Do you feel that you could fairly try this case as to the guilt or innocence of this defendant? A. I doubt if I can, because I thought it was a particularly heinous offense. * * * Q. So that you feel that you are prejudiced against this defendant in this case? A. Well, to be perfectly frank, I feel that I would be. Q. Could you not give him a fair and impartial trial? A. No. Well, I might be able to do that. Q. * * * Now, if you were on trial under such circumstances, and you had a man sitting there feeling as you do, would you be willing to have a man of that opinion that you have at this time try you? A. No. Q. Then you would admit, wouldn't you, that you are prejudiced towards the defendant? A. I am prejudiced against the person who committed this offense, yet he may be— Q. You don't feel that you can try James Reed in this case with a fair, impartial, and open mind? A. I don't believe I could."

Here the challenge was interposed. It was resisted by the district attorney, who then

conducted the following examination of the prospective juror:

" * * * You heard the details of a burglary that occurred * * * in Mr. Lewis' home? * * * A. Yes. Q. Now, at that time did you hear anybody's name mentioned in connection with the commission of that burglary? A. No; that made no impression upon me at all. Q. You don't know anything about this defendant? A. No. Q. Never saw him before? A. No. Q. Or heard of him? A. No. Q. You don't know whether he committed this crime or not? A. No; I haven't any idea. Q. Notwithstanding this opinion about this house being burglarized in the manner in which it was, do you feel you could hear the evidence and weigh the evidence fairly and impartially and give this defendant a fair and impartial trial, just the same as you could anybody else? A. Well, Mr. McCartney, I am placed in a position where the burden of proof would be on the defendant."

The trial judge then subjected the talesman to the following examination:

"The Court: If you were a defendant, arrested for an offense, would you consider that you ought to prove yourself not guilty or that the state ought to prove you guilty? A. No. Q. What evidence do you have that this defendant is guilty? A. I haven't any at all. Q. Why do you say that you would want him to prove himself innocent? A. Well, I would try to differentiate between this defendant and the man who committed this crime, if I make myself clear. Q. Well, that is what you are impaneled for, to determine who committed the crime, not whether a crime has been committed; that is conceded in this case, that this house was burglarized; now, the question to be submitted to you is whether this defendant is the man. Now, you say that you would expect the defendant to prove that he was innocent? A. I would not go quite that far, your honor, to say that I would expect him to prove it, but I would go into the case with a feeling that it was perhaps, in a ways, up to him. Q. Why? A. Because I was very much struck at the details of this alleged crime as I heard it. I thought it was absolutely an unpardonable thing. Q. * * * Now, what is there in that to show that the defendant is guilty? A. Nothing at all. Q. Well, then, why couldn't you try the defendant and give him a fair, impartial trial? A. I intended to say that I felt that I could, but that I would not like to be tried by a jury that had the same mental attitude that I have. Q. Well, you say you haven't any mental attitude against the defendant; you don't know him, never heard of him. Suppose they had Mr. McCartney up for it; would you be prejudiced against him? A. Not at all. Q. Well, you haven't any more evidence that the defendant committed it than you have that Mr. McCartney committed it? A. Not in the least. Q. Why couldn't you try the defendant just as well as you could try Mr. McCartney? A. Well, it is possible that I

could, your honor. Q. Is there any reason why you could not, I say, is there any reason why you could not try this defendant? A. Oh, I believe I could set aside what prejudice I have, and give the man a fair trial. Q. By Mr. McCartney: The question is, would you? A. Oh, yes; I certainly would."

On its face, this examination shows a mess of contradictions, but we have grave doubts whether these apparent contradictions actually reflect the condition of mind of the talesman at the time. The phrasing of his answers shows him to have been a man of considerable intelligence, in fact, of a degree of intelligence which could not harbor the confusion which his words appear to exhibit between a prejudice or feeling against the nature of the crime and a prejudice against the man who was merely charged with its commission. We greatly fear that this juror was one of those men who so far forget the duties and obligations of their citizenship as to attempt to escape them when put to the test, and that he entered the jury box with a determination to escape jury service in this case if he could possibly do so. Unfortunately that manner of man is not a *rara avis*. If, however, this position is not tenable, it is enough to say that the trial judge was better qualified than are we, he having had the talesman under his eye, to resolve the apparent contradictions in his statements and to determine whether he would make an impartial juror. There is surely enough evidence among the varying statements in the record to support the ruling of the trial court in denying the challenge, and the finding of a trial court upon such a question as is here presented is, as to its finality, like any other finding of fact made upon conflicting evidence. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

[4] It is to be observed, also, that the opinion which some of the answers of the talesman, when taken alone, indicate that he held concerning the guilt of appellant, was based upon general discussion and newspaper report. It has been held in this state, both frequently and uniformly, that where a juror has formed such an opinion upon such a basis, he is not disqualified to act if his examination shows, as the examination in this instance did show, that he will set aside his opinion and give the defendant a fair trial upon the evidence. *People v. Warner*, 147 Cal. 546, 82 Pac. 196; *People v. Brown*, 148 Cal. 743, 84 Pac. 204; *People v. Ruef*, supra. The judgment and the order denying motion for a new trial are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(57 Cal. App. 779)

BRYAN v. PRESCOTT et al. (Civ. 3833.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1922. Hearing Denied by Supreme Court July 20, 1922.)

1. Deeds ¶196(3)—Conveyance by wife, in which husband gains advantage, is presumed to have resulted from undue influence.

Under Civ. Code, § 158, authorizing either husband or wife to enter into any transaction with the other subject to the general rules governing actions of persons occupying confidential relations, as defined in the title on trusts, section 2235, providing that all transactions between a trustee and his beneficiary by which the trustee obtains any advantage are presumed to be entered into under undue influence, and section 2219, providing that every one who voluntarily assumes a relation of personal confidence with another is a trustee, a conveyance by the wife to the husband, from which the husband obtained a large advantage for himself, is presumed to have been obtained by undue influence, and that presumption prevails until overcome by evidence clearly showing the contrary.

2. Trusts ¶103(3)—Purchase of outstanding interest in land with proceeds of mortgage on interest secured from wife by undue influence held void.

Under Civ. Code, § 853, as to resulting trusts, where a husband procured by undue influence a conveyance from his wife to her undivided half-interest in property, and then mortgaged the property, and with the proceeds purchased the other half-interest therein, the invalidity of the purchase from the wife affects also the purchase of the other interest.

3. Adverse possession ¶62(3)—Evidence held not to show possession of surviving husband was adverse.

Where a wife devised her home premises to her daughter, who resided in another state, and the daughter requested the husband to care for the property for her, not knowing of a void deed by the wife to the husband, the husband's possession of the property, without informing the devisee of the deed, was not adverse to the devisee's interest, especially where he yielded possession to her when she came to the state and demanded possession several years after the death of testatrix.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action to quiet title by T. P. Bryan, trustee, against Elizabeth J. Prescott, individually and as administratrix of the estate of Ruhamah Bryan, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Bowers, of Sawtelle, for appellant.
Victor Watkins, of Los Angeles, for respondents.

CONREY, P. J. Action to quiet title to a lot described in the complaint. The premises

are also referred to as 2130 Vallejo street, in the city of Los Angeles. The plaintiff appeals from the judgment entered against him.

In the year 1904 the lot was conveyed by one Palmer to Ruhamah Young and her daughter, Emma Brown, as tenants in common; the consideration therefor being paid by Mrs. Young. At some time between the date of that deed and the year 1910 Mrs. Young married the plaintiff, T. P. Bryan. In the year 1911 Emma Brown died, and it is conceded that whatever interest she had in the property passed to her husband, Woods G. Brown. On the 13th day of May, 1913, Ruhamah Bryan died. At the trial of this action it was stipulated that Mrs. Bryan left a will under which any interest that she had in this property at the time of her death passed to the defendant Elizabeth J. Prescott. On the 15th day of January, 1912, Mrs. Bryan signed and acknowledged a deed purporting to convey the lot to the plaintiff, and he caused the same to be recorded. According to his testimony, the deed was delivered to him by his wife. Mr. and Mrs. Bryan were living on the premises at that time and until her death. After that time he continued in undisturbed possession, under circumstances hereinafter stated, until the year 1919. The complaint in this action was filed May 10, 1920.

The deed of Mrs. Bryan to the plaintiff recites a consideration of \$100. The plaintiff testified that his wife did not make a gift to him of the property, but that the transaction was a matter of business; that he did not pay her any money at the time of execution of the deed; that he loaned her \$30 before they were married; that he afterwards paid for her a \$100 note to a physician, which note had been given for professional services rendered to her before the marriage. He testified that he had an understanding and agreement with his wife that she would give the deed for \$100, but he was unable to state any of the words used in their conversations on the subject. Within a few weeks after the date of this deed, the plaintiff obtained a loan of \$1,000 by mortgaging this property. With \$850 of this borrowed money he purchased from Woods G. Brown his interest in the property. This transaction is evidenced by a deed of date March 25, 1912, from Brown to the plaintiff. The admitted value of the property in dispute is at least \$2,000. Plaintiff testified that at the time when Mrs. Bryan signed the deed to him, her mind was "as good as I ever saw her," and that it continued the same until a few days before her death. Yet in a letter written at some time during that period, by the plaintiff to the defendant, referring to Mrs. Bryan, he said:

"I suppose you see by her letters that she is off on her mind. * * * She is not well by a long ways, that with her mind and age put her mind in bad form. * * * Her old age, and mind out of balance on many things, and from what I can learn, has always been so to some extent."

At the time of the death of Mrs. Bryan, the defendant Mrs. Prescott was living in the state of New York. She did not come to California until the 1st of January, 1919. Three weeks later she obtained from the plaintiff the key to the house, and went into possession of the property. Ever since that time she has occupied the same as her residence. She had been prevented by the death of her son and by other circumstances from coming to California until 1919. The plaintiff and another witness testified that plaintiff gave Mrs. Prescott the key on her representation that she wanted to rent the property from him. She denies this. She went to see him at the Soldiers' Home, where he was staying at that time, although some of his furniture remained in the house on the premises that are here in litigation. She says that she asked him for the keys, and he gave them to her. "He told me the things were all gone out of the home, and he didn't know where they had gone to or who had taken them, and he gave me the keys to the home to move in, and I moved in with my little daughter, and we lived there." After the commencement of this occupancy by the defendant, she for the first time learned that plaintiff had a deed to the property. Three or four weeks after the defendant moved into the premises, the plaintiff called there, and a conversation took place between him and the defendant. She said:

"I asked him how it was that my mother had willed me this property and deeded it to him. He said, 'As it is, she didn't know it was a deed she was signing. She was ignorant on business.'"

On the 6th day of April, 1913, Mrs. Bryan wrote to the defendant that she had given to Mr. Bryan "the deeds and receipts for this property. Mr. Bryan will keep them for you dear Bessie." The findings of the court state:

"That at the time said deed was so signed by said Ruhamah Bryan, now deceased, said Ruhamah Bryan was over the age of 80 years, and very infirm and feeble in health, and did not know or realize the purport of said instrument, and said instrument or said deed was never delivered by said Ruhamah Bryan to the plaintiff herein, with the intention of conveying her said property to the plaintiff herein as his property, but said Ruhamah Bryan thought she was conveying and intended by said deed or instrument to convey said property to plaintiff in trust for her said daughter, Elizabeth J. Prescott, one of the defendants herein. That at the time said plaintiff procured his said wife, Ruhamah Bryan, now deceased, to sign said in-

strument or deed, the said plaintiff and his said wife were living together as husband and wife in said property hereinbefore described, and continued to live there together until the death of said Ruhamah Bryan, to wit, on or about the 13th day of May, 1913. That no adequate or sufficient consideration was given to the said Ruhamah Bryan, or received by her for the signing of said instrument or deed, and the only consideration that was given to said Ruhamah Bryan or received by her, if any at all, was given to her or received by her for such, was the cancellation of an alleged debt in the sum of \$110, which the plaintiff claims was owing to him by his said wife at that time, by reason of the payment by him several years previous to that time of a doctor's bill, in about the sum of \$100, and previously owed by his said wife, and the advancement of about \$10 by the plaintiff to his said wife, or for her benefit, some years previous to said January, 1912."

[1] Appellant contends that no evidence was produced in support of any charge of fraud, misrepresentation, duress, threat, or undue persuasion on the part of appellant to obtain his deed from Mrs. Bryan, and that without such evidence the effect of the deed was to convey to him both the legal title and the entire beneficial interest in the property. In support of this proposition he relies upon section 158 of the Civil Code, and the decision in *Tillaux v. Tillaux*, 115 Cal. 663, 47 Pac. 691. The gist of the decision in *Tillaux v. Tillaux* is that the marriage relation does not ipso facto raise the presumption that a deed of conveyance from the husband to the wife has been the result of undue influence. It is summarized to this effect in *White v. Warren*, 120 Cal. 322, 325, 49 Pac. 129, 52 Pac. 723. Nevertheless, in *White v. Warren*, where the question at issue was whether moneys advanced by the wife to the husband were received by him as a loan or as a gift, it was held that—

"It devolved upon the husband, who claimed to have received the gift, to prove that such gift was made without any undue influence on his part, the presumption being that, in the absence of proof to that effect, there was such undue influence used."

This decision was based upon a construction of sections 158, 2235, and 2219 of the Civil Code. These sections are as follows:

Sec. 158. "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." Sec. 2235. "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient

consideration, and under undue influence." Sec. 2219. "Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter. * * *"

The court said:

"Here, conceding what is claimed by the defendant as to the nature of the transaction, it is evident that he was greatly advantaged thereby, and, such being the fact, the burden rested upon him of disproving the presumption of undue influence created by the law under such conditions."

So here, since it appears from the evidence that the plaintiff obtained a great advantage from the transaction with his wife, the presumption of undue influence must prevail unless overcome by evidence clearly showing that undue influence was not used by him to obtain that advantage. On the evidence which came before the court in this case, we think that the court was justified in finding, as in effect it did, that the conveyance was not made freely or with knowledge of its effect, and that the plaintiff obtained an unfair advantage thereby.

In *Magee v. Brenneman*, 206 Pac. 37, considering the effect of section 2235 of the Civil Code, in a transaction between attorney and client, the Supreme Court said:

"This does not mean that a trustee may not deal with his beneficiary. But if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair. * * * To place the burden on the beneficiary would be to put such contracts in the same category as those between parties occupying no relation of trust, to ignore the provisions of section 2235 of the Civil Code, and to deny this added protection to one whose confidence has been abused."

See, also, *Cox v. Schnerr*, 172 Cal. 371, 378, 156 Pac. 509.

[2] The conclusions above stated apply to the undivided half interest in the property obtained by the deed from Brown as well as to the interest which was vested in Mrs. Bryan. This results from the fact that the entire consideration paid to Brown was obtained by using the proceeds of a mortgage loan on Mrs. Bryan's property. Civ. Code, § 853.

[3] Appellant next contends that he has become the owner of this property by adverse possession; that he held and possessed the same adversely to the defendant for a period of more than five years prior to the commencement of this action. There is no merit in this claim. The plaintiff never entered into possession under the deed. He never did any act to direct the attention of the defendant to the fact that he repudiated the obligation of his trust. On the contrary, the testimony of the defendant is to the ef-

fect that she, by correspondence, requested him to take care of the property for her until she came to California, and that she knew of no adverse claim by him. His subsequent conduct, in surrendering possession to her on her arrival here, is confirmatory of that evidence.

The judgment is affirmed.

We concur: SHAW, J.; James, J.

(57 Cal. App. 674)

WINGARD v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 3831.)

(District Court of Appeal, Second District, Division 2, California. May 17, 1922. Hearing Denied by Supreme Court July 13, 1922.)

1. Evidence ⇨20(1)—Court takes judicial notice of employment of men of certain trades in certain places.

The court will take notice that both riveters and rivet passers had been employed continuously for many years in Los Angeles in the erection of steel structures for large buildings, and that such workmen had been continuously employed for several years in building ships at Long Beach and at San Pedro.

2. Master and servant ⇨385(1)—Compensation for injuries held computed on correct basis.

Compensation awarded to an employé injured after working a week in an employment calling for a weekly wage which was less than the wages in his ordinary employment, interrupted by illness, held computed on the proper basis under Workmen's Compensation Act, § 12, subd. (a), par. 4, the rate of wages paid at time of injury; there being no showing on the question as to earnings to bring him within paragraph 2.

Proceeding by A. E. Wingard before the Industrial Accident Commission against the Los Angeles Shipbuilding & Drydock Company for an award. From a decision awarding petitioner less than he asked, petitioner brings certiorari. Affirmed.

Courtney A. Teel, of Los Angeles, for petitioner.

A. E. Graupner and W. H. Pillsbury, both of San Francisco, for respondents.

WORKS, J. An award was made in petitioner's favor under an application to respondent Accident Commission for an allowance of compensation under the Workmen's Compensation, Insurance, and Safety Act because of injuries received by petitioner on April 16, 1921, and while working as an employé of respondent Shipbuilding & Drydock Company, hereinafter referred to as the employer. Petitioner by the present proceeding asks us to review the action of the Accident

Commission on the ground that the compensation allowed by the award was less than petitioner should have received under the law.

One of the contentions of petitioner is that a certain weekly benefit allowed by the award was computed upon an improper basis. For a long time petitioner had been in the service of the employer as a riveter at a daily wage of \$6.40. This employment was interrupted by an illness which was suffered by petitioner, and which kept him away from the plant of the employer for a week. On the Monday following this absence he appeared at the place, but asked, on the ground that his strength was not fully restored, that he be put to work temporarily as a rivet passer, that employment paying a daily wage of but \$4.16. Petitioner's request was granted, and he immediately began work in the capacity which called for this lesser wage. He continued in that line of work until Saturday of the same week, by which time it had become understood that he was to return to his ordinary employment as a riveter on the succeeding Monday. On that last day of his service as a rivet passer, however, that is, on the Saturday mentioned, petitioner suffered the injury because of which he asked respondent Accident Commission to allow him compensation. In awarding him a weekly benefit that body computed it upon the basis of his daily wage of \$4.16 instead of upon the daily wage of \$6.40, as petitioner contends should have been done.

The solution of this question depends upon a construction of portions of section 12 of the Workmen's Compensation, Insurance, and Safety Act. Stats. 1917, p. 831; Deering's Consolidated Supplement to Gen. Laws 1917-1921, Act 2143c. The section provides, under subdivision (a), as follows:

"(1) If the injured employee has worked in the same employment, whether for the same employer or not, during at least two hundred sixty days of the year preceding his injury, his average weekly earnings shall consist of ninety-five per cent. of six times the daily earnings at the time of such injury where the employment is for six full working days a week. Where his employment is for five, five and one-half, six and one-half or seven working days a week, the average weekly earnings shall be ninety-five per cent. of five, five and one-half, six and one-half or seven times the daily earnings at the time of the injury, as the case may be.

"(2) If the injured employee has not so worked in such employment during at least two hundred sixty days of such preceding year, his average weekly earnings shall be based upon the daily earnings, wage or salary of an employee of the same class working at least two hundred sixty days of such preceding year in the same or a similar kind of employment in the same or a neighboring place, computed in accordance with the provisions of the preceding subdivision.

"(3) If the earnings be irregular or specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivisions (1) and (2) above shall be ninety-five per cent. of the average earnings during such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

"(4) Where the employment is for less than five days per week or is seasonal or where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent. of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments during the year preceding his injury; provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury."

[1, 2] The parties to this proceeding agree that neither paragraphs (1) nor (3) apply to the question we now consider, petitioner insisting that the point is controlled by paragraph (4), and respondents contending that paragraph (2), the one followed by respondent Accident Commission in making its award, is to govern our decision. We are convinced that the view of respondents is the correct one, if all factors contemplated by paragraph (2) may be found in the record. It is obvious that the clauses, "If the injured employee has worked in the same employment" and "If the injured employee has not so worked in such employment," which are the opening words of paragraphs (1) and (2), respectively, refer to the employment in which an employee is engaged at the time of his injury. That employment in the present instance, as we have already observed, was that of a rivet passer. Taking the meaning which we have ascribed to the quoted clauses as a premise and looking now to paragraph (2) in an endeavor to ascertain its applicability to the present situation, we have only to determine, except for a consideration hereafter to be mentioned, whether rivet passers worked at the city of Long Beach, where petitioner was injured, or in a neighboring place, at least 260 days of the year preceding petitioner's injury. We are pointed to nothing in the record on this question, but that fact need give us no concern, for the particular point may be settled under the law of judicial notice. We know that both riveters and rivet passers have been employed continuously for many years in Los Angeles, which is less than 25 miles distant from Long Beach, in the erection of steel structures for large buildings. Even if there be a difference between that employment and the work of riveters and rivet passers in shipbuilding, a fact as to which we are not actually in-

formed, we know that such workmen have been at work continuously for several years in the building of ships at Long Beach itself and at San Pedro, distant less than 10 miles from the former city. That we may take judicial notice of such facts as these is attested by the opinion of the Supreme Court in *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436. Having progressed so far we come now to another matter—and this is the consideration to which we have referred above. Paragraph (2) contemplates the basing of the average weekly earnings of an injured employee upon the daily earnings of an employee of the same class in the same or a neighboring place, extended over the period of time mentioned in the statute. The record here shows nothing upon the question as to what the daily earnings of such an employee were during 260 days within the year preceding the injury to petitioner, either in Los Angeles, San Pedro or Long Beach. To this extent, then, respondents have failed to bring the case within the terms of paragraph (2). On account of this fact neither paragraphs (1), (2), nor (3) apply, and we are bound to fall back upon paragraph (4). It will be observed that under the last-mentioned paragraph, "where for any reason the foregoing methods"—that is, those defined in paragraphs (1), (2) and (3)—"of arriving at the average weekly earnings of an injured employee cannot reasonably and fairly be applied," certain average weekly earnings shall be taken as a basis for the computation, "provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury." The language of this proviso undoubtedly refers to the wages paid at the time of the injury to the injured employee. As the finding of respondent Accident Commission was based upon the exact wage paid to petitioner at the time of his injury, the requirement of the proviso seems to have been met precisely. We are satisfied that the finding of respondent Accident Commission, fixing the weekly benefit allowed petitioner, was computed upon the proper basis.

The next contention made by petitioner arises under section 9 of the Workmen's Compensation Act. The section provides that—

Where liability for compensation exists, the employer shall furnish "such medical, surgical and hospital treatment * * * as may rea-

sonably be required to cure and relieve from the effects of the injury."

The section also provides that—

"In case of his neglect or refusal reasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same."

Some time after petitioner was injured his parents removed him from the hospital in which he had been placed by the employer, that hospital being the place to which the employer regularly sent its injured employees for treatment, to another hospital, and there placed him under medical care other than that which had been provided for him by the employer at the first hospital. The reason assigned for the removal was that petitioner had not received proper care and attention up to the time of the removal. Respondent Accident Commission refused to allow petitioner his medical and hospital expenses after the removal on the ground that there was a conflict of the evidence as to conditions existing in the hospital in which the employer had placed him; that conflict being resolved against petitioner. We have read carefully all the evidence heard by the Accident Commission and referred to by counsel as bearing on the point presented—and it comprises a great part of the entire evidence taken in the proceeding—and conclude that the commission arrived at a correct solution of the question. The major parts of the evidence which petitioner aimed at the hospital management and at the conduct of the hospital physicians and nurses met with direct contradiction in the opposing testimony.

We cannot say from the uncontradicted items of the evidence on the subject that the removal of petitioner from the first hospital in which he was placed was justified; that is, we cannot say that those items show that the employer either neglected or refused to furnish to petitioner such medical, surgical, and hospital treatment as was reasonably required to cure and relieve from the effects of the injury which he had suffered. The propriety of this conclusion seems so manifest to us that we do not feel called upon to recite the somewhat voluminous evidence bearing upon the question.

Award affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(58 Cal. App. 59)

(307 P.)

LUTHER v. CLARK et al. (Civ. 3900.)

(District Court of Appeal, Second District, Division 1, California. May 31, 1922. Hearing Denied by Supreme Court July 27, 1922.)

1. Vendor and purchaser ⇨299(3)—Complaint held not insufficient as failing to allege a valid reason for failure to convey perfect title.

In an action by a vendor against a purchaser to recover possession of land, a complaint, alleging that plaintiff's predecessor in title was to convey a perfect title and furnish a certificate of title showing it to be perfect, and from which it appeared that a corporation supplying water to the public had a right of way across the property for its pipe line, and alleging that plaintiff tried to obtain a release of the easement without success, and because of this fact he was unable to obtain a certificate showing perfect title, was not insufficient as failing to allege a valid reason excusing plaintiff from conveying a perfect title and furnishing a certificate showing such condition of the title.

2. Judgment ⇨248—Letter written after decision could not affect judgment.

In an action by a vendor against purchasers for possession of property sold, in which the vendor's predecessor in title had contracted to convey perfect title and to furnish a certificate showing such condition of the title, which the vendor was unable to do because a right of way for a water pipe line across the property was held by a public service corporation, on the purchaser's refusing at the trial to accept a deed so long as the easement remained and to pay the purchase price, refusal to enter an interlocutory judgment setting a time within which the purchasers should pay the purchase price was not error, regardless of a letter written by the purchasers after the decision offering to accept the deed and pay the purchase price.

3. Vendor and purchaser ⇨296—Purchaser may not retain possession refusing to pay purchase price for failure to convey title according to contract.

Where a vendor's predecessor in title contracted to sell land and to convey a perfect title and to furnish a certificate showing such condition of title, which he was unable to do because of an easement for a pipe line across the land, the purchaser had no right to retain possession of the property and to refuse to pay the purchase price for failure to convey title according to the contract, and, on refusal to accept a conveyance subject to the easement, a decree returning possession to the vendor was proper.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Suit by Sidney Luther against Stephen A. D. Clark and others. From judgment for plaintiff, defendants appeal. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellants.

Muhleman & Crump, of Los Angeles, for respondent.

SHAW, J. It appears from the complaint herein that plaintiff is the owner of certain real estate described therein, the net area of which is 7.521 acres, which property is, and at all times mentioned was, subject to an easement and right of way across the same for a pipe line owned by the Hermosa Beach Water Corporation for the conveyance of water for public use; that plaintiff acquired title to said property from one Henry Krotzer, who, prior to plaintiff's acquisition thereof, had executed a contract for its sale to Stephen A. D. Clark. By the terms of the contract, dated June 11, 1912, Krotzer agreed that the tract of land consisted of 8 acres and was free and clear of all easements or incumbrances whatsoever, and that the purchase price to be paid by Clark was \$500 per acre, net measurement, and that he would furnish the purchaser with an unlimited certificate of title by the T. I. & T. Co. of Los Angeles, Cal., showing measurement of the land, names and width of streets and roads touching the same, and a perfect title. The terms of payment were \$50 cash, the balance to be paid as follows: \$950 on or before September 1, 1912, \$800 on or before March 1, 1913, and \$2,500 on or before September 1, 1913; the last two payments to be evidenced by promissory notes secured by a mortgage upon the property. It provided further that Clark should have immediate and full possession of the land; that the conveyance should be by grant deed; and that Clark and his wife should, within five days after the certificate as provided was written, place in escrow the mortgage to secure the last two payments, and complete the cash payments September 1, 1912. It further provided that should any defect appear in the title that could not be removed to the satisfaction of Clark, then, at his option, all payments made should be returned to him. It is alleged that Clark made the \$50 cash payment referred to, went into possession of the property about June 11, 1912, and has at all times since been and now is in possession thereof; "that plaintiff has heretofore attempted and endeavored to obtain a release of the easement and right of way of the Hermosa Beach Water Corporation over and across said property, and to obtain an unlimited certificate of title from the Title Insurance & Trust Company, referred to in said agreement as the 'T. I. & T. Co. of Los Angeles, California,' showing the measurement of the land, names and width of all streets and roads touching the same, and a perfect title as provided in said contract, but said Hermosa Beach Water Corporation has refused and does refuse to consider any proposition to relinquish said

easement and right-of-way owned by them, and said Title Insurance & Trust Company has refused and does refuse to issue such unlimited certificate of title, stating that it is impossible for it to do so in accordance with said contract; that plaintiff is unable to have said easement and right of way removed or said certificate of title issued through no fault of plaintiff or of said Henry Krotzer," who executed the contract and subject to which plaintiff acquired title to the property and the rights of Henry Krotzer therein; and further "that plaintiff is unable to comply with the terms of said contract on his part; that plaintiff is willing to and does hereby offer to restore to defendants everything of value which plaintiff has received under said contract, and hereby tenders unto defendants said sum of \$50, being the first payment on the purchase price of said land under said contract as alleged"; that defendants have refused and do now refuse to receive back said payment of \$50 and cancel said contract and restore possession of the property to plaintiff, or to accept such title as plaintiff is able to convey, which title plaintiff hereby offers to convey, with a reduction in the purchase price proportionate to the difference between 8 acres and 7.521, as provided in said contract, but insist upon and do retain both the balance of the purchase price of said land and the possession thereof.

The prayer of the complaint is that defendants be required to either accept such title as plaintiff can convey and pay the purchase price thereof as agreed, or to accept back the sum of \$50, paid by Clark to plaintiff's predecessor, Henry Krotzer, and cancel said contract and restore possession of the property to plaintiff; and in case of their refusal so to do, that said contract by decree of court be canceled, annulled, and declared to be of no effect, and that plaintiff's title be quieted against defendants, and that he be let into immediate possession of the property.

By their answer defendants denied that plaintiff, as alleged, was unable or had endeavored to comply with the contract by obtaining a release of the easement and right of way of the Hermosa Beach Water Corporation over and across said property, or that he had endeavored to or was unable to obtain an unlimited certificate of title from the Title Insurance & Trust Company, referred to in said agreement as the T. I. & T. Co. of Los Angeles, Cal., as provided in said contract, or that said T. I. & T. Co. has refused to issue such certificate of title, or has stated that it was impossible for it to do so in accordance with said contract; and further alleged that since the commencement of the action defendant George T. Clark had purchased from defendant Stephen A. D. Clark all of his right, title, and interest in and to

said contract and the land described therein.

Upon these issues the court found that plaintiff was the owner of and entitled to possession of the property, the area of which was as alleged in the complaint; that it was at the time of the execution of the contract and ever since had been and was subject to an easement or right of way for a pipe line across the southwest corner thereof in favor of the Hermosa Beach Water Corporation, as well as to other public easements for street and highway purposes; that defendants claim an interest and title in the property by virtue of said contract so executed by Henry Krotzer to Stephen A. D. Clark on June 11, 1912; that plaintiff has attempted and endeavored to obtain a release of the easement and right of way of the Hermosa Beach Water Corporation over and across the property, but that said corporation has refused to and does refuse to relinquish said easement or consider any proposition for the release thereof, and said Title Insurance & Trust Company refuses to issue an unlimited certificate of title, stating that it is impossible for it to do so in accordance with said contract; that plaintiff, without his fault or that of Henry Krotzer, has been and is unable to have said easement and right of way removed or said certificate of title issued, and is unable to fully comply with the terms of said contract on his part, but is willing and offered in open court at the trial of this cause to restore to defendants everything of value which plaintiff or his assignor received under said contract, and in open court at the trial tendered to defendants a grant deed conveying the property, subject only to the incumbrances aforesaid, which plaintiff has been unable to have removed, and offered to reduce the purchase price thereof in proportion to the difference between 8 acres and 7.521, as provided in said contract, but that defendants, and each of them, have at all times refused to exercise the option to receive back said payment of \$50 and cancel said contract and restore to plaintiff possession of the property, or to accept such title as plaintiff is able to convey, but insist upon, and do retain the balance of the purchase price of said land and the possession thereof; "that defendants in open court at the trial of this cause, unqualifiedly refused to accept a deed to said property subject to any easement or right of way for a pipe line across said land, or anything other than a perfect title." And as a conclusion of law the court found that defendants, and neither of them, had any interest or estate whatever in or to said premises or any part thereof, that they be debarred from asserting any claim to said land, and that plaintiff was entitled to the possession thereof. Final judgment followed as prayed for in the complaint, from which defendants have appealed.

[1] Appellants insist the complaint is insufficient in that no valid reason is alleged excusing plaintiff from conveying a perfect title and furnishing the certificate of the T. I. & T. Co. showing such condition of the title, and hence the court erred in overruling the general demurrer interposed. There is no merit in this contention. It appears from the complaint that the Hermosa Beach Water Corporation had an interest in the property, to wit, a right of way across the same for its pipe line, through which it conducted water for a public use, which fact, since it is obvious that one cannot convey a perfect title to real estate which he does not own, was a sufficient excuse for plaintiff's failure to comply with his contract. Assuming a duty devolved upon plaintiff, under the terms of his contract, to clear the land from such burden, he alleges and proves by competent evidence that he has in good faith endeavored to obtain from said corporation a release of the easement and right of way, and that it has refused to relinquish the same or entertain any proposition therefor, by reason of which fact he has been unable to obtain a certificate showing a perfect title. Since in our opinion the complaint was sufficient as against the general demurrer, it follows that the court did not err in denying defendant's motion for judgment on the pleadings, based upon the fact that the complaint did not state a cause of action, nor in overruling their objection to the introduction of evidence thereunder.

[2] It appears that the court at the close of the trial gave its decision in favor of plaintiff and ordered a final judgment entered, of which fact appellants complain. The evidence clearly shows that, as found by the court, defendants without qualification announced in open court that they would not accept the purchase of the property, nor pay for the same, until the property was free from the rights of the Hermosa Beach Water Corporation and the delivery to them of a certificate showing such fact, as called for by the contract, which was a condition impossible of performance under the circumstances shown to exist. In response to the question asked by the court, "You won't accept a deed so long as that easement remains?" defendants replied, "That is right," to which the court said:

"That being the case, there is no occasion to enter an interlocutory judgment. The defendant says he will not accept the offer (of the deed tendered in open court), and the judgment will be—"

After some further colloquy, the court asked:

"No point is made, Mr. Baxter, that these deeds do not run to the persons to whom you would have them run?"

"Mr. Baxter: No, only they do not satisfy us, and we won't accept them."

"The Court: Very well. Judgment will be for the plaintiff."

It is apparent that upon these facts defendants are in no position to complain because of the failure of the court to enter an interlocutory judgment extending the time within which defendants should pay the purchase price of the property. To do so under the circumstances would have been a futile act and no purpose could be served thereby.

The fact, as stated by appellants, that after the decision defendants, by a letter to plaintiff, offered to accept the deed and pay the purchase price, is immaterial, for the reason that it was a private communication and no part of the proceedings at the trial. It constitutes no part of the record and cannot be considered as affecting the judgment. While appellants claim that before the judgment was entered they made a motion before the court to be permitted to pay the purchase price, the record contains nothing whatsoever in relation thereto.

[3] Upon the findings, added to which, as shown by the evidence, is the fact that during the 10 years that defendants had the use and occupation of the property plaintiff was compelled to and did pay all the taxes, it would be difficult to conceive of a more inequitable position than that assumed by them. Their contention is that they may indefinitely keep possession of the property so received from the vendor and refuse to make payment of the purchase price; in other words, that they may keep both the property and the purchase money. They have refused to pay anything or comply with their part of the contract, save and except when plaintiff can convey a clear title, which, under the circumstances, he can never do, for the reason that another party owns an outstanding interest and title in the property; hence a conveyance in accordance with the terms of plaintiff's contract is impossible. As said in *Garvey v. Lashells*, 151 Cal. 526, 91 Pac. 498:

"A purchaser cannot retain possession of property delivered to him under a contract of sale without complying with the terms of the contract as to payment for the reason that the title of his vendor is not satisfactory. If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money."

In *Haile v. Smith*, 128 Cal. 415, 60 Pac. 1032, the court, supported by *Worley v. Nethercott*, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209, states the rule to be that—

"A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, re-

tain both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give if he chooses to retain the possession of the land."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(58 Cal. App. 1)

SMITH v. QUESTA. (Civ. 3642)

(District Court of Appeal, Second District, Division 2, California. May 24, 1922.)

1. Appeal and error \S 1024(5)—Order refusing motion to set aside judgment based on conflicting evidence will not be disturbed on appeal.

Where an order refusing a motion to set aside a judgment was founded on conflicting evidence, it will not be disturbed on appeal.

2. Appeal and error \S 339(5)—Appeal from order denying motion to vacate judgment held too late.

Under Code Civ. Proc. \S 889, providing that an appeal from an order denying a motion to vacate a judgment must be taken within 60 days after the entry of the order in the minutes, where an order denying defendant's motion to vacate a judgment was entered in the minutes February 18th, a notice of appeal filed April 25th following was too late.

3. Appeal and error \S 792—Appellate court will of its own motion dismiss appeal not taken in time.

Statutory time for taking an appeal is jurisdictional, and, where an appellant has made no attempt to appeal until after the time prescribed by the statute, the appellate court is without jurisdiction, and will of its own motion dismiss the appeal.

4. Appeal and error \S 113(1)—Order refusing to hear application for rehearing of motion to vacate judgment is not appealable.

Where defendant's motion to set aside a judgment was overruled, an order refusing to hear defendant's application for a rehearing of his motion to vacate the judgment is not appealable, and will be dismissed, since an appeal will not lie from an order refusing to set aside a former appealable order made regularly and advisedly.

5. New trial \S 153—Notice of intention must be filed within ten days after notice of entry of judgment.

Notice of intention to move for a new trial, not being filed within 10 days after receiving notice of entry of judgment, is too late.

6. New trial \S 153—Application of appellant for order vacating judgment held a waiver of formal written notice of entry of judgment.

Where a judgment was entered in favor of plaintiff December 10th, and defendant on Janu-

ary 22d following filed a notice of intention to move to set aside the judgment, accompanied by an affidavit, such application to vacate the judgment amounted to a waiver of a formal written notice required to be served on the attorney for defendant in order to start the running of the 10 days' time allowed after receiving notice of the entry of judgment within which the losing party may move for a new trial.

7. Appeal and error \S 345(1)—Failure to take appeal from judgment within 60 days held to cause loss of right to appeal.

Where a notice of intention to move for a new trial was not filed until 77 days after the entry of judgment, so that no proceeding on motion for new trial had been inaugurated or was pending at the expiration of 60 days after the entry of judgment, within which an appeal might be taken from the judgment in absence of any pending proceeding for a new trial, an appeal from the judgment taken more than 60 days after its entry was too late.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. R. Smith against Manuel Questa. From judgment for plaintiff, defendant appeals. Affirmed.

Joseph F. Seymour, of El Centro, for appellant.

Hill & Lee, of El Centro, for respondent.

FINLAYSON, P. J. In this action for the restitution of leased premises, and for damages alleged to have been sustained by reason of defendant's breach of certain covenants, plaintiff recovered judgment in the absence of defendant from the trial, and the latter now appeals from the judgment, and likewise from an order denying his motion to set it aside. He also appeals from an order sustaining an objection to hearing his motion for a new trial and his motion for a rehearing of his motion to set aside the judgment.

The action was commenced October 14, 1920. Defendant, appearing by an attorney who has since been superseded by present counsel, filed an answer and likewise a cross-complaint. In due time plaintiff answered the cross-complaint. On October 29, 1920, the case being then at issue, the court, on motion of plaintiff's counsel, set the cause for trial on December 1, 1920. On October 31, 1920, defendant's counsel received notice of the setting of the case for trial. Notwithstanding the receipt or such notice by defendant's counsel, neither he nor his client appeared in court when the case came on for trial December 1, 1920. Plaintiff, therefore, in the absence of defendant and his counsel, put in his evidence, and a judgment in his favor was rendered and entered December 10, 1920. Shortly before the opening of court on the morning of the day for which the case was set for trial, defendant's counsel called plain-

tiff's counsel on the telephone and asked for a short continuance of the case on account of his client's absence. Plaintiff's counsel refused to accede to the request, and defendant's counsel concluded that it was useless for him to appear in court without his client.

On January 22, 1921, defendant, who in the meantime had substituted his present counsel for his former attorney, served and filed a notice that he would move the court to set aside the judgment on the ground that it had been taken against him through inadvertence, surprise, and excusable neglect. He accompanied his notice with an affidavit made by himself, wherein, after admitting that his former attorney had received due notice that the cause was set for trial December 1, 1920, he deposed that he himself knew nothing about the trial or of the date set therefor, and that if his attorney had notified him that the case had been set for trial he would have been present with his witnesses. Counter affidavits were filed by plaintiff, as well as additional affidavits on behalf of defendant. In one of the counter affidavits, an affidavit made by defendant's former counsel, it is positively affirmed by the affiant that he did notify his client, the defendant here, that the case was set for trial on December 1, 1920, but that defendant failed to keep his promise to appear at the trial and bring his witnesses with him, and that the only reason why affiant did not appear was that he could not try the case without the presence of his client and his witnesses.

[1] The affidavits are quite voluminous, but from what we have set forth it sufficiently appears that there was a substantial conflict in the evidence upon which the court denied defendant's motion to set aside the judgment. So that, even if the appeal from the order denying defendant's motion to vacate the judgment had been taken in time—a matter which we presently shall consider—it would be our duty to affirm the order, for the reason that, there being a substantial conflict in the affidavits, the action of the trial court in determining whom to believe is conclusive on the appeal to this court. The statements in the affidavits that favor respondent must control. *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232.

On February 18, 1921, the court denied defendant's motion to set aside the judgment. Thereafter, namely, on February 25, 1921, defendant filed a notice that he would move the court to grant him a rehearing of his motion to set aside the judgment. At the same time he filed a notice of his intention to move for a new trial. The record before us is silent as to any service upon plaintiff of either of the last-mentioned notices. Plaintiff objected to any hearing of defendant's motion for a rehearing of his application to set aside the judgment. Plaintiff likewise objected to any hearing of defend-

ant's motion for a new trial. On March 10, 1921, the trial court sustained plaintiff's objection to hearing defendant's motion for new trial, and likewise sustained the objection to hearing defendant's motion for a rehearing of his application to vacate the judgment. The notice of appeal was filed April 25, 1921.

[2] The appeal from the order denying defendant's motion to vacate the judgment was taken too late. That order was entered in the minutes of the court on February 18, 1921. The notice of appeal was filed April 25, 1921, or 66 days after the entry of the order. An appeal from such an order must be taken within 60 days after its entry in the minutes. Code Civ. Proc. § 939.

[3] The statutory time for taking an appeal is jurisdictional and mandatory; and, where an appellant has made no attempt to appeal until after the time prescribed by the statute, the court is without jurisdiction. *Estate of Brewer*, 156 Cal. 90, 103 Pac. 486; *Lancel v. Postlethwaite*, 172 Cal. 328, 156 Pac. 486. Respondent has made no motion to dismiss the appeal. Indeed, he has made no appearance in this court by printed brief or otherwise. But, since this court is without jurisdiction of the appeal, we, of our own motion, and notwithstanding respondent's failure to appear and move a dismissal, are bound to dismiss the appeal from the order denying defendant's motion to set aside the judgment. *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *McLaughlin v. Menotti*, 89 Cal. 355, 26 Pac. 880; *People v. Walker*, 132 Cal. 137, 64 Pac. 133.

Moreover, the transcript before us has not been authenticated by the judge's certificate. The record here consists of a clerk's typewritten transcript containing the judgment roll, together with certain papers and records purporting to have been used on the proceedings had subsequent to the entry of the judgment. This transcript is certified by the clerk, but not by the judge. In *Barnabee v. Hunstock*, 42 Cal. App. 659, 183 Pac. 951, and *Reed v. Clark* (Cal. App.) 206 Pac. 1018, it was held that, where the order appealed from is subsequent to the judgment, and arises on a record outside of the judgment roll, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made, and that, in the absence of a record so certified the order should be affirmed. Here the order cannot be affirmed, because, the appeal not having been taken in time, the court is without jurisdiction, and the appeal must be dismissed.

[4] The order refusing to hear defendant's application for a rehearing of his motion to vacate the judgment is not appealable, and therefore must be dismissed. The first order, that made on defendant's original motion to set aside the judgment, was an appealable

order. An appeal will not lie from an order refusing to set aside a former appealable order, made regularly and advisedly. Such subsequent order is the mere negative action of the court declining to disturb its first decision. It is the first decision, and not the refusal to alter it, which is the proper subject of complaint. *Henly v. Hastings*, 3 Cal. 341; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Doyle v. Republic Life Ins. Co.*, 125 Cal. 15, 57 Pac. 667.

[5] In sustaining the objection to hearing defendant's motion for a new trial the court did not err. There is some doubt whether a new trial is the proper remedy when the defendant has not appeared at the trial. See *McKinley v. Tuttle*, 34 Cal. 235, and *Hayne on New Trial and Appeal*, § 9. But, regardless of whether a new trial was an appropriate remedy, defendant's notice of intention to move for a new trial was filed too late, and for that reason alone the court was warranted in refusing to entertain the motion. The party intending to move for a new trial must file and serve his notice of intention "within ten days after receiving notice of entry of the judgment," when the case is tried by the court without a jury. In this case the judgment was entered December 10, 1920. Defendant's notice of intention to move for a new trial was filed February 25, 1921.

[6] The record before us is silent as to any service on defendant of a formal written notice of the entry of the judgment. But, though the statute requires written notice of the entry of judgment to be served upon the attorney for the adverse party, such formal written notice may be waived. Such waiver may appear, as declared in *Mallory v. See*, 129 Cal. 356, 359, 61 Pac. 1123, from some act of acquiescence of the party in open court or in the proceedings in the case as disclosed by the records, or files of the case or the minutes of the court, when the conduct of the party in the case, as appears from such records or minutes, is inconsistent with any theory other than that he had notice of the entry of the judgment. Under such circumstances he is deemed to have waived written notice. A written admission by a party entitled to notice of knowledge that the judgment had been entered would supersede the necessity of giving such notice; and a motion to the court or other proceeding by a party with reference to the judgment, which presumes his knowledge that it has been made and entered, and by which he seeks to protect his own interests against the rights of the other party under the judgment, will be regarded as a waiver of his right to a notice of the entry of the judgment. *Gardner v. Stare*, 135 Cal. 118, 67 Pac. 5. In the present case the appellant, on January 22, 1921, or 34 days before he filed his notice of intention to move for a

new trial, filed a notice of motion to set aside the judgment, accompanied by his affidavit. The contents of the papers which appellant thus placed upon the files of the court leave no room to doubt that, as early as January 22, 1921, his counsel knew that the judgment had been entered. We hold, therefore, that the application of appellant for an order vacating the judgment was a waiver by him, as of that date, of a formal written notice of the entry of judgment. And, since the notice of intention to move for a new trial was not filed until February 25, 1921, the court had no jurisdiction to hear the motion, and therefore the objection to hearing it was properly sustained.

[7] The appeal from the judgment was taken more than 60 days after its entry. The notice of intention to move for a new trial was not filed until 77 days after the entry of the judgment, with the result that no proceeding on motion for new trial had been inaugurated or was pending at the expiration of the 60 days after entry of the judgment within which an appeal might be taken from the judgment in the absence of any pending proceeding for a new trial. The right of appeal from the judgment was therefore lost. *Ransome-Crummey Co. v. Beggs* (Cal. Sup.) 196 Pac. 487.

The appeal from the judgment is dismissed; the appeal from the order denying defendant's motion to set aside the judgment is dismissed; the appeal from the order refusing to hear defendant's motion for a rehearing of the order denying his motion to vacate the judgment is dismissed; the order sustaining plaintiff's objection to a hearing of defendant's motion for a new trial is affirmed.

We concur: WORKS, J.; CRAIG, J.

(58 Cal. App. 14)

HOYT v. THOMAS et al. (Civ. 3897.)

(District Court of Appeal, Second District, Division 1, California. May 26, 1922. Hearing Denied by Supreme Court July 24, 1922.)

Specific performance — 86 — Not granted of contract to make will for ordinary service susceptible of pecuniary measurement.

Specific performance will not be granted of deceased's contract to will to plaintiff deceased's property, in consideration of plaintiff taking care of and managing it, and during illness of deceased rendering such aid and assistance as was in his power, conceding fairness of the contract, the services being ordinary and susceptible of pecuniary measurement, and it being immaterial that plaintiff has kept no memoranda and is unable to testify to the time devoted thereto or the value thereof.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Frank O. Hoyt against Belle Thomas and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Charles J. Kelly, of Los Angeles, for appellant.

Lloyd W. Moultrie, of Los Angeles, for respondents.

SHAW, J. Plaintiff appeals from a judgment entered in favor of defendants upon an order of court sustaining a general demurrer to the second amended complaint for the specific performance of a contract, without leave to amend.

The case stated by the complaint, so far as material, is in substance as follows: Hattie McIntire died in September, 1917, leaving an estate the value of which, as distributed to defendants as the heirs of deceased under an order of court, was \$3,469.12. It is alleged that in March, 1903, a contract was entered into between plaintiff and said Hattie McIntire "by the terms and conditions whereof this plaintiff promised and agreed to and with the said Hattie McIntire that he would render to the said Hattie McIntire from that time during the remainder of the term of her natural life such care and personal services as she might require of him, and particularly that he would attend to the business affairs of the said Hattie McIntire both in connection with her real property and otherwise, and that he would endeavor to so manage and conduct her affairs in such manner if it were possible that the said Hattie McIntire would, during the remainder of her lifetime, be assured of and provided with a suitable and proper home and sufficient income to provide for her a suitable and proper living, and that whatever sickness, misfortune, or losses she might suffer he would render to her such comfort, aid, and assistance within his power or ability as she might require or request of him, and that during the remainder of the term of her natural life he would, and in consideration thereof the said Hattie McIntire then and there promised and agreed to and with this plaintiff that upon her death all of the property and estate of which she died possessed should be and become the property of this plaintiff, and that prior to her death she would execute a last will and testament or such other papers as might be necessary to transfer, set over, and secure to this plaintiff such property and estate of which she might die possessed"; that plaintiff, during the lifetime of Hattie McIntire fully performed his part of the contract so made, notwithstanding which fact the said Hattie McIntire did not, as she agreed, execute a will in favor of plaintiff, nor execute any papers transferring to plaintiff the property which she possessed at the time of her death, nor any part thereof, the legal title to all of which was, under said order of distribution, acquired by defendants, who are

alleged to hold the property in trust for plaintiff under and by virtue of the terms of said contract so made between plaintiff and deceased. It is further alleged that plaintiff, in reliance upon the terms of said agreement and promise so made by Hattie McIntire, neglected to keep any account or memoranda in writing of the numerous services rendered by him in the performance of said contract or the time devoted to her care and comfort, without which plaintiff has no recollection or knowledge of the total time so devoted by him to the performance of said agreement, and hence during the administration of the estate of Hattie McIntire was not and is not now able to produce satisfactory evidence to establish the value of the services so rendered by him under the terms of the agreement; that the greater part thereof had, at the time of their rendition, no fixed market value, and as to such thereof upon which a value could have been fixed it is now impossible, upon the evidence which he could produce, for a jury to determine the measure thereof in money.

The prayer of the complaint is that defendants be required to transfer and convey the property so received by them to plaintiff.

The case has heretofore been before this court upon an appeal had by the defendants from a judgment of specific performance rendered upon the original complaint in favor of plaintiff, and the opinion reversing the judgment therein is reported in *Hoyt v. Thomas*, 195 Pac. 260. The decision on the former appeal should be deemed determinative of the question here presented. In the opinion referred to we had occasion to quote at length from the contract as alleged in the original complaint and from the testimony of plaintiff as to the character of the agreement and what he did thereunder. Reference to this contract and testimony shows the contract then under consideration to have been identical with that now declared upon, save and except that in the original complaint plaintiff alleged and at the trial had thereon testified that the services performed under the contract were of the value of \$4,000; whereas in the amended complaint now presented he alleges that he kept no account or memoranda in writing of the numerous services rendered to deceased and has no recollection or knowledge thereof, by reason of which fact he cannot even approximate the time so devoted to the services rendered under the terms of the agreement or fix the value thereof so as to enable a jury or court of law to determine his damage. Nevertheless, as said in the former appeal, "the plaintiff himself seems to have had it in his mind that the services had a particular and definite money value, for he testified, without apparent hesitation and without qualification, so far as the record shows, that in his opinion the services were worth, as stated, about \$4,000." Waiv-

ing plaintiff's apparent willingness to meet the exigencies of the case arising from the former decision and conceding a loss of memory as to the facts upon which he so readily based his sworn statements in obtaining the former judgment, we are of the opinion that the complaint fails to state a cause of action for the equitable relief demanded.

The action is one for the specific performance of the alleged contract whereby Hattie McIntire agreed that she would by will, in consideration of the performance of the alleged contract on plaintiff's part, devise her property to him. That courts of equity will under special circumstances enforce such contracts seems to be the settled law. *Pomerooy on Specific Performance*, p. 268; *Morrison v. Land*, 169 Cal. 580, 147 Pac. 259. To warrant such action, however, it must not only be made to appear that the contract is fair and just (*Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148), but that the services called for and performed, by reason of their peculiar character, are such that they cannot be measured by a pecuniary standard (*Morrison v. Land*, *supra*), and hence cannot be compensated for in money (*Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369). Most of the cases where contracts of the nature here involved have been enforced appear to have been those where home ties were broken and new domestic or filial relations created, as where a minor goes to live with an adult upon his promise that he will stand in loco parentis and will devise to such minor his property in return for filial services during his lifetime. *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881. In the instant case no personal and domestic ties were severed by plaintiff and no peculiar personal relation created between the parties pursuant to which Hattie McIntire would be the recipient of plaintiff's society and filial affection. No such relation was contemplated by the contract. This being true, and conceding the contract is not obnoxious to the rule that it must be fair and just, it follows that plaintiff's right to specific performance of the contract must be based upon the fact that the services called for by the same were, by reason of their peculiar and unusual character, not susceptible of pecuniary measurement, for, as said in *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609:

"If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed."

The contract as made was that plaintiff during the period specified should care for and render to deceased such personal services as she required of him; that he should give attention to her business affairs in an

effort to successfully manage the same to her interest and profit, and during her illness render her such aid and assistance as should be within his power, to the extent that she requested the same. We are unable to perceive anything unusual or out of the ordinary in the character of the services which plaintiff agreed to perform for deceased, or why, upon proper proof, they could not be adequately compensated for in money. In character they are such as are of everyday occurrence and usually performed upon an express or implied contract for an agreed or implied pecuniary compensation. Hence, since it appears that no relation of a filial or like personal character was created, the trade into which plaintiff was induced to and incidental to which plaintiff discharged duties the nature of which made it impossible to estimate their value, but, on the contrary, the services called for thereby, if rendered, were susceptible of measurement and plaintiff compensated in money on account of the breach thereof, specific performance should not be decreed. The fact that plaintiff kept no memoranda and is unable, as he says, to testify as to the time devoted by him in rendering the services, or value thereof, is immaterial. His is the misfortune suffered by any plaintiff who performs services which may be measured in money and is unable to produce evidence of such value, but it furnishes no reason for equitable jurisdiction.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(58 Cal. App. 51)

McKEEVER v. LOCKE-PADDON CO.
(Civ. 3889.)

(District Court of Appeal, First District, Division 1, California. May 31, 1922. Hearing Denied by Supreme Court July 27, 1922.)

1. Fraud §11(2)—False representations regarding land value held actionable.

False representations as to the value of land made by a party to a trade are alone sufficient to constitute fraud where the party to whom the representations were made is not acquainted with conditions and land values in the locality where the land is situated, has no opportunity to investigate, and relies upon the representations.

2. Fraud §59(2)—Finding of value of plaintiff's land exchanged held unnecessary under rule of damages.

In an action for false representations made by defendant in an exchange of land, it was unnecessary for the court to find on the value of the land plaintiff traded; his measure of damages being the difference between the ac-

tual value of the property received and its value had it been as represented.

3. Trial \S 391—Separate findings as to ratification of an exchange of land held unnecessary.

Where, in an action for false representations made by defendant in an exchange of land, the court found that plaintiff did not ratify the exchange, it was unnecessary to further find on each reason on which defendant claimed the ratification was predicated.

4. Appeal and error \S 1011(1)—Findings of trial court based on conflicting evidence conclusive.

Where the findings of the trial court on matters of fact are based on conflicting evidence, the appellate court cannot interfere.

5. Appeal and error \S 1033(9)—One cannot complain of value placed on his land by the court, where the value fixed was more than the value he conceded.

Where defendant, in an action for false representations made in a trade of land, conceded that his land was worth no more than \$16 per acre, and where the evidence showed that the land was worth no more than \$5 per acre, defendant could not complain of the value of \$28.75 per acre fixed by the court.

Appeal from Superior Court, City and County of San Francisco; George H. Cabanis, Judge.

Action by Frank M. McKeever against the Locke-Paddon Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant.

Reisner & Honey, of San Francisco, for respondent.

KNIGHT, Justice pro tem. In this action the plaintiff, Frank M. McKeever, recovered a judgment against the defendant, Locke-Paddon Company, a corporation, for damages sustained in connection with a real estate trade into which plaintiff was induced to enter through the fraudulent representations of the defendant. On stipulation of the parties the action was tried before a jury, sitting in an advisory capacity, and a general verdict was rendered in favor of plaintiff for \$3,500. The trial judge failed to file any written decision, findings of fact, or conclusions of law, or any order adopting the verdict, but merely entered judgment on the verdict. An appeal was taken by defendant, and the judgment was reversed and the cause remanded, with directions to the trial court to give its decision in writing, as provided in section 633 of the Code of Civil Procedure, and to enter judgment accordingly. *McKeever v. Locke-Paddon Co.* (Cal. App.) 193 Pac. 258. Thereafter the trial court adopted the verdict of the jury, filed its decision containing its findings of fact and conclusions of law, and judgment was entered in accordance

therewith. The defendant has again appealed from the judgment.

Appellant's grounds of appeal are in effect an attack upon the entire record in the case. Among the numerous grounds urged are that the amended complaint is fatally defective; that the findings are insufficient in form and incomplete in substance, and do not support the judgment; that the evidence is insufficient to support the findings; that the court erred in the exclusion of evidence offered by defendant, and that the amount of damages allowed by the jury was arrived at in an illegal manner.

The record discloses that on December 23, 1916, the plaintiff McKeever agreed to exchange certain real property situate in Palo Alto, Santa Clara county, for two pieces of real property, represented as belonging to the defendant Locke-Paddon Company, one being situate in Alameda county and the other in Yolo county. The exchange was consummated on January 18, 1917.

During the trial the court withdrew from the jury the issues as to the Alameda county property, and afterwards found against the plaintiff on those issues, upon the ground that that transaction was free from fraud. We are therefore concerned here only with the transaction involving the Yolo county property.

In this respect it is alleged in the amended complaint that the defendant fraudulently represented to plaintiff:

"That said Yolo county property contained 80 acres of comparatively level farming land and 80 acres of pasture and woodland, said woodland being timbered with large oak trees, which were very valuable when cut; that said Yolo county property was worth \$60 per acre, and was accessible by a good road."

Appellant contends, first, that because of the allegations in the amended complaint, to the effect that it was represented by defendant that part of the Yolo property was "timbered with large oak trees, which were very valuable when cut," the trees must be considered separately from the land and dealt with as personal property, and that, since there is no allegation in the amended complaint as to the value of those trees "when cut" independent of the allegation as to value of the real estate, the amended complaint fails to state a cause of action. The allegation in question will not, we think, bear such technical construction. It is elementary that growing timber is part and parcel of the land. Section 658, Civ. Code; *Sears v. Ackerman*, 138 Cal. 583, 72 Pac. 171. There is no claim made that any part of the timber here was severed from the soil. The parties assumed to deal with land, and the apparent reason that timber was mentioned at all was by way of description of the character of the land as represented by defendant. The point, we think, does not merit further discussion.

The findings, if substantially supported by the evidence, are sufficient in law, in our opinion to uphold the judgment. The trial court found that the defendant made the representations as alleged by plaintiff, and that the same were false, and were known by defendant to be false when made; that they were made for the fraudulent purpose of procuring the exchange of the properties, and that they were the controlling influence and inducement for the consummation of the transaction by plaintiff. The court further specifically found that said property did not contain 80 acres of comparatively level farming land nor 80 acres of pasture and woodland, and that said land was not worth any more than \$28.75 per acre, and "that said land was inaccessible, there being no roads to the same; that said land lies upon the summit of a high and inaccessible range of hills." It was further found that at the time of making said exchange plaintiff resided in Oakland; was totally unacquainted with conditions and land values in Yolo county, and "did not have sufficient opportunity to investigate the value thereof"; that plaintiff confided in the truth of said representations, and trusted, believed, and relied upon the statements so made, and that had it not been for such statements and representations he would not have made said exchange.

[1] The misrepresentations concerning the land values alone are sufficient, under the circumstances here shown, to constitute fraud. *Winkler v. Jerrue*, 20 Cal. App. 555, 129 Pac. 804; *Bonnarjee v. Pike*, 43 Cal. App. 502, 185 Pac. 479. In the latter case it is said:

"That a representation as to the value of property is often a representation of fact, and actionable if false, is well established, especially where the vendee to whom the representation is made is so situated as to have no means of investigating the question for himself, and therefore relies on the statements of value made by the vendor or his agent. *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018; *Phelps v. Grady*, 168 Cal. 73-77, 141 Pac. 928."

Appellant further contends that the findings ignore material issues, in that they do not negative certain allegations contained in the answer to the effect that plaintiff made independent investigations of the Yolo property before he made the trade; that he was familiar with the property, and that he was an experienced real estate dealer. We find no merit in the point. All of the issues above mentioned, even conceding them to be material, are adequately covered by the findings. It was found by the court that plaintiff at the time of the exchange "was totally unacquainted with the actual conditions and value of said Yolo county property, and did not have sufficient opportunity to investigate the value thereof"; that said defendant had much experience in handling real estate, and was familiar with conditions and land values in Yolo county. And the court further found that plaintiff "believed, trusted, and relied

upon" said representations, and that they were the controlling influence which induced plaintiff to make the exchange, and, had it not been for said representations, plaintiff would not have done so. In the recent case of *Koblick v. Larson*, 207 Pac. 929, it is held that the failure to find specifically on the issue of investigation is not ground for reversal, when the evidence shows that no real investigation was made, and that the party who was victimized relied implicitly and solely upon the representations of the selling agents, who he considered and believed to be his friends. In view of the evidence on this point it cannot be successfully contended that the plaintiff made any independent investigations. There was some testimony given by the witness Paddon and his agent Ausmus, who were charged with perpetrating the fraud on behalf of the defendant, to the effect that plaintiff had stated that he had communicated by phone with a friend who was familiar with Yolo property, and that as a result of such communication he, the plaintiff, was satisfied with the Yolo property. This conversation was positively denied by plaintiff, however, and in view of the fact that the court found that plaintiff did not have opportunity to investigate, and that he relied wholly upon the representations made by defendant, no further finding was necessary, we think, on the matter of independent investigation.

[2] Appellant also contends that the findings are incomplete because the court did not fix the value of the Palo Alto property. That contention cannot be sustained. In the case of *Hines v. Brode*, 168 Cal. 507, 143 Pac. 729, in a comprehensive and clear opinion written by Mr. Justice Henshaw, the Supreme Court held it to be the law of this state that where one sues for damages for fraud and deceit upon an executed contract for the sale or exchange of land, and where there has been no rescission, the measure of damages is the difference between the actual value of the property received and its value had the property been as represented, and that the measure of plaintiff's recovery is not affected by the price paid. This rule is based upon the principle that the vendee is obliged to accept the burden of the contract with its benefits, according to its terms, with the right to a recovery for the fraud based upon the fact that the benefits which he receives are not those which under the representations of the vendor he was entitled to receive. The rule contended for by the appellant here seems to be the one mentioned in *Cross v. Bouck*, 175 Cal. 253, 165 Pac. 702, which is therein quoted from the case of *Rockefeller v. Merritt*, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633, namely that the "measure of the damages suffered by one who is fraudulently induced to make a contract of * * * exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he

receives under the contract." But, as pointed out by Mr. Justice Henshaw in *Hines v. Brode*, supra, the courts of this state do not follow the federal rule. He says, in speaking of the rule adopted and followed in this state:

"This is not only the rule in California, but it is declared to be the rule under the great weight of authority. The opposing rule is that which obtains in England and in the courts of the United States. That rule refuses to recognize * * * the prospective profits which the vendee expected to make by his transaction."

Later, in the case of *George Cople Co. v. Hindes*, 34 Cal. App. 576, 170 Pac. 155, the Supreme Court, in denying a petition for a hearing before that court, criticized the rule mentioned in *Cross v. Bouck*, supra, declaring the correct rule to be the one stated in *Hines v. Brode*, and held that only the peculiar facts of *Cross v. Bouck* justified the application of the exceptional rule, in that case.

It was therefore not only unnecessary for the court to find on the value of the Palo Alto property, but the evidence rejected, if any there was, on this point was properly excluded. It could not have been received on the theory of recoupment for the simple reason that no recoupment was pleaded or prayed for by the defendant. In fact, the answer contains no allegation as to the value of the Palo Alto property. We do not consider the case of *Herdan v. Hanson*, 182 Cal. 538, 189 Pac. 440, cited by appellant, in point, for the reason that the situation there was different from the one presented here. There the evidence of the value of the property traded by plaintiff was offered and received in support and as a part of plaintiff's case, over the objections of the defendant, on the main issue of fraud charged against the defendant.

[3] As an affirmative defense it was alleged in the answer that plaintiff ratified the exchange in various ways, among them being by a settlement or agreement of compromise. Defendant contends that in order to sustain the judgment there must be a specific finding that there was no such compromise. This objection may be dismissed with the statement that the trial court, in its findings, did specifically negative the very wording of the allegation itself. The ultimate fact alleged was the ratification, and the court found that there was no ratification. It was unnecessary to further find on each reason upon which the defendant claimed the ratification was predicated.

[4] The question of the sufficiency of the evidence to support the findings on the main issue of fraud is one we are not permitted to inquire into, under the well-determined rule, because of the conflict of proof on the essential elements constituting the fraud. Appellant has quoted testimony extensively in its brief for the purpose of showing that the representations plaintiff claims were

made by the selling agents of the defendant were not in fact made, and that whatever was said by them was mere matter of opinion and stated as such. But, in view of the positive testimony given on the part of the plaintiff that the representations were made, it is evident that the testimony quoted by appellant merely raises a conflict, and under such circumstances we are not at liberty to interfere with the findings of the trial court. The question of whether the statements were expressions of opinion was likewise one for the trial court. In *Stockton v. Hind* (Cal. App.) 196 Pac. 122, it is said:

"Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury. 20 Cyc. 15, et seq.; *Spreckels v. Gorrell*, 152 Cal. 395, 92 Pac. 1011; 14 Am. & Eng. Ency. of Law, 36."

This conflict in the evidence was first passed upon by a jury and then by the trial court. Both found adversely to the defendant. In that state of the record the decision of the trial court must prevail.

[5] The defendant, we think, is not in a position to complain about the value of the land as fixed by the court, for the reason that the defendant conceded the land to be worth no more than \$2,500, which would be less than \$16 per acre, whereas the court allowed \$28.75 per acre. By what method the court arrived at this figure is immaterial, so long as the amount fixed was within the limits of the evidence. There was evidence received to the effect that the land was hilly and inaccessible, with no road at all to the property; that there were only two or three acres "on top of the hill" fitted for agriculture; that the soil was "gravelly and rocky" with some clay land; that the only timber on the place was a small quantity of "scrub oak"; and that the rest of the land was practically covered with "buck" and "chamise" brush, and that the whole property was worth no more than \$5 per acre. From this evidence it would appear that the value fixed by the court was liberal.

Defendant has also made the points that the wrong party has been sued, and that the court erred in its rulings on the admissibility of proof. We have examined those points, and find that they are without support in the record. Equally untenable is the objection that the jury arrived at the amount of its verdict illegally. The jury was an advisory one. Its verdict was not binding upon the court, and so far as the judgment in the action is concerned it makes no difference what system the jury adopted in arriving at its verdict.

Finding no error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

(121 Wash. 21)

SCOCCIA v. STREETER et al.
(No. 17027.)

(Supreme Court of Washington. July 18, 1922.)

1. Appeal and error \S 1048(6)—Refusal to permit cross-examination of witness to prove employment held not prejudicial where the witness later testified to the same facts.

In an action against a corporation and some of its employees for an assault and wrongful arrest by the employees, the refusal to permit the cross-examination of the manager of the corporation after being called by plaintiff to prove the employment of one of the defendant employees, as to instructions given the employee, was not prejudicial where the manager was later called by the corporation and properly permitted to testify as to instructions.

2. Master and servant \S 332(4)—Instruction on scope of employment held not susceptible to misinterpretation.

An instruction that, if a servant exceeds his authority, and does an act which the master does not authorize, yet, so long as he acts in the line of his duty, "and does things or attempts to do things which he thinks pertain to the service" his master is responsible, and that defendant through its employees could protect its property, and it would not be liable for acts of the employees outside the scope of their employment, but if, in arresting a person on defendant's premises they unnecessarily beat and injured him defendant would be liable, held correct, though the quoted language taken alone, might be susceptible to misinterpretation.

Department 1.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Joseph Scoccia against E. S. Streeter and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Davis & Neal and C. E. Stevens, all of Tacoma, for appellants.

S. A. Gagliardi and Bates & Peterson, all of Tacoma, for respondent.

TOLMAN, J. Respondent prosecuted this action below to recover damages suffered through an alleged assault and wrongful arrest. The case was tried to a jury, which returned a verdict in his favor for \$1,040. From a judgment on the verdict, the defendants below have appealed.

[1] The individual appellants were employees of the appellant corporation, Judson being the then acting manager of the corporation, and having supervision over the other appellants. Judson was called as a witness by respondent to prove the employment of Streeter. Having testified in chief to the bare fact of such employment, he was asked

on cross-examination to state what instructions were given to Mr. Streeter, to which an objection was interposed upon the ground that it was improper cross-examination, and, the objection being sustained, that ruling is assigned as error. The first and most complete answer to this assignment is that appellant suffered no prejudice therefrom. Mr. Judson was later called as a witness on behalf of the appellant, and was properly permitted to testify fully upon the subject of the instructions given to Mr. Streeter. Manifestly at the time the objection was made it was properly sustained, because the fact of employment only had been brought out in chief; hence there was no other subject properly open for cross-examination. *State v. Crowder* (Wash.) 205 Pac. 850.

[2] It is next contended that the trial court erred in giving the following instruction:

"Where a person or corporation employs another to perform a certain duty, they are responsible in law for the acts or conduct of such person so employed while he is performing such duty. And, even if the servant exceeds his power and authority, and does an act which the master does not authorize him to do, yet, so long as he acts in the line of his duty, and does things or attempts to do things which he thinks pertain to that service, then the master is responsible for his acts while so acting. In this case, while the lumber company, through its employees, could protect its property, it would not be liable for acts of such employees outside the scope of their employment; but if, in arresting a person upon the company's premises, they unnecessarily beat and injured him, the company would be liable for such injury, and the individuals doing the beating would also be liable individually"

—criticism being directed to the language, "and does things or attempts to do things which he thinks pertain to that service." It may be admitted that this language, taken alone, is unusual, and, if it stood alone, might possibly be susceptible of a wrong interpretation; but, when the instruction is read as a whole, it will be found to announce the correct rule that to bind the master the servant must have acted within the scope or line of his duty, and we cannot conceive of the jury understanding it otherwise. The most obvious misinterpretation of the instruction would be favorable to the appellants rather than the reverse, and we cannot assume that the jury misinterpreted the instruction in any particular way, and certainly not that it misinterpreted it to the prejudice of appellants.

What has been said in part disposes of other assignments of error based upon the giving and refusal of instructions. We have carefully considered these further assignments, but find no error with respect thereto shown by the record. A discussion of each

in detail would serve no good purpose, and we pass, therefore, to the other questions.

The remaining assignments of error are based upon the denial by the trial court of appellant's motion for judgment at the conclusion of respondent's case, the overruling of motions for a new trial, and for judgment non obstante veredicto, and the entry of judgment on the verdict for the reason that the same was excessive. This was peculiarly a case for a jury, both as to the question of whether the servants were acting within the scope of their employment in the matter complained of, and as to the amount of recovery. There is sufficient evidence to sustain the verdict in both respects. From the standpoint of the assault alone the verdict might appear to be large, but, when the arrest, detention, and other surrounding circumstances are considered, we cannot say that the amount allowed is such as to establish passion and prejudice on the part of the jury.

The judgment is affirmed.

(PARKER, C. J., and BRIDGES and MITCHELL, JJ., concur.)

(120 Wash. 532)

WAGNER v. BENJAMIN et al. (No. 17121.)

(Supreme Court of Washington. June 26, 1922.)

1. Bills and notes \Leftrightarrow 400—Facts held sufficient to show that presentment to makers was excused by diligence of holder.

Where note designated no particular place of payment, and the makers changed their residence after defendants became indorsers and plaintiff holder of the note, and the holder, upon the interest falling due, twice called at the last known residence of the makers, and, finding no one there, mailed a written notice to them at that address, and upon nonpayment on the date recited therein mailed notice of dishonor and demand of payment to each indorser, presentment to the makers was excused by the holder's exercise of reasonable diligence under Rem. Code 1915, § 3473.

2. Bills and notes \Leftrightarrow 403—What is sufficient presentment to hold indorser stated.

Generally, when a note is dated at a place and payable generally without any particular place being designated as the place of payment, in order to charge the indorsers the note must be presented and payment asked at the place of business of the maker, if he has one at the place where the note is dated and payable, and if he has no place of business then at his residence, and if he have neither place of business nor residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand.

3. Bills and notes \Leftrightarrow 446—After diligence to present note to makers for payment of interest, holder, 70 days after default in interest, may declare note due and charge indorsers with payment.

Where for 70 days after interest on note fell due the holder used due diligence to ascertain the whereabouts of makers to make presentment for payment of interest, and the manner of giving notice complied with Rem. Code 1915, §§ 3494-3496, he could, at such time, under section 3475, declare the whole note due and payable, and immediately charge the indorsers therewith and sue on the note.

Department 2.

Appeal from Superior Court, King County; Sam. B. Hill, Judge.

Suit by William Wagner against Bessie Benjamin, Herman Broberg and wife, and others. From a judgment for plaintiff, defendants Broberg appeal. Affirmed.

Solen T. Williams, of Seattle, for appellants.

C. A. Schneider, of Seattle, for respondent.

HOLCOMB, J. Respondent sued defendants Benjamin, as makers, the defendants Decker, as payees, and the defendants Broberg, as indorsers, on a promissory note for \$336.80, dated at Seattle, Wash., September 23, 1919, due September 23, 1922, and containing a provision that should the interest, which was payable semiannually, not be paid when due, the owner and holder of the note might, at his option, declare the whole sum due and payable. The semiannual interest due March 23, 1920, was paid. The next installment due September 23, 1920, was not paid. From a judgment against all of the defendants only the defendants Broberg have appealed.

[1] Appellants first make the point that since they were not primarily charged by the note, not being either makers or payees, presentment for payment to the makers was necessary when the interest became due, or the indorsers would be discharged.

The note does not designate any particular place of payment, and was dated at Seattle, Wash. At the time of the execution of the note, and for a few months thereafter, the makers, the Benjamins, lived in Seattle, and stayed at the residence of a daughter at 6749 Twenty-Fifth Avenue Northwest. Prior to the maturity of the interest on March 23, 1920, respondent, as holder of the note, addressed the makers at the above address, notifying them that he was the holder of the note, and requesting payment of the interest. This interest payment was made at the residence of respondent by an agent of the makers. The interest falling due September 23, 1920, not being paid on that date, although respondent was in Seattle, where it was payable, respondent called at

the residence of the daughter within a day or so after the due date, and could find no person there. A few days later he again called at that address, and again failed to find any person there. He was informed by the party from whom the Benjamins were buying the house for which the note had been given that they resided in the country, but he could not state where. Having been unable to find the makers, on November 27, 1920, respondent mailed a written notice to the makers at the address of the daughter as above given, demanding payment of the interest by December 1, 1920. The interest not being paid by that date, on December 2, 1920, respondent mailed a written notice to each of the indorsers, properly addressed and mailed. The notice informed each of the indorsers of the dishonor by nonpayment and of respondent's declaration of the whole sum being due, and demanded payment. On December 6, 1920, this action was commenced. The Benjamins had resided at Sedro-Wooley in this state from about February, 1920, to December 5, 1920, and respondent did not know, and could not find their place of residence during that time, but did know that they did not reside in Seattle. It is thus established that the change of residence of the makers occurred after appellants became indorsers and respondent the holder of the note.

Our Uniform Negotiable Instruments Act provides (section 3473, Rem. Code), as follows:

"Presentment for payment is dispensed with
 "1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made."

The lower court expressly found "that after due diligence the plaintiff could not make presentment of the note to the makers." Under our statute and under the finding of fact above quoted, there is no doubt that presentment to the makers, under the facts shown, was excused.

[2] It is a general rule that when a note is dated at a place and payable generally without any particular place being designated as the place of payment, in order to charge the indorsers the note must be presented and payment asked at the place of business of the maker, if he has one at the place where the note is dated and payable, and if he has no place of business then at his residence, and if he have neither place of business nor residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand. *Meyer v. Hibsher*, 47 N. Y. 270; *Daniel*, Negotiable Instruments, § 640. The law requires no useless ceremony, and the fact of the absence of the party from the

place of payment would dispense with the necessity of going where he could not be found.

[3] The only remaining question is whether the notice of dishonor given by respondent and mailed to appellants on December 2, 1920, was sufficient to hold appellants as indorsers for the full amount of principal and interest of the note, which would not have matured until September 23, 1922, but for the default in the payment of interest by the makers.

No point is made that the notice itself was not sufficient. It is only contended that respondent had not the right, long after September 23, 1920, and on December 2, 1920, to mail a notice to appellants in another city, declaring the whole sum of the note due, and only four days thereafter bring suit against appellants as indorsers for the whole sum.

During the time elapsing from September 23, 1920, to December 1, 1920, the evidence shows that respondent was exercising great diligence to ascertain the whereabouts of the makers of the note. Seventy days is not an unreasonable lapse of time in which to exercise the option to declare the whole note due and payable and charge the indorsers therewith under such circumstances as shown in this case. The manner of giving notice complies with sections 3494, 3495, and 3496 Rem. Code, and section 3475, Rem. Code, provides that—

"Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right * * * to all parties secondarily liable thereon accrues to the holder."

The findings and judgment are correct.
 Affirmed.

PARKER, O. J., and MAIN, MACKINTOSH, and HOVEY, JJ., concur.

(121 Wash. 39)

SHIPLEY et ux. v. NELSON. (No. 17069.)

(Supreme Court of Washington. July 15, 1922.)

1. Negligence ⇐119(4) — Proof confined to specific negligence alleged.

Where there is a general allegation of negligence in a complaint, followed by a specification of the acts of negligence complained of, or where negligence is specifically set out without any general allegation, the evidence must be confined to the specific issue so presented in the pleadings.

2. Highways ⇐184(4) — Complaint against driver of automobile held to raise issue of negligent failure to sound statutory signals so as to justify an instruction submitting such issue.

A complaint, alleging that defendant, driving an automobile at a high and reckless rate

of speed, so carelessly and negligently operated it as to injure plaintiff, does not allege the reckless rate of speed as the specific negligence, but also alleges, in addition to the reckless speed, negligent operation, which would justify an instruction submitting to the jury the negligent failure to sound the signals required by statute.

3. Highways ⇐184(4)—Evidence held not to authorize instruction on failure of automobilist to sound horn.

Where witnesses for defendant testified that he sounded the proper signals on his horn when his automobile was overtaking plaintiff, who was riding a bicycle, and plaintiff's only testimony contradicting it was that he heard something just before he was struck, but did not know what it was, there was no evidence to support an instruction submitting to the jury negligent failure to sound the horn.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Irwin S. Shipley and wife against N. P. Nelson. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Morris B. Sachs, of Seattle, for appellant. Coleman & Fogarty, of Everett, for respondents.

MACKINTOSH, J. The complaint in this action alleged that—

"The defendant, N. P. Nelson, also traveling south, driving an automobile at a high and reckless rate of speed and going uphill, in broad daylight, so carelessly, negligently and recklessly managed and operated said automobile that the same was driven over and upon the plaintiff, Irwin S. Shipley," thereby injuring Shipley.

The trial of the case resulted in a verdict in favor of the plaintiff, from which the defendant has appealed.

A reading of the testimony in the case discloses sufficient evidence to justify the trial court's refusal to grant defendant's motion to dismiss the action at the close of the plaintiffs' case, and also its denial of the defendant's motion for judgment notwithstanding the verdict.

Among other instructions which the court gave the jury was the following:

"It is proper, I think, in this connection to instruct you upon another provision of the law, which requires any one using a motor vehicle upon the public roads or highways to be equipped with a proper bell, horn or other signal device in order to warn a person in case of danger. The complaint in this case does not specify that as one of the grounds of negligence, but it is a proper matter to be taken into consideration in determining whether or not the defendant in this case used the proper care in approaching the plaintiff and his bicycle

when he was approaching him on the highway; so that, if you find from a preponderance of the evidence that under the circumstances of this particular case it would have been proper or reasonable for the defendant to give warning of his approach in order to avoid the injury or danger to the plaintiff, then it would be his duty to give such warning as to notify the plaintiff of his approach, and if he failed to do that it would be a lack of reasonable care in the operation of his machine."

[1, 2] The giving of this instruction is assigned as error for the reason, as argued, that the allegation of negligence pleaded by the plaintiff was specific, and referred only to "high and reckless rate of speed." While it is true that, as we have held in *Albin v. Seattle Electric Co.*, 40 Wash. 57, 82 Pac. 145, and *Ennis v. Banks*, 88 Wash. 237, 152 Pac. 1037, and *Eddy v. Spelger & Hurlbut* (Wash.) 201 Pac. 898, where there is a general allegation of negligence in a complaint which is followed by a specification of the acts of negligence complained of, or where negligence is specifically set out without any general allegation, the evidence must be confined to the specific issue so presented in the pleadings in the absence of any amendment, yet as we read the allegation of negligence here we cannot agree with the plaintiffs' contention, for the complaint seems to allege, in addition to the high and reckless rate of speed, the careless, negligent, and reckless management and operation of the automobile, which would justify the court in submitting to the jury the question of whether the defendant was negligent under the general provisions of the statute providing that a person shall drive in a careful and prudent manner, and not at a greater rate of speed than is reasonable and proper and with due regard to the traffic and use of the road by others.

[3] The instruction complained of, however, is improper, for the reason that there was no testimony in the case to the point that the automobile was not properly equipped with sounding apparatus, or that this had not been used, and that no warning had been given. Several witnesses for the defendant testified that proper warning signals were given, and the only testimony on this point by the plaintiff was the following, from his cross-examination.

"Q. And as I understood your testimony on the direct examination you say that you heard a noise behind you? A. I heard something just before I was struck.

"Q. Now what was that? A. That I couldn't tell.

"Q. Was it a horn honking? A. I couldn't swear to that. I heard something, and seems like it came just like that (indicating), and I was hit."

This evidence was not sufficient to submit this phase of negligence to the jury.

A motion was made for new trial on the ground of the misconduct of the jury. It is unnecessary to discuss this assignment of error to any extent, for although the new trial should have been granted on account of this misconduct, it is a matter which will not arise on a retrial of the case.

The erroneous instruction and the misconduct of the jury entitle the appellant to a new trial.

Judgment reversed, and cause remanded.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(121 Wash. 53)

HENNING v. ANDERSON et al. (No. 17256.)

(Supreme Court of Washington. July 15, 1922.)

1. Husband and wife \S 268(5) — Note given for the benefit of a corporation in which community is stockholder is a community obligation.

A note given by a married man for the benefit of a corporation in which he is a stockholder is a community obligation if the corporate stock is the property of the community.

2. Husband and wife \S 268(1)—Absence of profit to community is not material in determining community liability.

The fact that no profit to the community resulted from a transaction is immaterial in determining whether an obligation was a community obligation, the test being whether the transaction was carried on for the benefit of the community.

3. Husband and wife \S 268(5)—Note to manager of corporation in which community was stockholder held community obligation.

Where a married man executed a note payable to the manager of the corporation in which the community owned stock for the benefit of the corporation, the note became a community obligation, regardless of the fact that it was not executed directly to the corporation, and that the manager to whom it was made payable subsequently absconded with the proceeds realized by pledge of the note.

Department 1.

Appeal from Superior Court, Pierce County; Wm. D. Askren, Judge.

Action by W. J. Henning against G. J. Anderson and wife and others. Judgment for plaintiff, and defendant Anderson and wife appeal. Affirmed.

J. W. A. Nichols, of Tacoma, for appellants.

J. Chas. Dennis and John M. Coffee, both of Tacoma, for respondent.

FULLERTON, J. In the early part of the year 1921 one J. C. Steward was the president and manager of a corporation known

as the Steward Food Products Company. The appellant G. J. Anderson was a stockholder in the corporation, holding shares of the par value of \$500, which was the community property of himself and his wife. In February of the year named Steward represented to Anderson, and to others of the stockholders in the corporation, that the corporation had many orders for its products which it could not fill for want of ready money, and that it was necessary to raise money for that purpose. Thereupon Anderson, together with two others of the stockholders, executed and delivered to Steward their promissory note, wherein they promised and agreed to pay to Steward \$3,000, with interest at 8 per cent. per annum, three months after the date of the note. The note bore date of February 1, 1921. On February 23, 1921, Steward borrowed from the respondent, Henning, \$1,100, giving his own promissory note therefor, indorsing and delivering to the respondent the first-mentioned note as security. Steward did not apply the money so borrowed to the uses of the corporation, but seems to have absconded with this and other moneys raised in a similar manner. Steward's note was not paid at its maturity, and the respondent thereafter brought this action against the makers of the security note, together with their wives, claiming the obligation to be the obligation of the several makers, and the community obligation of the several communities composed of the makers and their wives. He sought, however, to recover only the amount of his loan to Steward. Anderson and wife alone defended. They did not dispute the liability of Anderson upon the note, but contended that the liability was his separate obligation, not an obligation of the community. The trial court ruled against the contention, and entered a judgment for the amount claimed to be due against Anderson as an individual and against him and his wife as a community. From that part of the judgment holding the obligation to be a community obligation Anderson and wife appeal.

[1] This court has repeatedly held that a note given, or an obligation incurred, by a married man for the benefit of a corporation in which he is a stockholder is a community obligation if the corporate stock is the property of the community. *Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *Allen v. Chambers*, 22 Wash. 304, 60 Pac. 1128; *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536; *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738; *Bird v. Steele*, 74 Wash. 63, 132 Pac. 724; *Williams v. Hitchcock*, 86 Wash. 536, 150 Pac. 1143.

[2] We have also held that the fact that no profit to the community resulted from the transaction is immaterial; that the test is:

Was the transaction carried on for the benefit of the community? *Clumner v. Spokane-Columbia R. R. & N. Co.*, 79 Wash. 278, 140 Pac. 365.

[3] These principles, when applied to the facts in the present case, it seems to us, conclude the question against the appellants. It is not material that the note of the appellants was given to Steward instead of the corporation, nor is it material that the respondent's loan was made directly to Steward. The controlling circumstance is found in the answer to the inquiry: For whose benefit did the appellant Anderson execute the note? His own testimony all but conclusively shows that he executed the note for the purpose of aiding the corporation in the prosecution of its business, and that he was induced so to do because of the fact that he was a stockholder therein, and believed that it would result to the benefit of the corporation, and thus, incidentally, to the benefit of the community composed of himself and wife. Undoubtedly he was deceived because of the rascality of the man whom he trusted, but this fact does not change the nature of the transaction; it does not change a community obligation into a separate one.

The judgment is affirmed.

PARKER, C. J., and MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

(120 Wash. 687)

SITTON v. KEITH et al. (No. 16994.)

(Supreme Court of Washington. July 11, 1922.)

Sales §316(1)—Seller breaching conditional sale contract not entitled to retake piano.

Where plaintiff's predecessor in interest contracted to sell defendant a specified piano, and to furnish the use of another piano until the one sold was delivered, plaintiff is not entitled to retake the substituted piano until delivery of the piano sold or tender back of the consideration paid.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Replevin by H. W. Sitton, trustee in bankruptcy for the Eilers Music House, against Wm. C. Keith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James R. Chambers, of Seattle, for appellant.

Carroll B. Graves, of Seattle, for respondents.

TOLMAN, J. This is an action in replevin brought to recover possession of a piano sold on a conditional sale contract. From a judg-

ment denying the relief sought, and dismissing the action, the plaintiff has appealed.

We are convinced by an examination of the record that the evidence there appearing justifies and supports the following findings of fact made by the trial court:

"IV. That on the 22d day of December, 1911, the defendant Wm. C. Keith entered into a conditional contract to purchase from Eilers Music House one Chickering piano at the agreed price of \$820, upon which contract said defendant then and there paid the sum of \$25 in cash and delivered in exchange another piano at the agreed price of \$220, and the balance of the purchase price was to be paid at the rate of \$25 per month on the 1st day of each and every month, commencing February 1, 1912, and the deferred payments to bear interest; that the original purchase contract was not introduced in evidence, and the rate of interest which the deferred payments were to bear and the number and style of the piano are uncertain, since the complaint alleges that the interest rate was to be at 8 per cent., whereas the copy of the contract annexed to the complaint provides that interest should be at the rate of 10 per cent. per annum, and the number and style of the piano as testified to by the witnesses for the plaintiff are not the same as testified to by the witnesses for defendants; but whatever the contract may have been, the same was modified by a subsequent written contract entered into between the parties, bearing date December 22, 1911, whereby the said Eilers Music House agreed to furnish a style W Chickering Grand piano, not bearing any number, on special order from the factory, according to the specifications then and there stated in said modifying contract, the purchase price and the times of payment remaining unmodified, and the payments hereinbefore mentioned being allowed to apply upon said modifying contract for the purchase of a piano to be furnished on special factory order, and according to specifications stipulated for by the defendant Keith.

"V. That the piano contracted to be sold by the original purchase and sale contract, without regard to the style and number testified to by the different witnesses, was never delivered by Eilers Music House to the defendant Keith, nor did the Eilers Music House ever deliver any piano to the defendant Keith under the modifying contract, and no piano was ever delivered to the defendant Keith by Eilers Music House either under any original sales contract or under the modified contract.

"VI. That after entering into the modified written contract it was mutually and orally agreed that, pending the furnishing and delivery of the piano to be made and furnished upon the special order and specifications aforesaid, said Eilers Music House would deliver to the defendant Keith a piano for his use to be held by him until the piano provided for by the modifying contract would have been made, furnished, and delivered. That pursuant to said oral understanding and agreement Eilers Music House did deliver to said defendant Keith a piano to be held by him until delivery of the piano contracted for, and subsequently said piano was redelivered to the Eilers Music

House and a further piano furnished the defendant Keith to be held by him under the same terms as the first piano placed in his possession. That the piano last-mentioned is the only piano furnished by the Eilers Music House to the defendant and which was in possession of the defendant Keith at the time of the commencement of this action, and the piano is not the piano described in the complaint or mentioned in the purported contract in said complaint and the testimony of the plaintiff's witnesses, nor is it the piano ordered under the modified contract aforesaid.

"VII. That after the execution of the modified contract aforesaid the defendant Keith, relying upon the modified agreement aforesaid, made payments thereunder until he had paid to the said Eilers Music House, including the initial payment, the sum of \$495 principal and \$50 interest; and the said Eilers Music House failed and refused to deliver the piano and its equipment as ordered and specified in the modified agreement, and the said defendant Keith thereupon refused to make any further payments until and unless the piano called for by the modified contract of purchase should be delivered to him, and that the piano now held by the said Keith was not sold or delivered to him under any contract of purchase or of sale, but was delivered to him solely to be held until the piano purchased should be delivered; that the said Keith now has possession of said piano under the oral agreement aforesaid, and not otherwise, and the Eilers Music House, or the plaintiff herein, has not complied with the oral agreement aforesaid whereby it is entitled to take possession of said piano."

It is true there was evidence tending to show, and it is vigorously contended, that the second and last piano placed in the possession of respondents was, or was intended to be, a compliance with the modified contract, but we are not convinced that the trial court was wrong, or disregarded the weight of the evidence in that respect.

Since we cannot find that the evidence preponderates against the findings, it remains only to determine whether the right conclusions were reached from the facts found.

Notwithstanding the argument that respondents have had the use of the piano for more than 10 years, and by the payment of a little more than one-half of the purchase price are, by the judgment below, permitted to retain indefinitely, and virtually become the owners of, a piano worth substantially as much as the piano contracted to be sold to them, we think the judgment was right. If, as found, appellant's predecessor in interest contracted to sell and deliver a certain specified instrument, and to furnish the use of another piano until the one sold was delivered to the purchaser, then the remedy was at all times in the hands of the seller. By complying with its contract and delivering the instrument sold it would immediately become entitled to the return of the substituted in-

strument, and to the purchase price in accordance with the terms of the contract; but until it fulfilled its part of the contract by such delivery, or, if that were impossible, placed the purchaser in status quo by the return or tender of that part of the consideration which had been paid, it was not entitled to retake the substituted instrument.

Finding no error, the judgment is affirmed.

PARKER, C. J., and FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

(121 Wash. 60)

OCHFEN et ux. v. KOMINSKY. (No. 17206.)

(Supreme Court of Washington. July 17, 1922.)

1. Waters and water courses §150—Adverse user to create prescriptive right to maintain drain must be of character required for acquisition of land.

Ordinarily a prescriptive right to maintain a ditch to drain land through adjoining lands in different ownership can be acquired only by adverse user of the character required for the acquisition of land, title by adverse possession, and the use must be adverse, continuous, and uninterrupted, under claim of right, for the statutory period of 10 years.

2. Waters and water courses §150—Prescriptive right to maintain drain and adjoining owner's right to protect against outflow surface waters distinguished.

Where a prescriptive right exists to maintain a ditch following a natural swale connecting various swampy places and draining water onto and through adjoining lands, and an adjoining owner objects to the ditch and dams it, the question of the prescriptive right to cast surface waters by means of an artificial ditch is raised, and the adjoining owner cannot prevail in contending that he is within his right because protecting his land against outflow surface waters.

Department 1.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Charles Ochfen and wife against Mike Kominsky. From a decree for defendant, plaintiffs appeal. Reversed, and case remanded, with instructions.

E. F. Adams, M. S. Lindsay and Gordon & Nolte, all of Tacoma, for appellants.

Louis J. Muscek, of Tacoma, for respondent.

BRIDGES, J. Each the plaintiffs and the defendant own 160 acres of land in Pierce county. The defendant's land joins the plaintiffs' on the west. The plaintiffs' land is, generally speaking, a little higher than that of the defendant. There is a strip of low, swampy land commencing near the

easterly portion of the plaintiffs' land, and, continuing in a general southwesterly direction, passing into and through the land of the defendant. On the plaintiffs' land there are three or four swampy tracts, separated one from the other by natural barriers. In 1877 the then owner of the land now belonging to the plaintiffs constructed a ditch connecting the various swampy and low places of that land, and this ditch was carried across a part of the land now owned by the defendant. The purpose of this ditch was to drain the low and fertile lands on the tract now owned by the plaintiffs so that they could be put under cultivation. This ditch was originally dug by the father of Mrs. Ochfen, who inherited the land from him. At all times since it was made the plaintiffs and their predecessor in ownership have kept the ditch cleaned out so that it would be suitable for drainage. In a general way it follows the natural swale in the land in question, but it also serves to accelerate and increase the flow of the water onto and through defendant's land. The land now owned by the defendant was government land when this ditch was dug, and for some years thereafter. In 1889 it was entered as a homestead and patent was issued thereto in 1895. In 1917 the defendant became the owner of the lower 160 acres, and in 1918 constructed a dam in the ditch at a point on his own land near where it left the plaintiffs' land and entered his. Up to this time no person had ever interfered with the ditch or complained of its maintenance and the use to which it was put. The plaintiffs brought this suit to enjoin the defendant from maintaining this dam, and to obtain its destruction, and also for damages resulting to their crops caused by the back waters as a result of the maintenance of the dam. The defendant, by affirmative answer, claimed that the plaintiffs had no right to cast the surface waters from their land onto his to his damage, and sought to enjoin them from so doing, and also asked damages which he had already received because of the waters flowing through the ditch and overflowing his land and damaging his crops. Although the case was tried as one in equity, the court submitted to the jury certain questions of fact, and entered its judgment in favor of the defendant, awarding him damages in the sum of \$1,850, and enjoining the plaintiffs from maintaining the ditch or causing any of the surface waters from their lands to run through the same onto or through the land of the defendant, and also adjudging that within a designated period the plaintiffs should fill up such ditch so as to prevent the flow of water therein. From this judgment the plaintiffs have appealed.

[1] Appellants contend that, under the facts as recited, they have obtained, by lapse of time, a prescriptive right to maintain this

ditch. We are of the opinion that this position must be sustained. As a general proposition, a prescriptive right to the use of waters or ditches such as is involved here can be acquired only by adverse user of the character which is required for the acquisition of the title to land by adverse possession. To acquire a prescriptive right there must be continuous, uninterrupted, and adverse use, under claim of right, for at least the period of 10 years. In the case of *Berryman v. East Hoquiam Boom, etc., Co.*, 68 Wash. 657, 124 Pac. 130, we said:

" * * * Where, under claim of right, a person uses such stream openly and notoriously and for the statutory period of 10 years, a grant of the owner's consent will be presumed. 3 Kent's Commentaries (9th Ed.) 574. 'If the use of the easement for 20 years is unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription. * * *' Gould, Waters (3d Ed.) p. 644. In this state the statutory period is 10 years. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777. In this case it is conclusively shown that the appellants have used the stream openly and notoriously and continuously for more than 10 years prior to the time this action was brought, and that this use was under a claim of right which was a matter of public record in the office of the secretary of state. * * * It is therefore clear that defendants have acquired an easement in the plaintiffs' premises by prescription."

All of these elements are present in this case. There are some authorities which hold that a prescriptive right cannot be initiated on public lands, even after they have been entered as a homestead, and that the commencing period of such prescriptive right cannot be earlier than the date of the issuance of the patent. There are cases, however, holding to the contrary. It is not necessary for us to decide this question because the testimony conclusively shows that this ditch was constructed many years before this land was patented in 1895, and that in that year the ditch was on the land in question and was then serving and has continued to serve the purposes of its construction. More than 15 years elapsed from the date of the issuance of the patent before the respondent built the dam and caused the obstruction to the flow of the water in the ditch. Up until 1918 the ditch was maintained in the same manner it was originally built, and during all that period was used by the appellants and their predecessor in interest for the purpose of draining the surface waters from their land. During all those years this use was open and adverse and under claim of right and without any objection or protest from any person. These facts unquestionably give the appellants a prescriptive right to maintain and use this ditch in the way it has in the past been maintained and used. It follows from this

conclusion that the respondent had no right to obstruct the flow of the water in the ditch by placing a dam there or in any other manner. *Railway Co. v. Mossman*, 90 Tenn. 157, 16 S. W. 64, 25 Am. St. Rep. 670; *Farnham on Waters*, vol. 2, p. 1735 et seq.

[2] The respondent contends that this ditch carries off surface waters which, under the decisions of this court, are outlaw waters, and that the owner of the land has a right to protect himself against such waters. We have so held in a number of cases. We have also held that an upper landowner has no right to dig a ditch by means of which he seeks to rid himself of surface waters on his land by casting them on the land of his neighbor. *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859; *Morton v. Hines*, 112 Wash. 612, 192 Pac. 1016; *Whiteside v. Benton County*, 114 Wash. 463, 195 Pac. 519. Other decisions of this court will be found cited in the last-mentioned case. But those cases are not in point here. We have not before us the question of the rights of respective parties concerning outlaw or surface waters, but we have the question of the prescriptive right of an owner of upper land to cast such surface water, by means of artificial ditches, onto the land of his neighbor.

The respondent is not entitled to any relief in this action. Appellants are entitled to a decree enjoining the respondent, his servants, agents, and employees, from interfering with the ditch in question, and requiring respondent to abate the obstruction which he has placed in the ditch, and appellants are also entitled to recover of the respondent such damages as they have shown. We are satisfied that the trial court is in a much better position than we to determine what, if any, amount appellants are entitled to recover as damages. The decree is reversed, and the case remanded with instructions to the trial court to fix the amount of appellants' recovery for damages, and to enter a decree in their favor in accordance with this opinion.

PARKER, C. J., and FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

(120 Wash. 559)

STATE v. LARSON. (No. 17204.)

(Supreme Court of Washington. June 26, 1922.)

Indictment and information \S 125(20)—information charging defendant received and consented to and connived at receiving deposits by bank when insolvent is not duplicitous.

An information drawn under Rem. Code 1915, \S 2640, charging that defendant, as president of a bank, did receive, consent to, and

connive at the receipt of a deposit knowing the bank to be insolvent, did not charge more than one offense contrary to Rem. Code 1915, \S 2059, in view of the rule that, where the statute prescribes that, if a crime may be committed in one of several ways, using the disjunctive, an information charging the crime to have been committed in all of those ways, using the conjunctive, charges but a single offense.

Department 1.

Appeal from Superior Court, Pierce County; Wm. D. Askren, Judge.

O. S. Larson was charged by information with receiving deposits in a bank when he knew it was insolvent. A demurrer to the information was sustained, and the State appeals. Reversed and remanded, with instructions to overrule the demurrer.

See, also, 204 Pac. 1041.

J. W. Selden and J. A. Sorley, both of Tacoma, for the State.

Tucker & Hyland, of Seattle, and Hayden, Langhorne & Metzger, of Tacoma, for respondent.

MITCHELL, J. An information was filed in the superior court charging O. S. Larson substantially as follows: That on or about January 15, 1921, he was president and one of the directors of the Scandinavian-American Bank of Tacoma, a corporation engaged in a general banking business, and as such president he personally conducted the general management of the bank, and did then and there, as such president, accept, receive, consent to, and connive at the reception of a certain deposit of \$1,409 from George Chapman by his agent, W. H. Reed; that the money so deposited was lawful money of the United States, and that the defendant then and there knew, and had good reason to believe, that the bank was at that time unsafe and insolvent.

Upon arraignment the defendant demurred to the information on the grounds: (1) That it did not substantially conform to the requirement of section 2059, Rem. Code 1915, which provides that the "information must charge but one crime, and in one form only"; (2) that more than one crime is charged; and (3) that the facts set forth in the information do not constitute a crime. The demurrer was sustained. The state, electing to stand upon the information as drawn, has appealed from the judgment dismissing the action.

It appears that the information is founded on section 388, chapter 429, Laws 1909, commonly known as the Criminal Code (section 2640, Rem. Code 1915). The section provides against one "who shall accept or receive * * * any deposit, or who shall consent thereto or connive thereat"; and, because section 81, chapter 80, Laws of 1917, in deal-

ing with the same subject-matter, omits the words "or who shall consent thereto or connive thereat," and because these words are used in the information, considerable argument has been indulged in by both parties as to whether or not the act of 1917 has by implication repealed the former law (section 2640, Rem. Code 1915). But, since the information states a cause of action under either of the statutes, we do not feel called upon, in considering the general demurrer, to decide this feature of the controversy; that is, whether or not the later act repeals the former by implication. Nor is a decision thereon necessary for the disposition of the other causes of demurrer, according to the conclusion we have reached thereon.

However, it is contended by the respondent that, if it be assumed section 2640, Rem. Code 1915, has not been repealed, the information is bad for duplicity; that is, because it is charged that the respondent, as president of the bank, did, accept, receive, consent to, and connive at the receipt of the deposit, he is thereby accused of more than one crime. Attention is called by the respondent to the cases of *State v. Dodd*, 84 Wash. 436, 147 Pac. 9, and *Todd v. State*, 89 Tex. Cr. R. 99, 229 S. W. 515, in support of that contention. An examination of those cases shows that in each the defendant was accused of two or more transactions, each of which constituted a completed crime, and each of which had no readily perceived connection with the other transaction or transactions with which the defendant was charged. If the statute on which this case rests provided that one should not accept or receive a deposit, and further provided that one should not solicit a deposit, whether it was received by the bank or not, an information charging all of such things would be vulnerable to the claim of duplicity. It would charge more than one crime, each of which would consist of different elements. It is not so in this case. The statute covers but one crime. Different states have more or less different statutes upon this subject, but, "as a general rule, there are in common with all statutes three elements necessary to the offense: (1) insolvency at the time the deposit was received; (2) knowledge of the insolvency; and (3) the receipt of the deposit." 3 R. C. L. Banks, § 117, p. 490. There is no crime in this kind of a case without the receipt of the deposit; and, whether the one accused shall accept or receive the deposit or consent thereto, or connive thereat, the crime and punishment are the same. Those are but ways or means by which the crime may be committed.

In the case of *State v. Holedger*, 15 Wash. 443, 46 Pac. 652, the rule given in 1 Bishop's Criminal Procedure (3d Ed.) § 586, was approved. That rule is as follows:

"If a statute makes it a crime to do this, or that, or that, mentioning several things disjunctively, all may indeed, in general, be charged in a single count; but it must use the conjunctive 'and' where 'or' occurs in the statute, else it will be defective as being uncertain. All are but one offense, laid as committed in different ways. And proof of it in any one of the ways will sustain the allegation. On the other hand, the indictment may equally well charge what comes within a single clause of the statute, and still it embraces the complete proportions of an offense."

The rule is adhered to and announced in the later cases of *State v. Newton*, 29 Wash. 373, 70 Pac. 31, and *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014. To the same effect see 29 Cyc. pp. 379, 380; Wharton's Criminal Pleading and Practice (9th Ed.) § 251.

The crime charged against the respondent is of statutory origin, and in the charging part of the information the words of the statute have been pursued, using the connective word "and" where "or" occurs in the statute, according to the rule approved by the authorities. All of the ways or means enumerated in the information and charged upon the respondent have reference to the same time and place and to the same transaction, viz. on or about January 15, 1921, in Tacoma, Pierce county, Wash., and the deposit of \$1,409 from George Chapman by and through his agent, W. H. Reed. We conclude that the information is well within the requirements of good pleading, and that the demurrer to it should have been overruled.

Reversed and remanded, with instructions to overrule the demurrer.

PARKER, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(120 Wash. 591)

PRESTON et ux. v. CALIFORNIA MEDICAL MISSIONARY & BENEVOLENT ASS'N
et al. (No. 17269.)

(Supreme Court of Washington. July 6, 1922.)

1. Appeal and error \S 544(1)—No review of proposed findings in absence of statement of facts.

Where there is no statement of facts, the trial court's refusal to make proposed findings will not be reviewed.

2. Quietting title \S 40—Reply held to show that escrow holder paid purchase money to grantor.

In an action to quiet title where a reply alleged the placing of a deed to plaintiff in escrow and payment of the purchase price, it was not error to refuse to require plaintiff to be more definite as to whom the escrow holder paid the money, as the reply was sufficient to show that it was paid to grantor.

3. Pleading \S 367(1)—No error to refuse to require reply to be made more definite; information desired being more properly obtained by bill of particulars.

It was not an abuse of the trial court's discretion to refuse to require a reply to be made more definite as to whether the instructions from grantor to escrow holder were in writing, and, if so, to set forth a copy, since this information could be more properly furnished by a bill of particulars or by a subpoena duces tecum.

4. Continuance \S 46(4, 5, 8) — Affidavit not showing materiality or substance of expected evidence or diligence held insufficient.

A motion for a continuance based on an affidavit, which failed to show, as required by Rem. Code 1915, \S 322, the materiality of the evidence expected to be obtained, that due diligence had been used to procure it, or what the absent witness would have testified to if present, was properly overruled.

Department 1.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Nathan M. Preston and wife against the California Medical Missionary & Benevolent Association and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

P. L. Pendleton, of Tacoma, for appellants.

B. A. Crowl, of Tacoma, for respondents.

TOLMAN, J. Respondents, as plaintiffs below, brought this action to quiet title to certain real property in the city of Tacoma. Appellant was made defendant, and filed a cross-complaint, alleging that it was the owner of the property in question, attacking the good faith of the foreclosure proceeding hereinafter mentioned, and praying that its title thereto be quieted.

The facts, as gathered from the record, appear to be substantially as follows: One Irene Le Page, or Irene Anderson, as she seems to have been sometimes called, was the owner of this property, subject to a mortgage in the sum of \$950, and interest, running to one Arthur Boucher. While the title was in this condition appellant recovered a judgment in the superior court for Pierce county, against Irene Anderson, in the sum of \$270.70, and costs, caused execution to be issued thereon, levied upon the property in question, and on April 15, 1916, the property was sold by the sheriff under such execution, and bid in by the appellant for the full amount of its judgment. A certificate of sale was issued to it, in the usual form, and thereafter, on January 2, 1920, a sheriff's deed, in the usual form, was duly issued, which was recorded on June 10, 1920. In the meantime Arthur Boucher, the holder of the mortgage brought action to foreclose the same, in which action appellant and Irene

Anderson were duly and properly made parties defendant, which resulted in a judgment of foreclosure rendered on the 29th day of January, 1917. Thereafter the property was duly sold by the sheriff in that proceeding, Boucher becoming the purchaser at such sale, for the full amount due under the decree of foreclosure in his favor, and a sheriff's deed was duly issued to him, bearing date May 18, 1918, and acknowledged May 20, 1918, which was thereafter duly recorded. On May 13, 1918, Irene Le Page executed and acknowledged a contract for the sale of the lots in question to the respondents, the purchase price being therein fixed at \$2,575, of which the receipt of \$600 was acknowledged, the remainder to be paid at the rate of \$20 per month, with interest. On the same day, and as a part of the same transaction, Arthur Boucher executed a warranty deed covering the property, in which respondents were named as grantees, and, according to the allegations of their reply, the \$600 cash payment mentioned in the Le Page contract was at that time paid to Boucher, and on the same day his deed was placed in escrow in the Scandinavian-American Bank, with instructions from him to the bank to collect the deferred payments, and upon the full payment to deliver the deed to the grantees. It is further alleged that final payment was made on the 15th day of October, 1920, to the bank, and the deed was thereupon delivered to respondents.

[1] From a decree awarding the respondents the relief prayed for, appellant brings the case here by appeal, alleging as error, the refusal of the court to entertain their motion directed to respondent's reply in certain features, the refusal to make findings of fact as proposed by it, and the denial of its application for a continuance. As no statement of facts is brought here, we cannot review the court's refusal to make findings as proposed by appellant, and the other matters do not require extended discussion.

[2] The reply, as we have seen, by way of explanation and denial of the allegations of appellant to the effect that Irene Anderson, or Le Page, profited by the sale from Boucher to respondents, sets forth the facts showing the receipt of the cash payment by Boucher, and the placing of his deed in escrow, to be delivered only on the payment of the balance of the purchase price; and, since it was his deed, delivered in escrow by him, the allegation, properly construed, can mean only that the purchase price so paid was his money, and was required to be, and was paid to him by the escrow holder. This being true, the court did not err in not requiring the reply to be made more definite and certain so as to state what part of the purchase price of \$2,575 was paid to Boucher, and what part was paid to Irene Anderson.

[3] Nor can we say that the court erred in denying appellant's motion to require the reply to be made definite and certain as to whether the instructions from Boucher to the escrow holder were in writing, and, if so, to set forth a copy. This is a matter largely within the discretion of the trial court, and the information desired would be more properly furnished by a bill of particulars than by pleading the evidentiary facts. No bill of particulars was demanded. In any event evidence as to the fact might readily be produced upon the trial by the proper service of a subpoena duces tecum, and for aught the record shows was so produced.

[4] The motion for a continuance was based upon an affidavit by appellant's attorney, which fails to state facts such as are required by the statute (Rem. Code, § 322), in that the affidavit wholly fails to show the materiality of the evidence expected to be obtained, that due diligence had been used to procure it, or what the absent witness would have testified to if present.

Finding no error, the judgment appealed from is affirmed.

PARKER, C. J., and MITCHELL, BRIDGES, and FULLERTON, JJ., concur.

(121 Wash. 28)

MOORE v. MARINE FIREMEN, OILERS & WATERTENDERS' UNION OF THE PACIFIC. (No. 17242.)

(Supreme Court of Washington. July 13, 1922.)

1. Trade unions ⇐5—One appointed at mass meeting of union as chairman of lockout committee held not entitled to compensation.

Where the by-laws of an incorporated labor union, providing that a member appointed at a regular meeting on a committee to transact necessary business should be paid for his services and the constitution of the union provided for a time for regular meetings and that no monetary matter could be acted upon at a special meeting, a person selected as chairman of a lockout committee at a special meeting of a local branch of the union was not entitled to compensation for his services, since under the constitution no regular meeting could be held except at the residence of the local union, and he was not selected at a regular meeting.

2. Trade unions ⇐5—Member of labor union claiming compensation for work done for union is bound by by-laws and constitution of union.

A member of a labor union, claiming compensation for services rendered as a chairman of a lockout committee, is bound by the constitution and by-laws of the union relating to compensation of members appointed to committees.

Department 2.

Appeal from Superior Court, King County; Austin E. Griffiths, Judge.

Action by J. Moore against the Marine Firemen, Oilers & Watertenders' Union of the Pacific. From judgment for plaintiff, defendant appeals. Reversed.

Paul A. McCarthy, of San Francisco, Cal., and Peters & Powell, of Seattle, for appellant.

Mark M. Litchman, of Seattle, for respondent.

HOLCOMB, J. Appellant is a labor union, and is also a corporation, organized under the laws of the state of California, having its principal office and headquarters in San Francisco, and branch offices in charge of agents in other Pacific Coast ports, including Seattle. The object of the corporation, among other things, is to maintain good working conditions for its members, as stated in the preamble to its constitution.

On and prior to May 8, 1921, one J. Carney was the agent in charge of the branch of the union in Seattle. On May 6, 1921, a lockout had occurred in Seattle, at which time the agent of the union in Seattle was absent. The lockout involved three unions, appellant union, the Sailors' Union, and the Marine Cooks & Stewards' Union. A meeting was thereupon held at the Sailors' Hall in Seattle, and not at the hall of appellant union, which was apparently a voluntary meeting held by common consent, and not called by any officer or agent of the union, or after notice. The members of the several unions were appointed by the meeting as committees to organize the men for picket duty in resisting the lockout. The committee for appellant union was composed of respondent, and four or five others. They performed services as committeemen until May 26, when another meeting was informally held, at which the same persons were elected to act as a lockout committee for the appellant union, and respondent was made chairman. The meeting of May 26 seems to have been held for the purpose of determining a controversy as to strike benefits in lieu of board at a restaurant, and to settle differences between the local members of the union and the local agent, Carney.

Respondent, a member of the union and a member of the lockout committee, brought this case to recover compensation for services as a member and chairman of the lockout committee during the period of the lockout, which lasted from May 6, to July 28, 1921. He based his action upon a by-law of the union reading as follows:

"Section 16. Any member appointed at a regular meeting, on any committee, to transact any necessary business, or perform any work for this union, shall, if such business or work requires attendance during working

hours, be paid for his services. Such pay shall not exceed five dollars (\$5) per day."

The constitution of the union contains the following provisions:

"Article II.

"Section A. This union shall be composed of one headquarters and branches to be established along the Coast from time to time as the necessity for such branches arises.

"Section C. San Francisco shall be the headquarters of this union and its branches.

"Section B. Each branch shall bear the name of its respective locality."

Regular meetings are provided for by the Constitution, as follows:

"Article X.

"Section A. The regular meetings of this union shall be held on Tuesday of each week, commencing at 7 p. m. * * * Fifteen members in good standing shall form a quorum to transact any and all business.

"Section B. Special meetings may be called by the financial secretary or by a written request signed by twenty-five members in good standing, and presented to the president, or, in his absence, to the vice president or financial secretary, stating the cause of such urgency.

"No other business than that for which it may have been called shall be transacted at a special meeting.

"Twenty-five members shall constitute a quorum. * * *

"Section C. In no case can any monetary matter be acted upon at a special meeting."

[1] The trial court found that the plaintiff was appointed or employed at a regular meeting of the union, and that under the provision of the by-law upon which his action was based he was entitled to compensation at the rate of not to exceed \$5 per day, and that he worked 12 weeks or 84 days, making a total of \$420, from which should be deducted and was deducted the sum of \$50, which had been paid to respondent for strike benefits.

The trial court was in error. No regular meeting of the union was held, or could be held, in Seattle, under the constitution of the union. No regular meeting could be held at any place except at San Francisco, the corporate headquarters and place of business of the union, nor could any special meeting such as might have been held in Seattle on May 26, although it was called in accordance with the Constitution of the union, pass upon any monetary matter. But the special meeting was not such special meeting as was contemplated by the Constitution of the union, but was merely a voluntary mass meeting.

[2] This union is not only a labor union, but is a corporation. Its constitution and by-laws constitute the law for it, by which respondent must abide.

Respondent had no right to recover, and the judgment is reversed.

PARKER, C. J., and MAIN, MAOKINTOSH, and HOVEY, JJ., concur.

(120 Wash. 520)

BEECHER et al. v. THOMPSON.
(No. 16997.)

(Supreme Court of Washington. June 23, 1922.)

1. Pleading \S 180(1)—That complaint stated legal relief and reply asked equitable relief not a departure.

Where plaintiff brought replevin for a truck claiming as mortgagee and also as assignee of the mortgagor's interests, and defendants in the cross-complaint, set up and asked for foreclosure of a mechanic's lien, prior to defendant's lien, and plaintiff filed a reply asking for foreclosure of his mortgage, defendant having asked for equitable relief, his contention that there was a departure, as the complaint stated a legal action and the reply an equitable action, was without merit.

2. Chattel mortgages \S 138(1)—Superior to subsequent mechanic's lien.

A chattel mortgage given before the furnishing of labor and material on the chattel is superior to the lien for such labor and materials.

3. Chattel mortgages \S 240—Assignment of mortgagor's interests to mortgagee held not a merger giving priority to subsequent lien.

Where there is nothing to indicate such an intention, the mere assignment of mortgagor's interests in a chattel to the mortgagee does not result in a merger giving priority to a subsequent mechanic's lien, the presumption being against a merger, where it is to the interest of the mortgagee that there should not be one.

Department 2.

Appeal from Superior Court, King County; Austin E. Griffiths, Judge.

Action by H. W. Beecher and another against Walter Thompson. From a judgment for defendant and a refusal to grant a new trial, plaintiffs appeal. Reversed, and new trial granted.

Kerr, McCord & Irely, of Seattle, for appellants.

E. L. Rinehart, of Seattle, for respondent.

MACKINTOSH, J. The trial court, upon the following findings of fact, entered a judgment in favor of the respondent, foreclosing his lien:

"1. That plaintiffs, W. H. Beecher and Darrah Corbet, at all times herein mentioned were copartners as Beecher & Corbet, and Walter Thompson, defendant, a sole trader as Utility Garage.

"II. That, on or about October 3, 1919, one A. B. Cody was the owner of one Packard truck, dump body, factory No. 31477, model 4A; that on said date the said Cody gave a mortgage to plaintiffs on the said truck in the sum of \$1,850; that during the month of December, 1919, plaintiffs began foreclosure proceedings on said mortgage, which proceedings they abandoned on or prior to April 20, 1920; that, on or about January 9, 1920, said truck was delivered to defendants for repair work, and conversion of the same into a trailer truck, defendant being an automobile repair and garage keeper, the delivery being made by said Cody. Of these facts plaintiffs were, when work was in progress, advised, and to which they at no time made objection. Defendant thereupon performed labor upon and furnished materials for the repair and alteration of said truck as aforesaid, of the value of \$110.50, and stored said truck from the said date of its delivery to him to the present time, without interruption, said storage being of the value of \$150; no part of either of said items has been paid; that on or about April 20, 1920, said Cody sold and assigned all interest in said truck to the plaintiffs by his legal representative, he having died prior thereto.

"III. That defendant has a lien on said truck for the charges aforesaid; that no part of said charges have been paid."

[1] The first question presented by this appeal is raised by the respondent, who claims that the appellants' reply constituted a departure from the complaint. The pleadings present the following situation: The complaint, which was one in replevin, alleges that the appellants were entitled to possession for the reason that they held the chattel mortgage upon the truck in question, and thereafter had received an assignment of the owner's interest therein. To the complaint the respondent answered denying that the appellants were entitled to possession, and set up in a cross-complaint his claim for a lien for services performed on the truck, and asked foreclosure thereof. To the new matter in this answer the appellants filed an amended reply, which, in substance, states that, although the respondent may have a right to a lien, yet that the appellants would have a right to foreclose their mortgage as against such a subsequent lien, and asked that the mortgage be so foreclosed. It is the respondent's position that the action, having been begun as one at law, the appellants are not entitled therein to the equitable remedy of foreclosure of their mortgage, and that such a departure cannot be sanctioned.

As we view the situation, the contention is without merit, for the reason that the respondent, by his cross-complaint, had asked the court of equity to foreclose his lien, and in answer thereto the appellants allege such rights as entitle them to equitable relief. If such pleadings were not allowed in this action it would only result in the prosecution of two suits instead of one, where the result

would have to be the same as that obtained in the one action. We, therefore, hold against this position of the respondent.

[2, 3] There being no statement of facts in the case and no exceptions to the exclusion or admission of testimony, the only question is whether the findings of fact sustain the judgment. This brings up the question as to whether there has been a merger of the legal title and the interest of the mortgagee, so that the respondent is entitled to the foreclosure of his lien. The chattel mortgage given before the furnishing of labor and material upon the chattel is superior to the lien for such labor and materials. *Rothweiler v. Winton Motor Car Co.*, 92 Wash. 215, 158 Pac. 737. Therefore the appellants' mortgage gave them a right superior to the respondent's lien. The question is whether the subsequent acquiring of title by assignment of the legal title resulted in a merger which could give preference to the respondent's lien over the appellants' title. The general rule is that the passing of the interest of both mortgagor and mortgagee into the same person does not result in a discharge of the mortgage on the theory of a merger, unless it was so intended by the parties. As stated in 11 O. J. 689:

"The assignment of interests of both mortgagor and mortgagee to the same person will not operate to discharge the mortgagee on the doctrine of merger, unless the parties so intended. A fortiori, after the mortgagee has parted with his interest an assignment of the equity of redemption to him does not extinguish the mortgage. The intention that the mortgage lien shall be extinguished will not be presumed, where the interest of the purchaser of the mortgage and the mortgaged property requires that the mortgage shall remain in force, as where the result of the merger would be to give priority to intervening liens, and a transfer of the mortgaged property to the holder of the mortgage expressly subject to the mortgage debt, evidences an intention that no merger shall be effected."

This court has followed that rule in several decisions. *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Nommenson v. Angle*, 17 Wash. 394, 49 Pac. 484; *Stewart v. Eaton*, 20 Wash. 378, 55 Pac. 314; *Chase National Bank v. Hastings*, 20 Wash. 433, 55 Pac. 574; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506; *Connecticut Investment Co. v. Demick*, 105 Wash. 268, 177 Pac. 676.

The rule is stated as follows, in the note to 39 L. R. A. (N. S.) 834:

"The lesser estate in land will merge in the greater whenever the two estates are owned by the same person. This rule, however, does not apply where such merger would be inimical to the interests of the owner. Hence, unless an intention to merge with knowledge of a junior lien or liens clearly appears, no merger results from the acquirement by the holder of the

senior mortgage of the interests of the mortgagor, and the senior mortgage retains its priority as against all junior or intervening liens upon the mortgaged property."

There is nothing in this case to indicate any intention to merge the legal title and the interest of the mortgagee so that the priority which the appellants held over the respondent's lien would be lost. Equity will not hold transactions such as is revealed by the findings of fact here to be a merger, when the natural conclusion from those facts must be, without any other evidence of the intention of the parties, that the mortgagee did not intend to have a merger result, it being more beneficial to him to maintain his interest under his prior mortgage, and there being no intention manifested to make the intervening lien superior to his prior rights or accept and pay such lien. As was said in *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 7 Ann. Cas. 693:

"The view generally held is that merger is not favored in the courts of law or equity, and in equity, at least, it will not take place if opposed to the intention of the parties either actually proved or implied from the fact that merger would be against the interest of the party in whom the several estates or interests have united. This doctrine is sustained by an unbroken current of authority in the other states of the Union and in England."

There is nothing in the circumstances surrounding this case which show other than an intention on the part of the appellants to hold their rights under the mortgage. Mere silence is not sufficient, the presumption being against a merger where it is to the interest of the mortgagee that there should not be one, the taking of the legal title not being sufficient of itself to overcome that presumption.

It therefore follows that the judgment based on the findings is incorrect; the motion for a new trial should have been granted.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(121 Wash. 42)

**SCHOOL DIST. NO. 176 OF KING COUNTY
v. SANFORD et ux. (No. 17087.)**

(Supreme Court of Washington. July 15, 1922.)

Schools and school districts — 65—Third-class district authorized to sell real estate otherwise than for cash.

Rem. Code 1915, § 4511, provides that, if the value of property to be sold by first-class districts is less than \$2,000, directors may sell on such terms as they may decide, but if over that amount the sale must be for cash, but sec-

tions 4522 and 4538, governing sales by second and third class districts, provide the board shall sell real estate as directed by vote so to do, and is silent as to what kind of a sale may be authorized, and hence a third-class district may sue otherwise than for cash, though authority to sue does not of itself imply authority to sell on credit.

Department 2.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by School District No. 176 of King County, Wash., against A. N. Sanford and wife. From judgment for plaintiff, defendants appeal. Reversed and remanded.

E. C. Million, of Seattle, for appellants.

Malcolm Douglas and Arthur Schramm, Jr., both of Seattle, for respondent.

MACKINTOSH, J. Can a school district of the third class sell real estate otherwise than for cash? This is the question to be answered in this case, which arises from the sustaining of the demurrer to the affirmative defense of the appellants, who are being sued in ejectment. The affirmative defense pleads that the voters of the plaintiff school district "did decide to and did authorize the board of directors of plaintiff to enter into a contract for the sale of said property," and that thereafter, in pursuance of such election, the board of directors entered into a contract of purchase and sale.

Authority to sell does not of itself imply authority to sell on credit. The presumption is that the sale is to be for cash. *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440. This presumption can be overcome in several ways, and, if the act giving the authority can, when fairly read, show an intention of not confining the sales to cash, the presumption will be successfully met. Section 4511, Rem. Code, relating to the sale by directors of first-class school districts, provides that, if the value of the property to be sold is less than \$2,000, the directors may sell it on such terms as they may decide, but if the value is over that amount the directors must be authorized by vote of the electors to sell, and that the "sale must be made for cash." Section 4522, Rem. Code, governing sales by second-class districts, and section 4538, Rem. Code, concerning sale by third-class districts, are in all essentials the same, and provide that—

"The board shall build or remove schoolhouses, purchase or sell lots or other real estate as directed by vote so to do."

The section is silent as to what kind of sale may be authorized. Sales are of various kinds, and there is nothing in the statute which indicates that the Legislature did not intend to authorize the directors of districts

of the first and second classes to either sell for cash or on terms or to enter into any contract of sale that is known to the law. The fact that the Legislature, in dealing with the question of the sale of property by school districts of the first class, specifically provided that those sales which are authorized by the voters shall be for cash, and remained silent as to the sort of sales that can be authorized by the voters in second and third class districts, would seem to indicate a recognition by the Legislature, not only that sales may be of different characters, but, by restricting districts of the first class to sales for cash by implication, and by implication to have intended to allow the voters of the second and third class districts to provide for sales upon credit, time, etc. In the case of *Washington-Oregon Corporation v. Chelalis*, 76 Wash. 442, 136 Pac. 681, this court said:

"If the statute required the bonds to be sold in any particular manner, no sale, unless in the manner provided in the statute, would be valid. But our statute contains no requirement of this character. It provides only for the sale of the bonds in such manner as the corporate authorities shall deem best, thus vesting in them a discretion as to the method of sale or disposal. Because the statute uses the word 'sale' does not necessarily imply that the bonds can only be disposed of for cash and the cash thus obtained paid to the contractor. Tiedeman, in his work on Sales, § 12, says: 'Although it has been sometimes held that the sale must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or market value, so that the one thing is received in payment of the price of the other.' In so far as this definition would make the contract between the city and the contractor a sale of the bonds because the bonds and the construction were exchanged at an agreed valuation, the bonds at their face value, and the construction at the price bid and accepted, it is supported by the authorities. A statute of New Jersey authorized township commissioners to issue and dispose of bonds in aid of railway construction at not less than par, and that the money so raised by any loan or sale of the bonds should be invested in bonds of the railway company. The commissioners, instead of selling the bonds and investing their proceeds in bonds of the railway company, exchanged them for a like amount of the railway company bonds, and it was held to be a compliance with the statute. *Montclair v. Ramsdell*, 107 U. S. 147. A like ruling was made in *Cady v. Watertown*, 18 Wis. 338, construing a statute authorizing the commissioners to negotiate the sale of bonds and use the proceeds in purchasing sites for schoolhouses and other purposes. The commissioners accepted a deed from Cady and delivered to him bonds in payment. It was contended that the commissioners, under the act, had no power to dispose of

the bonds except by sale for cash. This contention was overruled, the court saying in its holding that there was nothing in the act which required the sale of the bonds for cash; that the exchange of them for school sites was a sale of them within the meaning of the law, and that it was not a departure from the power to negotiate a sale to pay for the property purchased in these securities without resorting to the idle ceremony of first selling the bonds for cash and then paying the money so received to the owner of the site. A third case in point is *O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. 283, where a statute, providing for the issuance of bonds for an irrigation district declared that the bonds so issued should be sold. The court held that this imposed no restriction upon the district commissioners in exchanging the bonds for water rights, rights of way, etc., the court saying: " * * * An exchange of the bonds of the district for the property of the company at its cash value was a sale of them, the same as if they had been sold for cash. * * * Other supporting authorities are: *Germania Sav. Bank v. Town of Darlington*, 50 S. C. 337, 27 S. E. 846; *Meyer v. Muscatine*, 1 Wall. 384; *Wiley v. Board of Education*, 11 Minn. 371; *Harris, Municipal Bonds*, n. 342; *McQuillin, Municipal Corporations*, § 2303."

Had a vote of the people, as we have already indicated, merely given the board of directors authority to sell, the presumption would be that that vote would not have authorized the board to enter into a contract of sale such as that set out in the affirmative defense. In the case of *School District v. Insurance Co.*, 62 Me. 330, it was decided under such circumstances "that a special authority or direction to sell does not authorize a sale on credit." Under such circumstances there would be no evidence overcoming the presumption that a cash sale only was authorized. The Maine case recognizes that proof of custom to the contrary or a ratification by the voters of the credit sale would have overcome the presumption and validated the sale. But the defense alleges that the vote was an authorization to enter into a contract of sale, and that the contract was the one authorized by the voters. The demurrer, of course, admits the truth of these allegations.

We therefore hold that, the voters having authorized the making of the sale by contract, the act of the board of directors in conformity with that direction of the voters of the district was lawful, and the demurrer to the affirmative defense should not have been sustained.

The judgment is reversed, and the cause remanded to the trial court for further proceedings.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 659)

LAKE UNION BRICK & FIREPROOFING CO. v. MacWHINNIE. (No. 17071.)

(Supreme Court of Washington. July 8, 1922.)

1. Sales \S 355(1)—Allegations of complaint for materials sold held sufficient to admit proof of a new purchase and an original promise to pay for materials furnished contractor.

In a materialman's action against owner of premises on which a house was built, a complaint alleging that plaintiff sold and delivered to defendant building materials of a specified value, which sum defendant agreed to pay, and that the sum is past due, and that demand has been made and defendant has refused to pay, was sufficient under which to prove a new purchase by the owner, after the building contractor's death, of materials already on the ground which had been sold and delivered to the contractor by the materialman.

2. Frauds, statute of \S 23(3)—Promise by owner after contractor's death to pay for materials furnished contractor held an original and independent undertaking.

If, after building contractor's death, the owner of the building made a new promise based on a sufficient consideration to pay for all the materials theretofore furnished the contractor, all of which were on the ground, it would not be a promise to answer for the debt, default, or miscarriage of another, but an entirely original and independent undertaking upon which recourse could be had against the promisor.

Department 2.

Appeal from Superior Court, King County; C. H. Neal, Judge.

Action by the Lake Union Brick & Fireproofing Company against A. M. MacWhinnie. From a judgment for defendant, plaintiff appeals. Affirmed.

Kerr, McCord & Ivey, of Seattle, for appellant.

Roberts & Skeel, of Seattle, for respondent.

HOLCOMB, J. Appellant furnished materials consisting of tile, brick, lime, sand, and cement to one Rutledge, a contractor, for the construction of a house for respondent, and, not having been paid therefor by the contractor, brought a law action against respondent as the owner of the house constructed, as having purchased the materials.

The cause of action stated in the complaint, omitting certain formal matters not necessary to set out, is as follows:

"That in the month of August, 1920, plaintiff sold and delivered to the defendant building materials of the reasonable value of \$834.55, which sum defendant agreed to pay, that said sum is long since past due, and that demand has been made for the said sum, and the defendant has wholly failed, neglected and refused to pay the same or any part thereof."

Rutledge had contracted with the respondent in July, 1920, to build the house of tile and brick for the sum of \$1,700. On August 27 Rutledge was killed in an automobile accident.

Appellant claims that after the death of Rutledge respondent approached the president and manager of appellant, Mr. Englebrecht, and in the presence of three other persons promised and agreed to pay for the amount of the materials that had been sold and delivered to Rutledge, all of which were on the ground, and some of which were in the building, and amounting to the sum stated in the complaint, if respondent might proceed immediately with the construction of the building himself. It is contended by appellant that the latter matter made a sufficient consideration for the independent promise of respondent, that it was sufficient to support an independent contract on the part of respondent to pay for the materials, and that the promise was overwhelmingly established by the evidence. It is further contended that the finding of fact by the court that the new and independent promise was not made by respondent is against the overwhelming preponderance of the evidence.

It is admitted by appellant that practically the entire controversy in this case is over the facts. The only errors assigned are as to whether or not the decision of the trial court was contrary to the evidence in the case, and, assuming that the court erred in finding for the respondent on the facts as stated, whether or not he is entitled to a judgment as a matter of law.

[1] We agree with appellant, contrary to the contention of respondent, that the allegations of the complaint hereinbefore set forth, are sufficient under which to prove a new purchase and original promise to pay, and under which the proofs furnished by appellant were admissible.

[2] We also agree with appellant that, if there had been a new promise to pay on the part of respondent, after the default of his contractor, for all the materials theretofore furnished the contractor, based upon a sufficient consideration, it would not be a promise to answer for the debt, default, or miscarriage of another, but an entirely original and independent undertaking upon which recourse could be had against the promisor. Williston on Contracts, § 481.

But the trouble is in this case the trial court found, notwithstanding there were more witnesses on behalf of appellant than on behalf of respondent, that the new and independent promise was not made by respondent. Appellant says respondent did no more than deny that the promise was made to appellant.

The record shows that respondent testified as to the details of his conversation with

appellant and with the widow of Rutledge, the contractor, and does deny that he made any such promise as was testified to by them. He also testified to what was said to the contrary. Assuming, but not deciding, that there was sufficient consideration for a new promise, we are unable to conclude that the trial court erroneously found that no new and independent promise was made by respondent to pay for the materials which had been furnished the contractor.

The trial court summed up the evidence at the conclusion of the trial, and stated that, taking it all together, he was not satisfied that the evidence preponderated in favor of a subsequent agreement.

Since he had all of the witnesses before him, and was able to observe their demeanor and judge of their credibility, we are unable to say that the evidence preponderates against the finding of the trial court.

That being the case, it is useless to discuss the legal question advanced by appellant.

Judgment affirmed.

PARKER, C. J., and MAIN, MACKINTOSH, and HOVEY, JJ., concur.

(121 Wash. 104)

BADLEY et ux. v. ACME MOTOR TRUCK SALES CO., Inc., et al. (No. 17158.)

(Supreme Court of Washington. July 26, 1922.)

Fraud §20—Representations regarding business purchaser of truck would obtain held not actionable.

Statements by the salesman to the prospective purchaser of a truck as to the quantity of business the purchaser would get under a milk route contract if he was able to obtain the contract were manifestly statements based on information the salesman procured from others, and did not give the purchaser a right of action for fraud after he purchased the motor truck to carry out the contract, where it appeared that he negotiated for the milk route contract before buying the truck, and he himself testified that, if the milk route contract had been fully performed, he would have been satisfied.

Department 1.

Appeal from Superior Court, King County; Austin E. Griffiths, Judge.

Action by E. J. A. Badley and wife against the Acme Motor Truck Sales Company, Inc., and others, to recover damages resulting from an alleged misrepresentation. Judgment for defendants on directed verdict, and plaintiffs appeal. Affirmed.

Flick & Paul, of Seattle, for appellants.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for respondents.

TOLMAN, J. Appellants, as plaintiffs below, brought this action to recover damages resulting from alleged misrepresentations, made by respondents, inducing the sale to appellant Badley of a certain automobile truck, sold on conditional sale contract. The respondent Acme Motor Truck Sales Company, Inc., is engaged in the business of selling Acme trucks, with its principal place of business in Seattle. Respondent W. J. Kohlmeyer is its local agent at Tolt, Wash., and the respondent Fred T. Hall is a salesman in the employ of Mr. Kohlmeyer. Appellant Badley, desiring to purchase an automobile truck and operate it as a business, called on the Acme Truck Sales Company, made known his purpose, investigated a supposed opportunity to obtain a logging contract in Snohomish county, with a view, if he obtained such contract, of purchasing a truck to be used in that connection, but upon investigation did not undertake that proposition. A little later it was learned that the King County Dairymen's Association desired to let a contract for the hauling of milk from a country route near Tolt to the milk condensery which served that section of the country. Mr. Badley was advised of this matter, and talked with respondents regarding it. He testified that respondents represented and guaranteed to him that if he entered into this contract with the dairymen's association he would get a minimum of 85 cans of milk per day, each can containing 85 pounds of milk, and the compensation to him would be 22 cents per hundredweight for the hauling. Several statements to this effect are testified to. It appears, however, that appellant Badley knew that none of the respondents had anything to do with the letting of the milk-hauling contract, and that if he obtained it, it would be between himself and the King County Dairymen's Association, and he was directed to the offices of the dairymen's association for the purpose of learning the facts and obtaining the contract if he was satisfied. Appellant Badley accordingly went to the offices of the dairymen's association, met the manager and also the field man of the association, who was in charge of this particular part of the business, and knew all of the facts pertaining to it, and the whole matter was discussed between them, before the contract was entered into for the purchase of the truck, or any payment was made thereon. Being apparently satisfied with what he learned from the representatives of the dairymen's association, Mr. Badley made his initial payment, and entered into a contract for the purchase of the truck, and within a day or two thereafter went to the offices of the dairymen's association, and there entered into a contract for the hauling of the milk, which contract was to begin on November 1, 1920, and terminate

on December 31, 1920, covering an already established route, which had been previously served by a Mr. Isaacson. Mr. Badley in his testimony says that the contract with the dairymen's association was in every way satisfactory to him, and that, if the contract had been carried out and he had obtained the amount of milk to haul which the representatives of the dairymen's association informed him he would have, he could have carried out his contract for the purchase of the truck, and would have been entirely satisfied. It appears that Mr. Badley began work under his contract about the 8th of November, 1920, first making a trip or two with Mr. Isaacson to learn the route, but that he soon discovered that instead of the route producing a minimum of 7,225 pounds of milk per day to be hauled, as represented, it in fact produced for hauling less than 5,000 pounds per day, and consequently, instead of earning nearly \$500 per month under his contract, his gross earnings fell far short of that figure. At the close of plaintiff's case, the defendants and each of them challenged the sufficiency of the evidence, and made motions for judgment of nonsuit as to each. These challenges and motions were sustained by the trial court, the jury was discharged, and judgment entered in favor of respondents, from which this appeal is prosecuted.

The only question presented here is as to the sufficiency of the evidence to take the case to the jury. We have carefully read the record, having in mind the necessity of viewing the evidence in the light most favorable to appellants, and cannot escape the conclusion that the judgment of the trial court was right. Mr. Badley was fully aware from the beginning that the respondents had no control over the milk route whatever, and that any representations which they made must necessarily be based upon information which they had obtained from others. He was fully advised that the contract must be obtained from the dairymen's association, which had no connection whatever with the respondents, or any of them, and accordingly he went to the offices of the association, and was there given information, which he testifies fully bore out all representations regarding the milk route which respondents had made to him, and from his whole testimony it fully appears that he relied upon the representations made by the dairymen's association, rather than representations made by the respondents. He in fact testified that, if the dairymen's association had fulfilled its contract with him and given him the amount of milk to haul which it had represented it would do, or had agreed to do, he could have carried out his contract for the purchase of the truck, and would have been entirely satisfied. Under these circumstances we cannot

see that he has any right of action against the respondents.

The judgment appealed from is affirmed.

PARKER, C. J., and MITCHELL, BRIDGES, and FULLERTON, JJ., concur.

(121 Wash. 24)

PARKER et al. v. PARKER. (No. 17034.)

(Supreme Court of Washington. July 13, 1922.)

1. Appeal and error \S 1036(2)—Making payee of notes party plaintiff held not prejudicial.

In an action by the assignee of notes against the estate of the maker, making the assignor, the payee, a party plaintiff, in view of the fact that it presented no new issue, and did not change the conduct of the trial, was not prejudicial to defendant.

2. Pleading \S 259—Permitting answer denying execution of notes and setting up lack of consideration to be changed so as to allege payment held not error.

In an action by an assignee of notes against the administrator of the maker in view of the fact that defendant was a representative and unfamiliar with the transaction in which the notes were given, permitting an answer denying the execution of the notes and pleading lack of consideration to be changed so as to allege payment of the notes was not error.

3. Husband and wife \S 262(1)—Property acquired by husband after marriage presumed to be community property.

Where property consisting of cash and Liberty Bonds was acquired by a husband after his marriage, there is a presumption that it was community personal property.

4. Husband and wife \S 265—Gift of community property without consent of wife held invalid.

A gift by a husband of community property without the consent of his wife, in absence of testimony showing that it could be deducted from the husband's share of the community property, was invalid.

Department 2.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by Howard Parker and Katie M. Parker against Annie C. Parker, administratrix. From judgment for defendant, plaintiff's appeal. Affirmed.

See, also, 199 Pac. 723.

J. L. Corrigan and Million & Houser, all of Seattle, for appellants.

Shank, Belt & Fairbrook, of Seattle, for respondent.

MACKINTOSH, J. This action was originally brought by Howard Parker against

the estate of his deceased uncle, to recover upon two promissory notes, for \$1,000 each, given by the uncle to Katie M. Parker, the uncle's sister, and mother of Howard Parker. The notes were assigned to Howard Parker for collection. The answer of the estate to the complaint denied the execution of the notes, and pleaded lack of consideration. By order of the court Katie M. Parker was made a party plaintiff. After the introduction of the plaintiff's case upon the trial the estate was given permission to change its answer so as to allege payment of the notes.

[1] The first assignment of error is that the court was wrong in compelling the joining of Katie M. Parker as plaintiff in this action. Assuming that this was erroneous, it did not necessarily prejudice the plaintiff's case, as it presented no new issue, and did not change the conduct of the trial in any manner. This being true, it presents no sufficient reason for the granting of a new trial.

[2] It is next urged that it was error to allow the amendment to the answer, on the ground that the amendment presented a defense which was inconsistent with that presented in the first answer, and the case of *Seattle National Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. While it is true that inconsistent defenses are not sanctioned, still, in this case, we have a peculiar situation which would seem to justify the relaxing of so rigid a rule. It is to be remembered that the defendant in the case is a representative of the estate, unfamiliar with the transaction, and was justified in pleading that the notes were not executed and lacked consideration; and, when the proof developed that these defenses were untenable, she was justified in pleading the other defense of payment. No continuance was asked on the ground of surprise. The plaintiffs were not prejudiced in the presentation of what evidence was necessary to sustain their contention, or to answer the defense finally made by the administratrix. A person acting as administratrix of an estate in defense of an action of this kind may not be in such full possession of the facts which surrounded the transaction as would be the parties to it during their lifetime, and the rigid rule we have referred to is properly relaxed in such case.

In proof of the defendant's plea of payment, evidence was introduced that showed that prior to the death of Joseph H. Parker, he gave to his sister \$1,500 in cash and \$500 in Liberty Bonds, which the administratrix claims were in payment of the two notes for \$1,000 each, relying upon the presumption that money transferred from one person to another is presumed to be in payment of an obligation between them, where there is no evidence of the intention of the parties, and that this presumption is particularly strong

when the amount transferred equals the amount of the indebtedness. The plaintiffs sought to offset this presumption by another which arises by reason of the fact that the promissory notes are still in their possession, these facts giving rise to the presumption that they are not paid. With these contrary presumptions in the case, testimony was introduced on behalf of the plaintiffs from an attorney as to conversations with Joseph H. Parker, in which he stated that he had made a gift to his sister of these \$1,500 in cash and the Liberty Bonds in the amount of \$500. The testimony was objected to for the reason that it constituted a privileged communication between attorney and client, and was therefore inadmissible. The evidence, however, shows that the attorney was acting both for Katie M. Parker and Joseph H. Parker. Authorities are not lacking to support the position that communications made to an attorney acting for different clients are not privileged in a subsequent controversy between the clients, and the case of *Halfman v. Halfman*, 113 Wash. 320, 194 Pac. 371, is cited to that point. The authorities upon this question agree that, where the communications were made between such parties in the presence of the attorney and each other, they are not privileged, which was the situation in the *Halfman* Case, but there is some difference of opinion as to whether they are admissible when made between one of the parties alone and the attorney. But this question becomes unimportant in the case before us in view of what we will subsequently have to say, and it may be assumed that the testimony was properly admissible, and that the gift was satisfactorily proven.

[3, 4] This brings us to the question which determines this case against the contention of the appellants, and that is that Joseph H. Parker was not authorized to make such a gift. The testimony shows that Joseph H. Parker had been married for a great number of years, and that the \$1,500 in cash and the \$500 in Liberty Bonds were acquired by him after marriage. The presumption therefore arises that this was community personal property. *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398; *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732; *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819, and many other cases following. This presumption is not overcome in any way by any proof on behalf of the appellant. The law which gives the husband the management and control of the community personal property does not give him the right to make substantial gifts thereof against the consent of the wife. As was said in *Schramm v. Steele*, 97 Wash. 309, 166 Pac. 634:

"The statute * * * intends no more than to make him a statutory agent of the community."

Not having the consent of his wife—the record, in fact, disclosing that she would not consent thereto—the rule established in *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111, is applicable, and the gift must be held to have been void. If the testimony had shown that this sum of \$2,000 which was attempted to be given by Joseph H. Parker to his sister could have been deducted from his share of the community property a different situation might be presented. However, there is no testimony in this case showing what the value of Parker's community interest was, and, it being necessary to decide this action upon the facts presented in this record, we cannot supply this deficiency, and must hold that the gift was void.

The judgment is affirmed.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

(120 Wash. 586)

T. W. LITTLE CO. v. FYNBOH et ux.
(No. 17203.)

(Supreme Court of Washington. July 7, 1922.)

1. Fraud ¶31—Cross-complaint held one for false representations.

In action by seller of truck for price, buyer's cross-complaint, seeking recovery on implied warranty, which alleged that seller had full knowledge that buyer knew nothing about trucks and represented that truck would do seller's work, that truck was defective, and was useless for seller's purpose, held sufficient to support a recovery for false representations, although the words "false" and "fraudulent" were not used.

2. Sales ¶273(3)—Rule of implied warranty of fitness for known purpose applied to secondhand truck.

Where seller of truck knew of the work the truck was expected to do, and the buyer relied on seller's representations, the contract being silent on the subject of a warranty, there was an implied warranty that the machine was sufficient for the purpose intended, although the truck was a secondhand one.

3. Sales ¶287(4)—Return of defective truck held sufficient.

Where buyer of a warranted truck, which was defective, drove truck to seller's place of business, tendered it to seller, and left it, and seller had the city police remove it, there was a sufficient return of the truck.

Fullerton, J., dissenting.

Department 2.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the T. W. Little Company against L. H. Fynboh and wife. From a judgment for defendant on the complaint,

and also on the cross-complaint, plaintiff appeals. Affirmed.

Wm. H. Pratt, of Tacoma, for appellant.
Rickabaugh & McElroy, of Tacoma, for respondents.

TOLMAN, J. Appellant brought this action as plaintiff below to recover from respondents the amount due upon a promissory note given to evidence the deferred payments accruing under a conditional sale agreement for the purchase of a certain automobile truck and trailer. Respondents, by amended answer and cross-complaint, pleaded that the appellant, a dealer in new and secondhand trucks, with full knowledge that respondents knew nothing about automobile trucks, of the purpose for which the purchaser intended to use it, and of the roads over which it was to be used, represented that the truck would haul 2,000 or more feet of logs, and would do the work for which the purchaser intended it; that the truck was in fact defective and worn out, and would not do the work as represented, and would not haul more than from 900 to 1,500 feet of logs over the roads contemplated; that the truck was useless for respondents' purpose, and that it was held subject to appellant's orders.

There is ample evidence shown in the record to support the findings of the trial court sustaining this defense. It is admitted that appellant's salesman, who handled the matter, personally inspected and examined the roads before the sale was made, was informed that respondents knew nothing about trucks, and tacitly, at least, it is admitted that he represented, or expressed the opinion, that the truck would satisfactorily handle 2,000 feet of logs to a load under the conditions which had been made known to him. The cross-complaint seeks recovery of \$350 paid in cash as a down payment on the purchase, and the judgment of the trial court was for this amount, together with the cancellation of the note sued upon.

Appellant's chief contention is that the trial court erred in admitting oral testimony tending to qualify or add to the written contract of conditional sale. The conditional sale contract describes the truck and trailer by name and number, fixes the amount of the purchase price, and the terms of payment, reserves title in the vendor until the payments are fully made, contains the usual provisions as to insurance, payment of taxes, nonremoval from the county, and the like, for the protection of the vendor, but is wholly and entirely without any warranty or guaranty of any kind or nature.

[1] While in form the cross-complaint seeks recovery upon an implied warranty, yet the allegations are broad enough to support a recovery upon the ground of false rep-

representations, though the words "false" and "fraudulent" are not used, and, if treated from that standpoint, the judgment can be affirmed under the authority of *Warren v. Sheane Auto Co.* (Wash.) 203 Pac. 372.

[2] In any event, however, the conditional sale contract is entirely silent upon the subject of warranty, and we know of no good reason why the admitted rule that the law will imply a warranty when a machine, even though secondhand, is sold for a particular known purpose, should not apply. The work to be done and the conditions under which it must be done being fully made known to the seller, the fact that the purchaser relied upon the seller's knowledge of the truck and what it could or should do, all combined, create a situation from which, in the absence of any agreement to the contrary, the law implies, without any express contract, that the seller warrants the machine sufficient for the purpose intended. What was said in *Ellers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023, clearly relates to express warranties only, and has no application here.

[3] While no direct assignment of error is based thereon, yet in its brief, and in oral argument, appellant attempts to make the point that there was not a sufficient tender back of the truck and trailer. It clearly appears that, when it was fully demonstrated that the truck would not do the work, and after appellant had made repeated and unsuccessful efforts to cause it to do so, the truck and trailer were driven to appellant's place of business and tendered to its manager, who refused to accept them. Respondents then left them in the alley at the entrance of appellant's building. Had they been removed by a wrongdoer, or without the consent or connivance of appellant, a serious question would have been presented; but it appears by the uncontradicted evidence, offered by appellant, that its manager, well knowing all the facts and conditions, caused the police of the city of Tacoma to take the truck and trailer away. Clearly having so caused the removal of the property, it cannot now urge a nondelivery to it.

The judgment appealed from is affirmed.

PARKER, C. J., and MITCHELL and BRIDGES, JJ., concur.

FULLERTON, J., dissents.

(86 Okl. 255)

DAVIS et al. v. DAVIS et al. (No. 10583.)

(Supreme Court of Oklahoma. June 20, 1922.)

(Syllabus by the Court.)

I. Wills §130—"Holographic will" defined.

A "holographic will" is one that is entirely written, dated and signed by the hand of the

testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed. Section 8347, Rev. Laws 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holographic Will.]

2. Wills §289—Proponents have burden of proving execution and publication in accordance with statute.

The burden of proof rests upon the proponents of a will to establish by a preponderance of the evidence that the will was executed and published according to the provisions of the statutes. *McCarty et al. v. Weatherly et al.* (Okl.) 204 Pac. 632.

3. Wills §302(6)—Evidence held not to prove instrument the holographic will of testator.

Where a holographic will is offered for probate, and the name of the testator is not signed at the bottom of the will, but appears only in the body of the instrument, evidence showing that the deceased, prior to his death, had made isolated statements to the effect that he had made a will without identifying the paper purporting to be his will, does not meet this proof.

4. Sufficiency of evidence.

The record examined, and held, that the evidence does not sustain the judgment of the trial court.

Appeal from District Court, Comanche County; Cham Jones, Judge.

Proceeding in the county court by Pearl Davis for the probate of an instrument as the last will and testament of R. B. Davis, deceased. From judgment of the district court admitting the will to probate on appeal from the county court, J. P. Davis and others appeal. Reversed and remanded.

Keaton, Wells & Johnston, of Oklahoma City, and J. F. Thomas, of Lawton, and Benson & Benson, and Donald & Donald, all of Bowie, Tex., for plaintiffs in error.

S. I. McElhoes, of Lawton, for defendants in error.

MILLER, J. This proceeding was instituted in the probate division of the county court of Comanche county, Okl., by Pearl Davis and others, asking for the probate of a certain instrument as the last will and testament of R. B. Davis, deceased, late of Comanche county, Okl. J. P. Davis and the other heirs of R. B. Davis, deceased, except those named as beneficiaries in the will, joined in a protest against admitting the will to probate. The county court refused to admit it to probate. Pearl Davis and his cobeneficiaries appealed to the district court of Comanche county. On a full hearing had before the district court of Comanche county that court, on November 7, 1918, ordered the paper probated as the will of the deceased

ed. Notice of appeal was given, and this appeal perfected. J. P. Davis and others associated with him objecting to the probate of the will appear here as plaintiffs in error. Pearl Davis and his associates appear as defendants in error, and they will be so referred to.

The plaintiffs in error in their brief refer to their assignments of error as follows:

"The petition in error contains a number of assignments of error, including the assignment so necessary to a consideration by this court, that the court erred in overruling appellant's motion for a new trial, and that the court erred in admitting said will to probate."

The only question discussed is whether or not the court erred in admitting the will to probate. The facts necessary to determine this question may be briefly stated as follows:

R. B. Davis died April 16, 1918, as a resident of Comanche county, Okla., and leaving an estate therein. The defendants in error claim this estate under a holographic will dated August 1, 1901. The plaintiffs in error are the other heirs at law of the deceased. On April 1, 1918, the deceased executed another will which, after making certain specific bequests in amounts of \$1, left the estate to the defendants in error. This will was filed for probate, but, it appearing that the witnesses thereto did not sign in the presence of the testator, the proponents of the will did not insist on its being admitted to probate.

Some two months after the death of R. B. Davis the will in question in this case was found in an old trunk which the evidence discloses Davis kept locked, and prior to his death he carried the key. The will in question reads as follows:

"Know all men by these presents that I, R. B. Davis, have this 1st day of August, 1901, made and executed this my will to L. S. Davis and his children, Edgar Davis and Mabel Davis and Claude Davis and Pearl Davis, to take effect at my demise as follows, to wit: All of my land and all of my stock, both horses and cattle, and all of my money, bank deposits, notes promissory and otherwise, and all my house furnishings. In fact all of my incumbrances to be divided equally between all the above named when Pearl Davis, the youngest, becomes of age, and I hereby name L. S. Davis as trustee for this will, and I further enjoin that there be no legal procedure interceded against this document.

"Witness my hand this the 1st day of August, 1901. Witness."

This will is not signed at the bottom, but it was shown by opinion testimony of a large number of witnesses to be in the handwriting of the deceased. At least six witnesses who appear to be disinterested testified that the deceased had told them on different occasions that he had made a will and had left his property to Stanhope's children. It is

admitted the Stanhope referred to in the testimony of these witnesses was a brother of the deceased and is the one referred to in the will as L. S. Davis, and Stanhope's children referred to are the other persons named in the will and are the defendants in error here.

The evidence further discloses that the deceased formerly resided in Montague county, Tex., and removed to Comanche county, Okla., bringing with him his brother, Stanhope, and Stanhope's four children, who are the beneficiaries under this will; that he took care of Stanhope's children when they were small, and they in turn took care of the house, making a home for him and helping him with his farm work. They lived together as a family and deceased was practically a father to the children.

The plaintiffs in error contend that the name "R. B. Davis" written by him in the top of the instrument is not a sufficient signing to make the paper a valid will; their contention being that it must either be signed at the bottom or the will must show on its face he intended that his name appearing in a different part of the instrument should constitute his signature to the instrument. They say, in effect, that evidence allunde is not admissible to prove he intended the writing of his name in the upper part of the instrument to stand as his signature. Without passing upon this question or expressing any opinion as to the admissibility of evidence allunde, we do not think the evidence offered has sufficient probative force to establish the factum of the will.

[1] Section 8347, Revised Laws of Oklahoma 1910, defines a holographic will as follows:

"A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

The evidence before the court as shown by the record was that the deceased stated to the various witnesses that he had made a will and left all of his estate to Stanhope and Stanhope's children, not that he was going to make a will or intended to make a will. Defendants in error contend this evidence established the paper offered for probate as the last will and testament of R. B. Davis, deceased. Not one of the witnesses testified they had ever seen this paper before, or that the paper had been exhibited to either of them by R. B. Davis, and he had declared it to be his will or in any way indicated that his name appearing in the top of the instrument was intended by him to constitute his signature. Neither did any witness testify to the identity of this paper as the will to which R. B. Davis referred in the conversation wherein he stated he had made a will. Ordinarily the person's name

appearing in the top of an instrument, although written by his own hand, is merely descriptive of the person unless there is competent evidence which would reasonably tend to establish as a fact that he intended it to constitute a signing of the instrument, or that his name so written by him was intended as a complete execution of the instrument.

[3] These words appearing at the bottom of the paper offered for probate have some significance, "Witness my hand this the 1st day of August, 1901." The declaration above quoted is so universally used as apt and appropriate words preceding the signature that they may be said to have an established meaning and import, to wit, that the execution of the instrument will be completed by signing his name immediately following such declaration of "Witness my hand." This declaration indicates that his signature or some mark or attestation made by his hand would follow to complete the execution of the instrument. The wording of the declaration is evidence of an intent to sign or make some mark with his own hand after he has made the declaration. While this may be only slight evidence of his intent to attach his signature or some mark of attestation to denote he had completed the execution of the instrument, yet it would require some evidence to rebut the import of the declaration. It cannot be presumed because he may have made statements to the effect that he had made a will, neither is it overcome by isolated statements that he had made a will, without evidence to identify this paper as the will he referred to in making the statements. He may have prepared this as a rough draft and then made a will in conformity with this rough draft which was duly signed. He may then have told different persons he had made a will, but afterwards for some reason he may have destroyed the will. The rough draft, not having been executed by him, received no further attention from him. We think the evidence lacks the probative force essential to identify this paper as his will or establish the factum of the will.

[2, 4] In *McCarty et al. v. Weatherly et al.* (Okl.) 204 Pac. 632, paragraphs 1 and 10 of the syllabus read as follows:

"1. The burden of proof rests upon the proponents of a will to establish by a preponderance of the evidence that the will was executed and published according to the provisions of the statutes. * * *

"10. The burden of proof rests upon the proponents of a will to prove not only the due execution of the will as provided by law, but that the instrument was in fact the free and voluntary act and will of the testatrix."

The evidence does not sustain the judgment of the district court. It is insufficient to establish the factum of the will. The

judgment of the district court is reversed, and this cause remanded, with instructions to sustain the judgment of the county court and deny the probate of the purported will.

HARRISON, C. J., and McNEILL, ELTING, KENNAMER, and NICHOLSON, JJ., concur.

(86 Okl. 288)

LINDBERG v. MESSMAN et al.
(No. 10482.)

(Supreme Court of Oklahoma. March 14, 1922.
Rehearing Denied July 11, 1922.)

(Syllabus by the Court.)

1. Quieting title — Plaintiff must recover on strength of own title.

The plaintiff in an action to quiet title to land must allege and prove that he is the owner of either the legal title or the complete equitable title. Unless plaintiff has the title, it is immaterial to him what title defendant claims.

2. Quieting title — 47(1), 51 — Absence of proof of title in defendant held not to warrant quieting title in plaintiff; absence of proof of title in plaintiff held not to warrant quieting title in defendant.

Record examined and held: (a) The judgment of the trial court sustaining the defendant's demurrer to plaintiff's evidence is affirmed; (b) the judgment of the trial court quieting title to the land involved in the defendant is reversed, and the cause remanded, with direction.

Appeal from District Court, Pawnee County; Redmond S. Cole, Judge.

Action by August Lindberg against L. F. Messman and others. From judgment for defendants and from an order denying a motion for a new trial, plaintiff appeals. Affirmed in part, and reversed and remanded in part.

Edwin R. McNeill, of Pawnee, for plaintiff in error.

L. V. Orton, of Pawnee, for defendants in error.

JOHNSON, J. This is an appeal from the judgment rendered in the district court of Pawnee county, state of Oklahoma, on the 21st day of May, 1918, wherein August Lindberg was plaintiff and L. F. Messman, Claude Macy, and O. T. Cashel, were defendants. The plaintiff in error, August Lindberg, hereinafter called the plaintiff, filed his petition in said court on September 13, 1916, against said defendants in error, hereinafter called defendants, alleging that he was the owner of and in possession of the following described premises, to wit:

"The northeast quarter of section twenty-two (22), township twenty (20) north of range

six (6) east of the Indian meridian, Pawnee county, state of Oklahoma"

—that he acquired the same by deed from Frank E. Lindeberg on the 3d day of April, 1913, and attached a copy of said deed to his petition which recited a consideration of \$5,000, subject to certain mortgages mentioned therein; that the defendant L. F. Messman, on the 26th of June, 1916, filed a deed to said premises from C. D. Webber, sheriff of Pawnee county, state of Oklahoma, and claimed some right, title, and interest therein; that Claude Macy claimed some right, title, and interest in and to said premises by reason of a mortgage executed by said Messman to Macy on the 21st day of August, 1918; that C. T. Cashel claimed some right, title, and interest in said premises by reason of an oil and gas lease made by said L. F. Messman. Plaintiff prayed that his title be quieted against said L. F. Messman, Claude Macy, and C. T. Cashel; that the said sheriff's deed filed by the said L. F. Messman be declared null and void; that the said mortgage of Claude Macy be declared null and void; that the said oil and gas lease be canceled; and that said defendants have no right, title, or interest in and to said premises.

To this petition L. F. Messman filed an unverified general denial and further claiming that he was the owner of said premises under and by virtue of a judgment rendered in the superior court of Garfield county, Okl., wherein a judgment on a cross-petition was recovered against Frank L. Lindeberg in the sum of \$307.80, and thereafter, on the 16th of November, 1912, a transcript of said judgment was filed in the office of the clerk of the district court of Pawnee county, and the premises herein were sold under execution, and that L. F. Messman purchased the same under said proceedings at a sheriff's sale, and L. F. Messman prayed that his title be quieted as against the plaintiff.

The defendant Claude Macy also filed an unverified general denial and claimed an interest in the premises by reason of a mortgage given by L. F. Messman and wife to said Claude Macy in the sum of \$850 on said premises and praying that the court decree that said Claude Macy have a valid and subsisting lien on said real estate.

Plaintiff filed a reply and an amended reply to the answer of L. F. Messman and alleges that the judgment referred to in Messman's answer, rendered in the district court of Garfield county, was null and void, and all subsequent proceedings based thereon are null and void and of no force and effect, and set forth the reasons why the same were null and void. The issues were thus framed, and the cause came on for trial.

Judgment was rendered on the 21st day of May, 1918, in behalf of the defendants, the court sustaining a demurrer to the evidence introduced by the plaintiff. A motion for

new trial was overruled on the 3d of September, 1918, and this appeal is prosecuted from the judgment and final order of the court overruling motion for new trial, and is here for final determination.

None of the pleadings were signed by the parties or in any way verified, being simply signed by the attorneys of the respective parties.

The plaintiff introduced without objection page 164, Warranty Deed Record No. 29, of Pawnee county, containing the record of the deed from Frank E. Lindeberg to August Lindeberg, a copy of which deed was attached to the plaintiff's petition, and called as a witness in his behalf Frank E. Lindeberg, who testified that said deed was intended as a mortgage to secure his indebtedness to the plaintiff, August Lindeberg in the sum of about \$8,000, representing moneys advanced to him by the plaintiff from time to time and prior to the execution of the said deed for the most part.

With this testimony the plaintiff rested, whereupon the defendants demurred to the evidence of the plaintiff, which demurrer, after argument of the same, was sustained by the court, the court rendering judgment as follows:

"It is therefore by the court ordered, adjudged, and decreed that the demurrer of defendants to the evidence of the plaintiff be, and the same is hereby, sustained, and the action of the plaintiff is hereby dismissed at the costs of plaintiff.

"It is further decreed that the plaintiff is not the owner of said real estate, hereinabove described, and it is further decreed that the defendant L. F. Messman is the owner of said real estate, and entitled to the possession thereof.

"It is further decreed that the title of the defendant L. F. Messman be, and the same is hereby, quieted against the plaintiff, or any one claiming by, through, or under him, and that the deed made on the 3d day of April, 1913, and recorded in Book 29 of Deed Records at page 164, be, and the same is hereby, canceled, set aside, and held for naught.

"To the above finding and decree the plaintiff excepts, and gives notice in open court of his intention to appeal to the Supreme Court.

"Conn Linn, Judge.

"O. K. L. V. Orton, Attorney for Defendants."

To reverse this judgment this proceeding in error was commenced by the plaintiff.

For convenience the parties will be hereinafter referred to as plaintiff and defendants, respectively, as they appeared in the trial court.

The plaintiff assigns error as follows:

"(1) The court erred in overruling the motion of plaintiff in error for new trial.

"(2) The court erred in sustaining the demurrer of defendants in error to the evidence of the plaintiff in error."

The sole question for our determination is whether or not the trial court erred in sustaining the defendants' demurrer to the plaintiff's evidence.

Frank Lindeberg testified that he was a bachelor, and had lived on the land in controversy eight years; that he continued to live on the same after making his deed to his brother, August Lindeberg; that he had the use of the land in consideration of his paying the taxes and making improvements thereon from time to time. The defendants offered no testimony at the trial.

The question of law arising upon the facts therefore is: Is the plaintiff himself entitled to recover in an action to quiet title?

Section 4927, R. L. 1910, provides that:

"An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

This court has frequently held that, as a necessary prerequisite to maintaining an action to quiet title or to remove cloud therefrom, the plaintiff must allege and prove that he is holder of the legal title or the complete equitable title to the land involved.

In the case of *Clark v. Holmes*, 31 Okl. 164, 120 Pac. 642, Ann. Cas. 1913D, 385, this court said in paragraph 2 of the syllabus:

"A person who has no interest in the title to real estate cannot maintain an action to remove a cloud upon the title to such real estate"—citing in support thereof *Le Force v. Haymes*, 25 Okl. 190, 105 Pac. 644; *Wheatland Grain, etc., Co. v. Dowden*, 26 Okl. 441, 110 Pac. 898; 32 Cyc. 1352.

And again, in *Spalding v. Hill*, 47 Okl. 621, 149 Pac. 1133, an opinion by the court in the case of *Clark v. Holmes*, supra, was cited with approval.

The same doctrine is announced in 5 R. C. L. 646, and again in the case of *Clark v. Duncanson*, 79 Okl. 180, 192 Pac. 806, 16 A. L. R. 315, this court, in an opinion by Ramsey, J., in the second paragraph of the syllabus, stated the rule as follows:

"The plaintiff in an action to quiet title to land must allege and prove that he is the owner of either the legal title or the complete equitable title. Unless plaintiff has the title, it is immaterial to him what title defendant claims."

[2] So it seems quite clear to us that that part of the judgment of the trial court sustaining the demurrer to the plaintiff's evidence and dismissing his cause of action was not erroneous, but should be sustained, but the decree of the court quieting title to the land in controversy in the defendant was clearly erroneous, for the reason that the defendant offered no testimony upon the trial,

and therefore there was no evidence to sustain his title.

So that part of the judgment is reversed, and the cause remanded, with directions to the trial court to further proceed in accordance with the views herein expressed.

HARRISON, C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

McCARTY v. STATE. (No. A-3773.)

(Criminal Court of Appeals of Oklahoma.
July 8, 1922.)

(Syllabus by the Court.)

1. Criminal law §665(4)—Whether witness violating rule of sequestration should be permitted to testify is within court's discretion.

Whether a witness who has violated the rule of sequestration should be permitted to testify is in the discretion of the trial court.

2. Criminal law §1153(5)—Burden rests on defendant to show abuse of discretion in excluding testimony of witness violating sequestration rule.

The burden rests upon the defendant to show a manifest abuse of discretion by the trial court in excluding the testimony of a witness who has violated such rule.

3. Criminal law §806(3)—Principle of "reasonable doubt" need not be repeated in each paragraph of instructions.

The principle of "reasonable doubt" is so firmly intrenched in the criminal jurisprudence of this country, and so well known by jurors generally, as not to require constant repetition of the rule in every paragraph of the instructions, especially where the issues are not involved, and no affirmative defense is interposed.

4. Criminal law §822(1)—Where instructions as a whole fairly cover the law of the case, the charge will be held sufficiently comprehensive.

Where the instructions as a whole fairly cover the law of the case, and are not misleading, although some instructions may be artificially drawn, the general charge will be held sufficiently comprehensive.

5. Gaming §98(2)—Evidence held sufficient to sustain conviction.

Evidence examined, and held sufficient to sustain the conviction.

Appeal from County Court, Grady County; Thos. J. O'Neill, Judge.

J. J. McCarty was convicted of gambling, and appeals. Affirmed.

Holding & Herr, of Chickasha, for plaintiff in error.

Geo. F. Short, Atty. Gen., and N. W. Gore, Asst. Atty. Gen., for the State.

PER CURIAM. By judgment rendered on the 12th day of April, 1921, defendant J. J. McCarty was, in the county court of Grady county, convicted of the offense of playing at a game of cards for money, and sentenced to pay a fine of \$50 and the costs of the action. From such judgment he has appealed to this court.

Counsel contend that the trial court erred in refusing to permit one Ellis to testify as a witness in the behalf of the defendant.

[1] Concerning this assignment of error, the record discloses that Ellis had been subpoenaed as a witness for the state, had been sworn as such witness, and, at the request of counsel for the defendant, all the witnesses were excluded from the courtroom during the progress of the trial. In violation of this rule the witness Ellis remained in the courtroom during the time the state's witnesses were testifying. At the conclusion of the state's evidence, the county attorney having failed to call the said Ellis as a witness, the defendant then offered to introduce Ellis in his behalf, and the county attorney then interposed an objection to Ellis' testifying on the ground that he had violated the rule by remaining in court during the time the state was introducing evidence. The court sustained the objection of the county attorney, to which action the defendant excepted. Whether a witness who has violated the rule of sequestration should be permitted to testify is within the discretion of the trial court. *Boyd v. State*, 153 Ala. 41, 45 South. 591; *Belk v. State*, 10 Ala. App. 70, 64 South. 515; *Fouse v. State*, 83 Neb. 258, 119 N. W. 478; *Woods v. State*, 68 Tex. Cr. R. 105, 151 S. W. 296.

In the case of *Kilgore v. State*, 10 Okl. Cr. 446, 137 Pac. 364, this court held:

"Where the court orders witnesses to be sworn and excluded from the courtroom during the taking of testimony, and where the order of the court is willfully violated, it is a matter within the discretion of the court to allow or exclude the testimony of such witness."

[2] In this case the record is silent as to whether the violation of the rule of the court by the witness Ellis was intentional or not. The burden rests upon the defendant to show a manifest abuse of discretion by the trial court in excluding the testimony of this witness. No such showing is evident from this record.

[3] Further, it is contended that the trial court erred in giving the following instruction:

"To this charge the defendant pleads not guilty; the burden of proof is upon the state to show to your satisfaction, and beyond a reasonable doubt by the proof in the case, the truth of the charge as made in the information. If the state has proven to your satisfaction that this defendant was engaged in playing a game of cards for money, as charged

in the information, your verdict should be guilty. If, however, from all the evidence, and the circumstances, as shown by the proof, you believe the defendant not guilty of the crime, or have a reasonable doubt as to whether he is guilty or not, your verdict should be 'not guilty.'"

It is urged that the instruction is erroneous in not requiring the state to prove the guilt of the defendant of the offense charged beyond a reasonable doubt. True, there is one sentence in the instruction which, if it stood alone, might be susceptible of such construction; but the instruction, considered in its entirety, is not misleading and, we believe, clearly states the law to be that the state must prove the defendant's guilt of the crime charged beyond a reasonable doubt. In a subsequent paragraph of the instructions the court clearly stated the law to be that the defendant must be proven guilty beyond a reasonable doubt. And the instructions, considered as a whole, are not misleading or confusing on this question.

In *Hawkins v. State* (Okla. Cr. App.) 188 Pac. 490, this court held:

"Though one instruction was somewhat confusing, when the instructions as a whole remedy such confusion it does not constitute reversible error."

In the case of *Cole v. State* (Okla. Cr. App.) 195 Pac. 901, it is held:

"The principle of 'reasonable doubt' is so firmly intrenched in the criminal jurisprudence of this country, and so well known by jurors generally, as not to require constant repetition of the rule in every paragraph of the instructions, especially where the issues are not involved, and no affirmative defense is interposed."

Cases from other states to the same effect are as follows: *Rowen v. State*, 16 Ga. App. 179, 84 S. E. 793; *Territory v. Price*, 14 N. M. 262, 91 Pac. 733; *State v. Ferrell*, 246 Mo. 322, 152 S. W. 33; *Lake v. Commonwealth*, 31 Ky. Law Rep. 1232, 104 S. W. 1003. *Raper v. State*, 16 Ga. App. 121, 84 S. E. 560.

[4] Furthermore, it has been repeatedly held by this court that, where the instructions as a whole fairly cover the law of the case, and are not misleading, although some instructions may be inartificially drawn, the general charge will be held sufficiently comprehensive. We find in this charge no error sufficiently prejudicial to authorize a reversal of this conviction.

[5] It is also contended that the evidence is insufficient to support the conviction. The undisputed evidence in the case is that a game of stud poker was being played for money on the night of the 23d of December, 1920, in a building in the city of Chickasha; that some of the police officers of the city and county, at about the hour of 11 o'clock,

made a raid on said place; that defendant was present at that time and place. The only dispute is as to whether he was engaged at playing at the game. The testimony of the officers is to the effect that he was sitting at the table with a lay-out of cards in front of him and 50 cents in money on top of the ace of spades directly in front of the defendant; that just before breaking into the building the officers stood on the outside for several minutes within just a few feet of where the defendant was sitting; that just before entering they heard some one say, "By God, I bet a half a dollar." The defendant denied playing at the game, and one witness in his behalf testified that defendant had just arrived, and did not have time to get into the game. But the officers testified that they had been standing on the outside of the building for five or six minutes before they broke into it, and that during that time nobody entered the building. Evidently the jury was not willing to believe that the defendant would go to such a place at that hour of the night for the purpose of gambling and waive the privilege of engaging in this fascinating American pastime for the length of time that the officers testified they stood on the outside of the building. And, furthermore, the testimony of the state's witnesses is amply sufficient to sustain the verdict and judgment.

For reasons stated, the judgment is affirmed.

MORRIS v. STATE. (No. A-4314.)

(Criminal Court of Appeals of Oklahoma. Aug. 5, 1922.)

(Syllabus by Editorial Staff.)

Criminal law §1131(5)—Defendant's appeal dismissed where he has become a fugitive from justice.

An appeal from a conviction for violation of the intoxicating liquor law may be dismissed on the ground that defendant has become a fugitive from justice, and cannot be made to answer the judgment upon the merits of his appeal.

Appeal from County Court, Greer County; Jarrett Todd, Judge.

Lorenzie Morris was convicted of a violation of the prohibitory liquor law, and he appeals. Appeal dismissed.

Stewart & Edwards, of Mangum, for plaintiff in error.

M. H. Mills, Co. Atty., and W. B. Garrett, Asst. Co. Atty., both of Mangum, and the Attorney General, for the State.

PER CURIAM. Plaintiff in error, Lorenzie Morris, was, in December, 1921, convicted in

the county court of Greer county of the offense of unlawfully manufacturing intoxicating liquor, and his punishment fixed at a fine of \$50 and imprisonment in the county jail for a period of 30 days.

Counsel for the state filed a motion to dismiss this appeal on the ground that plaintiff in error has become a fugitive from justice, and cannot be made to answer the judgment upon the merits of his appeal by this court. The motion was filed in this court on the 27th day of June, 1922, and no response has been made to the same.

We have carefully examined the showing made by the motion and supporting affidavits, and are of the opinion that the motion to dismiss is well-founded, and should be sustained.

The appeal is dismissed, with directions to the clerk to issue the mandate forthwith.

(35 Idaho, 580)

STATE v. STERRETT. (No. 3496.)

(Supreme Court of Idaho. June 29, 1922.)

1. Criminal law §21—Whether criminal intent is necessary element determined from language of statute; lack of criminal intent immaterial if not a necessary element of the crime.

Whether a criminal intent is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute, in view of its manifest purpose and design, and, where such intent is not made an ingredient of the offense, the intention with which the act is done, or the lack of any criminal intent in the premises, is immaterial.

2. Intoxicating liquors §131—Transportation of intoxicating liquor unlawful, notwithstanding good faith of person.

Under C. S. §§ 2606 and 8087, the intentional transportation of intoxicating liquor, without legal authority, is unlawful, and the good intentions and good faith of the person transporting such liquor is immaterial.

3. Criminal law §342—Exclusion of evidence tending to show good faith not error, where criminal intent is not a necessary element.

Error cannot be predicated upon the action of the court in excluding evidence tending to show the defendant's good intentions and good faith, where a criminal intent is not a necessary element of the offense charged.

4. Criminal law §1159(2)—Verdict not disturbed on appeal, where there is sufficient competent evidence to support it.

Where there is sufficient competent evidence to sustain the verdict of the jury, such verdict will not be disturbed on appeal.

Appeal from District Court, Bannock County; O. R. Baum, Judge.

T. A. Sterrett was convicted of transporting intoxicating liquor into a prohibition district, and he appeals. Affirmed.

J. M. Stevens and H. E. Ray, both of Pocatello, for appellant.

Roy L. Black, Atty. Gen., and Dean Driscoll, Asst. Atty. Gen., for the State.

BUDGE, J. Appellant was convicted of the crime of transporting intoxicating liquor into a prohibition district in the state of Idaho, from which he appeals.

From the record it appears that appellant was apprehended by two deputy sheriffs of Bannock county, while hauling two kegs of intoxicating liquor in a wagon, upon a public highway within said county, several miles from Alexander, Caribou county, on the afternoon of April 12, 1919. There is some evidence in the record tending to show that on the morning of said day appellant was in Soda Springs, where he appeared before the acting probate judge of Caribou county and made an affidavit of the existence of some intoxicating liquor near Alexander, that a search warrant was issued by the probate judge and handed to appellant with verbal instructions to seize the liquor, if found, and bring it to Soda Springs, and that appellant, as a de facto officer, seized the liquor at Alexander and by reason of the impassable condition of other roads was hauling it towards Soda Springs by a road which lay for some distance within the boundaries of Bannock county.

Appellant makes six assignments of error, the first five of which relate to the action of the court in sustaining objections of the state to certain testimony sought to be elicited in his behalf, tending to show that he was traveling towards Soda Springs when he was apprehended; that he and witness Barnett were orally deputized by the probate judge to get the particular whisky which was found in his possession upon his apprehension; that he exhibited to witness Allen, whom he employed, with a team and wagon, to haul the liquor to appellant's ranch near Alexander, a search warrant before loading the liquor; and that he directed Allen to drive to said ranch for the purpose of getting a heavier team to haul the liquor to Soda Springs, and in sustaining the objection of the state to the introduction of the search warrant claimed to have been issued and delivered to him by the probate judge.

Counsel for appellant cites no authorities supporting his position upon these matters, but contends merely that the evidence in each case was competent to go to the jury as establishing the good intention and good faith of appellant in the premises.

C. S. § 2806, under which appellant was convicted, provides that:

"It shall be unlawful for any person * * * to transport any intoxicating liquor or alcohol

unless the same was procured and is so possessed and transported under a permit as hereinafter provided. * * *

C. S. § 8067, provides:

"In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

At common law, a crime possessed the element of an evil intention together with an unlawful act, but the rule is well established that it is competent for the Legislature to prohibit the doing of a particular act and to provide a penalty for the violation of the prohibition. 1 Wharton's Criminal Law (11th Ed.) § 143, p. 187. This court held, in *State v. Keller*, 8 Idaho, 699, 70 Pac. 1051, that:

"Wicked or willful intent to violate the criminal law is not an essential ingredient in every criminal offense. And that is so in statutory offenses, when the statute does not make the intent with which an act is done an ingredient of the crime. The rule is that in acts mala in se the intent governs, and in acts mala prohibita, the intent does not govern, and the only inquiry is, 'Has the law been violated?'"

And in *State v. Sheehan*, 33 Idaho, 108, 190 Pac. 71, it was said:

"The crime of transporting intoxicating liquor into the state of Idaho * * * is committed whenever one knowingly and intentionally transports intoxicating liquor. No other intent is necessary in order to complete the offense, when coupled with the act of transporting, than the intent to transport."

[1-3] Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design, and, where such intent is not made an ingredient of the offense, the intention with which the act is done, or the lack of any criminal intent in the premises, is immaterial. *City of Hays v. Schueler*, 107 Kan. 635, 193 Pac. 811, 11 A. L. R. 1433 and note at page 1434. It is apparent that, by C. S. §§ 2806 and 8067, the Legislature has made the intentional transportation of intoxicating liquor, without legal authority, unlawful (In re Baugh, 30 Idaho, 387, 164 Pac. 529), and that the good intentions and good faith of the person transporting the liquor is immaterial. In the interest of the public, the burden is placed upon the actor to ascertain at his peril whether his deed is within the prohibition of the statute. 8 R. C. L., Criminal Law, § 12, p. 62, note 4. Error cannot be predicated upon the action of the court in excluding evidence tending to show the defendant's good intentions and good faith, where a criminal intent is not a necessary element of the offense charged.

[4] In the sixth assignment of error, appellant urges that the evidence did not warrant the jury in finding him guilty. The jury was entitled to, and evidently did, disbe-

lieve the evidence introduced by appellant whereby he sought to show that he had been deputized to seize the liquor in question and remove it to Soda Springs, but apparently did believe the testimony of the so-called acting probate judge that he did not deputize appellant. Although the defense interposed by appellant may well serve as a testimonial of legal ingenuity, altogether unique in the judicial annals of this state, nevertheless, since the jury took the view which it did, it is unnecessary to consider the question as to whether or not the deputization of appellant as a de facto special officer of Caribou county would constitute a defense to the crime with which he was charged.

There is sufficient competent evidence in the record to support the verdict of the jury, and, no prejudicial error appearing in the record, the judgment must be affirmed. It is so ordered.

RICE, C. J., and McCARTHY and DUNN, JJ., concur.

(35 Idaho, 574)

STATE v. MOODIE. (No. 3509.)

(Supreme Court of Idaho. June 23, 1922.)

1. Criminal law \S 1090(6)—Alleged error in overruling demurrer to criminal complaint denying motion to quash can be presented only on bill of exceptions.

Alleged errors of trial court in overruling demurrer to criminal complaint and in denying motion to quash complaint can be presented to this court only by bill of exception, properly settled and incorporated in the record.

2. Animals \S 102—Offense of grazing sheep on cattle range shown.

In prosecutions under C. S. \S 8333, it is not necessary to show that the cattle range is on public land.

3. Criminal law \S 86—Prosecution of misdemeanors triable in probate and justice courts may be commenced in district court.

Prosecution of misdemeanors triable in the probate and justice courts may be commenced in the district court by filing a criminal complaint.

4. Criminal law \S 1129(3)—General allegation of insufficiency of evidence sufficient where contention is that there is no evidence of offense.

Where the contention is that there is no evidence to prove the offense, or a material element thereof, a general allegation that the evidence is insufficient raises the point. If there is any evidence, the particulars of insufficiency must be stated.

Appeal from District Court, Lemhi County; F. J. Cowen, Judge.

Joseph Moodie was convicted of grazing sheep on a cattle range, and he appeals. Affirmed.

L. E. Glennon, of Salmon, for appellant.

Erle H. Casterlin, of Salmon, E. W. Whitcomb, of Blackfoot, Roy L. Black, Atty. Gen., and Jas. L. Boone, Asst. Atty. Gen., for the State.

McCARTHY, J. Appellant was convicted of grazing sheep on a cattle range in violation of C. S. \S 8333. The appeal is from the judgment. The specifications of error are: First, the court erred in not sustaining the defendant's demurrer to the complaint; second, in not sustaining appellant's motion to quash the complaint; third, the evidence is insufficient to sustain the verdict; fourth, the evidence is insufficient to sustain the judgment.

[1] The action of the trial court in overruling the demurrer and denying the motion to quash cannot be reviewed because not presented in a bill of exceptions. *State v. Maguire*, 31 Idaho, 24, 160 Pac. 175; *State v. Crawford*, 32 Idaho, 165, 179 Pac. 511; *State v. Snook*, 34 Idaho, 403, 201 Pac. 494; *State v. Ricks*, 34 Idaho, 122, 201 Pac. 827.

[2, 3] Waiving this technical point, we conclude that the court did not err. The specifications of uncertainty set forth in appellant's demurrer are not well taken. The point that the complaint does not state that the range in question was a part of the public domain is not well taken. In prosecutions under C. S. \S 8333, it is not necessary to allege or prove that the cattle range is on public land. *State v. Bidegain*, 34 Idaho, 365, 201 Pac. 312. The point raised by the motion to quash was that the filing of the sworn complaint in the district court did not invest the court with jurisdiction to try the charge. This point is disposed of by *State v. Snook*, supra, holding:

"Prosecution of misdemeanors triable in the probate and justice courts may be commenced in the district court by filing a criminal complaint."

[4] As to the third and fourth specifications, the state contends they must be disregarded because they do not state the particulars in which the evidence is insufficient. C. S. \S 9068; *State v. Snook*, supra. Appellant's counsel contends in the brief that there is no evidence to show that appellant acted willfully or knowingly in violation of the statute. Where the contention is that there is no evidence to prove the offense, or a material element thereof, a general allegation that the evidence is insufficient raises the point. If there is any evidence, the particulars of insufficiency must be stated. *State v. Becker*, 35 Idaho, —, 207 Pac. 429. We will consider whether there is evidence to show that appellant acted willfully and knowingly in violation of the law. This court has held that—

In order to justify a conviction under C. S. § 8333, there must be an intent to violate the law, "or the failure upon the part of the defendant by the exercise of ordinary diligence to ascertain whether or not the range upon which he drives, herds and grazes his sheep is a cattle range within the meaning of said section." *State v. Omaechevvaria*, 27 Idaho, 797, 152 Pac. 280.

"The intention to commit the act, as well as the commission of the act, are necessary and essential ingredients of the crime." *Id.*

Appellant argues that there is no evidence to show he knew he was grazing his sheep upon a cattle range, and that any intent to violate the law is rebutted by the fact that two persons owning ranches in the vicinity gave him permission to use the range. He was convicted of grazing sheep on this range on or about May 9. Witness Shoup testified he first saw appellant's sheep on this range on April 19, and remonstrated with him, telling him that it was a cattle range. This was sufficient to justify the jury in finding that he acted willfully and knowingly on May 9. The two neighbors in question denied that they absolutely consented to the use of the range. Even if they did, this would not justify the appellant when, as was shown, there were other cattlemen who had used and claimed the range. We conclude the evidence is sufficient to support the verdict and judgment.

The judgment is affirmed.

RIE, C. J., and DUNN, J., concur.

(35 Idaho, 584)

STATE v. FELLIS et al. (No. 3545.)

(Supreme Court of Idaho. June 29, 1922.)

1. Intoxicating liquors \S 216, 223(3)—Variance between information charging possession of whisky and proof that liquor may have been brandy not fatal; information charging possession of intoxicating liquor need not specify precise kind of liquor.

When the general term "intoxicating liquor" is used, and a particular kind of liquor is named under a *videlicet*, proof of another kind of intoxicating liquor is not a fatal variance; the naming of the precise kind of liquor not being an essential part of the description of the offense.

2. Witnesses \S 389—Adverse party should be allowed to prove statement of witness inconsistent with present testimony, unless witness unqualifiedly admits making statement.

If a witness does not absolutely and unqualifiedly admit that he made at another time a statement inconsistent with his present testimony, the adverse party should be allowed to prove such statement.

Appeal from District Court, Bannock County; O. R. Baum, Judge.

Spiro Fellis and George Georgantopulos were convicted of having possession of intoxicating liquor, and they appeal. Reversed.

W. H. Witty and W. H. Anderson, both of Pocatello, for appellants.

Roy L. Black, Atty. Gen., James L. Boone, Asst. Atty. Gen., and I. E. McDougall, Pros. Atty., of Pocatello, for the State.

MCCARTHY, J. Appellants were convicted of having intoxicating liquor in their possession. They appeal from the judgment.

The following are the only specifications of error which we find it necessary to expressly notice: First, the evidence is insufficient to warrant a conviction since the information charges the possession of whisky while the evidence shows it to have been whisky or brandy; second, the court erred in refusing defendant's requested instruction No. 1; third, the court erred in refusing to admit the transcript of evidence taken at the preliminary examination; fourth, the court erred as to appellant Georgantopulos in permitting witness Devaney to relate a conversation between himself and appellant Fellis without the presence of Georgantopulos.

[1] Devaney, being the only witness who claimed to have seen intoxicating liquor in the possession of the appellants, identified it as such by its appearance and smell. On cross-examination he stated that, while he thought it was whisky, it might have been brandy, there not being enough difference in the odor of the two to enable him to distinguish with certainty. On this ground appellants claim that the evidence does not show beyond a reasonable doubt that the liquor was whisky, as alleged in the information. They also contend that the court erred in refusing defendant's requested instruction No. 1, which reads as follows:

"You are instructed, gentlemen, that if you believe from the evidence that it was brandy in possession of and broken by defendant Georgantopulos, instead of whisky, you are instructed to acquit the defendants, or if the evidence does not show whether or not it was whisky or brandy, then it would be your duty to find the defendants not guilty."

"When the general term 'intoxicating liquor' is used, and a particular kind of liquor is named under a *videlicet* [as in this information] proof of another kind of intoxicating liquor is not a fatal variance; the naming of the precise kind of liquor not being an essential part of the description of the offense." *State v. Petrogalli*, 34 Idaho, 232, 200 Pac. 119; 23 Cyc. 264 (2), note 45, and cases cited.

This disposes of the first two specifications of error.

We will next consider the fourth specification of error. Witness Devaney testified that appellant Fellis was in his store; that the witness asked him what would be the chance to get a bottle, to which the latter

replied he could get one in a few minutes; that appellant Fellis said something in Greek to appellant Georgantopulos, who appeared in the back of the store; that Fellis then cashed a \$6 check for witness; that witness then walked over to the other appellant, who pulled a bottle from under his bib overalls. Appellant Georgantopulos contends that it was error to admit evidence of the conversation between the witness and appellant Fellis. Aside from the fact that there are circumstances from which the jury might reasonably have inferred that Georgantopulos overheard this conversation, the evidence was undoubtedly admitted upon the theory that there was concert of action between the two appellants. This theory is supported by the evidence that, following the conversation between the witness and Fellis, the latter spoke to Georgantopulos, who thereafter produced the bottle.

[2] We come now to the third specification of error, which raises the most serious question in the case. As before noted, the witness Devaney was the only witness who directly testified to having seen liquor in the possession of the appellants. He testified, in effect, that, after the appellant Georgantopulos produced the bottle, he evidently had a change of heart, and, running to the front door, threw the bottle upon the sidewalk. The witness identified the contents as whisky by the color, appearance, and especially by the smell. He testified that, about an hour later on the same day he returned with another witness named Wilson, and picked up the fragments of the bottle. Both he and Wilson testified that the odor seemed to be that of whisky. Appellants' counsel asked the witness Devaney whether he had testified upon the preliminary examination that this occurred on the day following, rather than on the same day. The witness replied that he was not positive that he had not given such testimony, but that he did not remember it. Appellants offered to prove by the testimony taken at the preliminary that he had so testified, which offer was rejected by the court.

"Sec. 8039. A witness may also be impeached by evidence, that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." C. S. § 8039.

This, of course, includes a contradictory statement made by the witness while testifying at the preliminary examination. *State v. Clark*, 27 Idaho, 48, 59, 146 Pac. 1107. If the witness admits that he made such contradictory statement, there is no need of in-

troducing the transcript of his testimony, and to reject it would not be error. If he does not absolutely and unqualifiedly admit that he made such contradictory statement, then the adverse party should be permitted to prove that he did so. *Jones' Commentaries on Evidence*, vol. V, § 845, p. 204. Counsel for the state argues that this was an attempt to impeach the witness on an immaterial matter. We do not so regard it. We cannot be sure what effect the evidence offered would have had on the minds of the jury, but it might well have had weight with them as affecting either the veracity or the accuracy of the witness. We regard this error of the court as prejudicial and requiring a reversal. The judgment is reversed.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

(35 Idaho, 614)

McCARTY v. WARNKIN et al. (No. 3467.)

(Supreme Court of Idaho. July 1, 1922.)

1. Appeal and error \S 553(2) — Reporter's transcript not considered unless settled by trial court.

Where a transcript an appeal contains what purports to be a reporter's transcript of the proceedings at the trial, which is not settled by the trial judge, the same cannot be considered on appeal from a judgment.

2. Appeal and error \S 616(2) — Appeal from order denying new trial dismissed for want of transcript containing certificate as to papers used at the hearing.

Where the transcript on appeal from an order or contested motion does not contain a certificate of the trial judge, clerk, or attorneys that the papers therein contained constitute all the records, papers, and files used or considered by the judge making the order on the hearing of the motion, as required by C. S. § 7167, and rule 24 of this court (176 Pac. xix), the appeal will be dismissed.

Appeal from District Court, Bear Lake County; Robt. M. Terrell, Judge.

Action by W. N. McCarty against Arthur Warnkin and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John A. Bagley, of Montpelier, and Peterson & Coffin, of Pocatello, for appellants.

White & Bentley and H. B. Thompson, all of Pocatello, for respondent.

RICE, C. J. The appeal in this case is from a judgment and from an order denying appellants' motion for a new trial.

[1] The record contains what purports to be a reporter's transcript of the evidence and proceedings at the trial, which is not settled by the trial court. It cannot be considered on appeal. *Wells v. Culp*, 30 Idaho,

438, 168 Pac. 218; Minneapolis Threshing Machine Co. v. Peterson, 31 Idaho, 745, 176 Pac. 99; Ellsworth v. Hill (Idaho) 200 Pac. 1087.

[2] The transcript does not contain a certificate as to the papers used upon the hearing of the motion for a new trial. The action of the court in denying the motion is therefore not subject to review. *Biwer v. Van Dorn*, 32 Idaho, 213, 179 Pac. 953; *Spencer v. John*, 33 Idaho, 717, 197 Pac. 827.

This leaves the judgment roll alone for consideration. No error appearing on the face thereof, as supplemented by permission of the court granted at the hearing, the judgment is affirmed. Costs to respondent.

BUDGE, McCARATHY, DUNN, and LEE, JJ., concur.

(35 Idaho, 577)

CALL et al. v. COINER. (No. 3456.)

(Supreme Court of Idaho. June 27, 1922.)

Use and occupation §10—Owner who tacitly consents to occupation and cultivation of land cannot recover value of crops.

Held, since the land in controversy was occupied and cultivated with the tacit consent of appellant, he has no right to recover from respondent the value of the crops, but, in any event, can recover no more than the reasonable rental value of the land.

Appeal from District Court, Lemhi County; F. J. Cowen, Judge.

Action by Edwin L. Call and another against V. A. Coiner. Judgment for defendant, and plaintiffs appeal. Affirmed.

Ariel C. Cherry, of Weiser, and Ralph P. Quarles, of Salmon, for appellants.

E. W. Whitcomb, of Blackfoot, for respondent.

DUNN, J. On May 11, 1905, Alma S. Barnett made a desert land entry at the Halley land office, which, after survey, was conformed to the official survey and embraced, with other lands, lot 3, section 5, township 17 north, range 25 E. B. M., which entry passed to patent October 30, 1916. On February 2, 1917, appellant took title to this lot with the other land covered by the patent by deed from Barnett, and said patent was recorded in the office of the recorder of Lemhi county on February 26, 1917. On January 12, 1912, respondent made application in said land office under the forest homestead law for a tract of land for which he afterwards received final certificate erroneously embracing a portion of said lot three. It appears from the evidence that the land in controversy, amounting to about 2½ acres, was reclaimed by respondent and

was seeded to hay and the crops removed therefrom by him up to and including the year 1918. Both appellant and respondent appear to have been aware, during the years 1917 and 1918, of the conflict between these two entries, but not to have known exactly where the line would run separating the patented land from that claimed by respondent. While appellant claimed the land in controversy and in fact was the owner of it during the years 1917 and 1918, respondent's occupation and use of it during those years appears to have been with the tacit consent of appellant. Whatever labor or expense was incurred in the growing and harvesting of the hay was provided by the respondent. In this situation, if appellant is entitled to compensation from respondent, which we do not decide, he can recover only the reasonable rental value of the land during those years. In this action he is suing for the full value of the crops grown upon said lands during said years, and this he is not entitled to recover. The verdict of the jury was correct.

The judgment is therefore affirmed, with costs to respondent.

RICE, C. J., and BUDGE, McCARATHY, and LEE, JJ., concur.

(35 Idaho, 637)

RYAN v. OLD VETERAN MINING CO. et al. (No. 3941.)

(Supreme Court of Idaho. July 10, 1922.)

1. Appeal and error §597(1)—Where amended pleading filed, original must not be put in transcript.

When an amended pleading has been filed, and no question is raised as to the original, the latter must not be put in the transcript.

2. Appeal and error §597(1)—Original pleading properly made part of transcript when filing date rendered material by adverse plea.

The filing date of the original pleading is properly made part of the transcript, when that date is rendered material, by the fact that the adverse party pleads that the action is barred by the statute of limitations.

Appeal from District Court, Shoshone County; A. H. Featherstone, Judge.

Action by Thomas Ryan against the Old Veteran Mining Company and others. From a judgment of dismissal, plaintiff appeals. On motion to dismiss appeal and strike transcript or part of transcript. Motion denied.

Isaham N. Smith, of Portland, Or., and Therrett Towles, of Wallace, for appellant.

C. W. Beale, of Wallace, for respondents.

McCARTHY, J. [1, 2] This is an appeal from a judgment of dismissal rendered after the court had sustained a demurrer to the third amended complaint. One of the grounds of demurrer was that the action was barred by the statute of limitations. The transcript contains the third amended complaint, but not the original. It contains the date of filing the original complaint, to wit, September 30, 1919. Respondents move to dismiss the appeal, to strike the transcript, and strike the date of filing the original complaint on the ground that the transcript does not contain a copy of the entire judgment roll, and that said filing date is not a proper part of the judgment roll or of the record on appeal.

When an amended complaint is filed, it takes the place of the original, and all subsequent proceedings in the case are based upon the amended pleading. *People v. Hunt*, 1 Idaho, 433; *Warren v. Stoddart*, 6 Idaho, 692, 701, 59 Pac. 540; *Armstrong v. Henderson*, 16 Idaho, 566, 102 Pac. 361. When an amended pleading has been filed and no question has been raised as to the original pleading, the latter must not be put in the transcript. *Warren v. Stoddart*, supra. In the present case no question is raised as to the original pleading itself. The only fact in connection with it which is pertinent to this appeal is the date of its filing. C. S. § 7163, requires the appellant to furnish a copy of the judgment roll, and C. S. § 6901, provides that the pleadings are a necessary part of it. These statutes, however, should be given a sensible construction, which will carry out the purpose clearly intended, and not a construction which will put the litigants to much useless trouble and expense. We conclude that, since the amended complaint takes the place of the original, the filing date on the original complaint pertains to the amended complaint, even though it be not indorsed on it, and is a proper part of the judgment roll. We conclude, further, that this transcript, which contains the amended complaint and the filing date of the original complaint, is a substantial compliance with the statute.

The motions to dismiss the appeal and to strike are denied.

RICE, C. J., and DUNN and LEE, JJ., concur.

(35 Idaho, 409)

PHY et al. v. SELBY et al. (No. 3011.)

(Supreme Court of Idaho. April 28, 1922.
On Petition for Rehearing,
July 1, 1922.)

1. Brokers \S 43(2)—Statute requiring written contract applicable to contract between owner of real estate and broker, but not to contract between brokers.

C. S. § 7979, applies to a contract between the owner of real estate and a broker, and not

to a contract between two brokers, one of whom is employed by the other to assist him.

2. Pleading \S 192(2)—Where complaint contained a count on express contract on quantum meruit, and for money had and received, a special demurrer for uncertainty was properly sustained.

Where a complaint attempts to state in one count a cause of action on an express contract, one on quantum meruit, and one for money had and received, a special demurrer for uncertainty is properly sustained.

3. Action \S 45(1)—Cause of action for money had and received held inconsistent with counts on express contract and quantum meruit.

In this case the cause of action for money had and received is inconsistent with, and cannot be joined with, the one on an express contract, or the one on quantum meruit.

Appeal from District Court, Camas County; H. F. Ensign, Judge.

Action by J. P. Phy and another against F. M. Selby and another for a commission on sale of real estate. Judgment for defendants following sustaining of a demurrer, and refusal of plaintiffs to plead further, and plaintiffs appeal. Remanded on rehearing with authority to determine appellants' motion to amend complaint if made in 10 days after filing remittitur or additional time granted; otherwise affirmed.

Paul S. Haddock, of Shoshone, for appellants.

J. W. Edgerton, of Pocatello, and Sullivan & Sullivan, of Boise, for respondents.

McCARTHY, J. This action was brought to recover a commission for a sale of real estate. The fourth amended complaint sets out that F. M. Selby (made defendant in the original complaint, but later dropped) owned certain land in Idaho; that respondent Edgerton was a real estate broker and agent for Selby for the purpose of selling the land; that respondent represented to the appellants, who were real estate brokers at La Grande, Or., that if they would furnish a purchaser for said lands he would be personally bound to them for their commission prior to the time when he should procure a binding contract with Selby for such payment; that, acting upon such request, appellants procured a purchaser who bought the land upon the terms stipulated, paying therefor \$65,000. Appellants incorporate into the complaint a letter written by them to respondent, in which they stated that they had had a talk with the prospective purchaser, Mr. Williams, who had decided to take the place on Mr. Selby's own terms, and in which they made arrangements for him to meet respondent and complete the deal. They also stated:

"Now, getting down to the part that is most interesting to me, which is the commission, I would like a written agreement about that stating that the amount of commission shall be \$3,250.00. A wire from Mr. Selby will be sufficient upon this point, or a letter authorizing you or Mr. Williams to pay me the said amount. I am not doubting but that this will be attended to, but it is business on my part to have it in writing."

Treating this letter as an offer from them, they allege that respondent accepted the offer on behalf of his principal, Selby, and himself, and communicated the acceptance in the following telegram, to wit:

"Fairfield, Idaho, Oct. 10, 1917.

"Henry T. Hill, La Grande, Or.: Selby confirms Williams' acceptance and deeds will be forwarded on wire from me that contract which I am authorized to draw is signed deal however must be closed by November first and fifteen thousand in escrow when contract signed wire when Williams wants possession will be away next week and Williams should come not later than Friday. Edgerton."

They further allege that respondent caused said Selby to close the contract with said Williams and sell the land to him on the terms and conditions contained in the said letter, that respondent failed and neglected to procure any binding contract for a commission between appellants and Selby, but, on the contrary, induced said Selby to pay respondent said commission of \$3,250 which he received to and for the use of appellants. They pray for judgment in the sum of \$3,250.

A demurrer was interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action; (1) On the theory of contract, quantum meruit, or for money had and received; (2) in that it did not allege a contract in writing between Selby and Edgerton for the payment of a commission; (3) in that the letter and telegram set forth therein did not constitute a contract for the payment of a commission for the sale of real property as required by section 6012 of the Compiled Laws of Idaho (now C. S. § 7979). This demurrer assigns the reasons why it is claimed that the complaint does not state facts sufficient to state a cause of action, but it is in essence a general demurrer. A special demurrer was also interposed on the ground that the fourth amended complaint is ambiguous, unintelligible, and uncertain, in that it cannot be determined whether the action is based upon contract, quantum meruit, or is for money had and received; also on the ground that several causes of action have been improperly united. The demurrer was sustained, and, appellant refusing to plead further, judgment was entered for respondent dismissing the action. From that judgment this appeal is taken. The principal specification of error is that the court erred in sustaining the demurrer.

The order and judgment do not show upon what ground the court sustained the demurrer, and, if any of the grounds mentioned are well taken, the judgment should be sustained.

[1] Respondent contends that any contract set out in the complaint was void under the provisions of Compiled Statutes, § 7979, which reads as follows:

"Sec. 7979. No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, signed by the owner of such real estate, or his legal, appointed and duly qualified representative."

California has a similar statute which has been construed by the courts of that state. The California cases are cited and relied upon by both parties. In *Gorham v. Helman*, 90 Cal. 346, 27 Pac. 289, the Supreme Court of California held:

"Civil Code Cal. § 1624, subd. 6, requiring agreements employing an agent or broker to buy or sell real estate for compensation or commission to be in writing, does not apply to contracts between brokers to co-operate in making sales for a share of the commissions."

In *Aldis v. Schleicher*, 9 Cal. App. 372, 89 Pac. 526, the Court of Appeal for the Second District of California held:

"While it is true, as said in *Gorham v. Helman*, 90 Cal. 346, 27 Pac. 289, that said provision was 'designed to protect owners of real estate against unfounded claims of brokers,' it is nevertheless equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate, and agrees unconditionally to pay a stipulated sum for the performance of such services. Conceding that the compensation recoverable by a broker for selling real estate is the subject of an oral contract between him and another, under which agreement, the latter is to recover the commission for effecting the sale, nevertheless a complaint, in order to state a cause of action, upon such oral contract, must allege that the one from whom it is sought to recover was by his principal authorized in writing to effect a sale."

In *Casey v. Richards*, 10 Cal. App. 57, 101 Pac. 36, the Court of Appeal for the Second District of California held that, where the first broker has no written contract with the owner, a second broker employed by the first can recover from the latter only in case the owner has paid the commission to the first broker, saying, by way of interpreting *Aldis v. Schleicher*:

"In other words, that, until it was shown either that the defendant had received a commission, or was legally entitled to recover one from the owner, there was no commission in which the plaintiff could share."

In *Johnston v. Porter*, 21 Cal. App. 97, 131 Pac. 69, the District Court of Appeal for the First District of California held that, even though the first broker did not have a written contract with the owner, yet, where the former had hired a second broker to help him, and the owner had paid the first broker the commission, the second broker could recover from the first broker where the agreement was to pay part of the commission. In *Hageman v. O'Brien*, 24 Cal. App. 270, 141 Pac. 33, the District Court of Appeal of the Second District of California followed *Gorham v. Helman* outright, holding,

"Civ. Code, § 1624, subd. 6, providing that an agreement employing an agent or broker to purchase or sell real estate for a commission, is invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. Held, that such section was only designed to protect owners against unfounded claims of brokers, and did not apply to a contract between brokers by which the principal broker contracted to pay his assistant a specified sum for services rendered in making sales."

It appears in the statement of facts, however, the agreement was to share the commission. In *Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 175, the District Court of Appeal of the First District of California held, in effect, that, in order for the second broker to recover of the first broker, where the latter did not have a written contract with the owner, it must appear that there was a partnership between the two brokers, or that the contract between them was for a division of the fee, or that the owner has paid the commission to the first broker. The court says:

"If we hold this case not to come within the provisions of section 1624 of the Civil Code we must ignore the careful insistence to be discerned in the cases upon the existence of a partnership, or of an agreement to divide commissions, or of the existence of a fund received by one broker in which the second broker may be allotted a share—and lay down the rule that all these things are immaterial, and that a direct contract of employment to sell real estate for a specific compensation is invalid if made by the owner of the property with a broker, but is valid if made between two brokers—contrary to the rule declared in *Aldis v. Schleicher*, supra, and which appears to us to be plainly applicable to the case at bar."

The refinements of the rule by the District Courts of Appeal do not impress us as sound or logical. In the only Supreme Court decision, to wit, *Gorham v. Helman*, the principle is established that the statute refers to agreements between the owner and a broker, and not to contracts between the first broker and a second broker whom he employs to assist him. With this principle we are in accord. We fail to see that it makes any difference whether the agreement between the

first broker and the second broker is to pay a specified sum, part or all of the commission, or whether or not the owner has paid the first broker. These circumstances do not affect the principle. If the statute does not apply to a contract between brokers the first brokers should be liable to the second broker on any contract which he makes for himself, and which is supported by a sufficient consideration, as distinguished from a contract which he makes on behalf of his principal. If respondent, acting on his own behalf, made a contract with appellants to pay them a commission for obtaining a purchaser, we conclude that it was a valid contract, even though there was no written contract between the owner and respondent, and irrespective of how much respondent agreed to pay appellants, and of whether or not the owner paid any money to respondent.

If the owner paid a fee to respondent for appellants, intending that respondent should pay it to appellants, that would raise the question of whether appellants could recover from respondent for money had and received, an entirely different question from that of a contractual liability on the part of respondent based on his contract with appellants.

In the fourth amended complaint the pleader starts out by alleging that respondent agreed to pay appellants a commission if he did not obtain a written contract to that effect with the owner. If this states any cause of action it is on a quantum meruit, and it is later alleged inferentially that \$3,250 is a reasonable commission. Next the pleader sets out the letter from appellants to respondent and respondent's telegram in reply, the theory evidently being that these made a written contract obligating respondent to pay a commission of \$3,250. Next the pleader alleges that Edgerton neglected to obtain a written contract between appellants and the owner, but induced the latter to deliver to him the commission of \$3,250, which he received to and for the use of appellants. Here the theory is that the action is one for money had and received. In our judgment the second theory is not tenable, in that the letter and telegram did not constitute a contract between appellants and respondent, obligating the latter to pay the commission. The third theory is also untenable in that the complaint does not allege that the owner paid the money to respondent to and for the use and benefit of appellant. If the complaint states any cause of action, it is by virtue of the allegations first above referred to, and on the theory of quantum meruit. Concluding, as we do, that the statute does not apply to a contract between the first broker and the second broker, a contract on the part of respondent to pay appellants a reasonable commission for obtaining a purchaser for the property would be valid. We conclude that the complaint states such a

cause of action, and the general demurrer was not well taken. Incidentally attention is called to the fact that the complaint alleges that the owner actually paid the commission to respondent, and this would permit a recovery even under the theory adopted in the latest California decision, to wit, *Sellers v. Solway Land Co.*, supra. However, we lay no stress on that circumstance.

[2] There remains, however, the special demurrer on the two grounds: First, that the complaint is ambiguous, unintelligible, and uncertain in that it cannot be determined whether the action is based upon contract or quantum meruit, or is for money had and received; secondly, that several causes of action have been improperly united. We think the first ground is well taken, and that the complaint is uncertain for the reason given. Even though the causes of action on express contract and for money had and received are not sufficiently stated, yet their presence in the complaint, and the theories which they inject, make the complaint uncertain. The fault is uncertainty, rather than ambiguity and unintelligibility; but the fact that the three adjectives are used in the conjunctive does not render the demurrer bad.

[3] We turn now to the second ground of the demurrer, viz. that several causes of action have been improperly united. Disregarding the question of commingling several causes of action without separately stating them, which defect should have been raised by a motion to require appellants to separately state their several causes of action rather than by demurrer (*Darknell v. Coeur d'Alene, etc., Transp. Co.*, 18 Idaho, 61, 108 Pac. 536), and conceding that under the authority of that case, an action on quantum meruit and express contract can be joined, it appears to us that an action on contract and one for money had and received are inconsistent. If inconsistent, they cannot properly be joined. *Darknell v. Coeur d'Alene, etc., Transp. Co.*, supra. We conclude that the special demurrer was good on both grounds. As stated above, if either the general or special demurrer was well taken, on any of the grounds covered, the ruling of the court was correct.

The judgment is affirmed, with costs to respondent.

RICE, C. J., and DUNN and LEE, JJ., concur.

On Petition for Rehearing.

RICE, C. J. Appellants have filed a petition for rehearing in this cause, or in lieu thereof, that the court modify its judgment and remand the cause to the trial court for such further proceedings as may be deemed proper, with liberty to the trial court to entertain an application by them to amend

their complaint. Under the circumstances of this case, we think the former judgment should be modified. See *Feehan v. Kendrick*, on petition for modification of decision, 32 Idaho, 225, 179 Pac. 507. The cause will therefore be remanded to the trial court, with authority, within its legal discretion, to entertain and determine a motion by appellants to amend their complaint, should such motion be made within 10 days after filing the remittitur, or within such additional time as the trial court may grant them. If such motion shall not be made within such time, the judgment of the trial court will stand affirmed.

BUDGE and DUNN, JJ., concur.

(35 Idaho, 589)

STATE v. GROVER. (No. 3591.)

(Supreme Court of Idaho. June 30, 1922.)

1. Homicide \S 119—One may protect his life by all available means if in fear of receiving great bodily injury.

One who is suddenly attacked by another has a right to protect his own life and bodily security by such means as may be available, provided he is in present fear of receiving great bodily injury and uses no greater force than necessary to repel the attack, in view of the exigencies of the situation as it appears to him as a reasonable man.

2. Criminal law \S 935(1)—Refusal to grant new trial where evidence is consistent with defendant's innocence is error.

Where in a criminal prosecution the undisputed evidence is entirely consistent with the defendant's innocence, and the jury nevertheless returns a verdict of guilty, the trial court commits error in refusing to grant the defendant a new trial.

3. Homicide \S 115—Where defendant struck deceased when deceased was attacking defendant with shovel, killing was justifiable.

Where in a prosecution for murder the evidence shows that the defendant was attacked by the deceased with a shovel, that the defendant warded off the first of deceased's blows with his own shovel, that deceased then struck a second blow at defendant which the latter dodged, and was in the act of administering a third blow when he was fatally struck by defendant, held, that the homicide was justifiable.

Appeal from District Court, Bingham County; F. J. Cowen, Judge.

William D. Grover was convicted of involuntary manslaughter, and he appeals. Reversed and remanded.

Thomas & Andersen, of Blackfoot, for appellant.

Roy L. Black, Atty. Gen., James L. Boone, Asst. Atty. Gen., and W. H. Holden, of Idaho Falls, for the State.

BUDGE, J. Appellant was convicted of involuntary manslaughter. This appeal is from the judgment and from an order denying a motion for new trial.

From the record it appears that on the morning of July 7, 1919, an altercation took place between appellant and one Joseph Koury, during the course of which the latter received a fatal blow upon the head from a shovel in the hands of appellant, resulting in cranial fractures and practically immediate death. The evidence tends to show that appellant left his house at about 5:30 a. m. on said date, and proceeded to a lateral irrigation ditch which runs through his premises, where he checked up the water and made a cut just above the headgate on one side of the ditch about 18 inches to 2 feet deep for running the water out into his sugar beet field. Appellant was wearing rubber boots and standing in the water in the cut, placing dirt against the headgate, when, about 7 a. m., the deceased came up. Some conversation ensued, and appellant testified that deceased attempted to remove the boards from the check in the headgate, but that he reached forward with his right hand and prevented deceased from doing so, whereupon deceased became enraged and struck two blows with his shovel at appellant, the first of which struck the shank of appellant's shovel, and the second of which appellant dodged, whereupon appellant, in defense of his person, struck deceased a left-hand blow with his shovel upon the right temporal region, knocking him into the ditch below the headgate. Appellant lifted deceased out of the ditch and laid him on the grass on the ditch bank and immediately notified the sheriff by telephone that he had had trouble with deceased and requested him to come at once. The sheriff arrived at the scene of the homicide shortly thereafter, found the body of the deceased, and placed appellant under arrest and conveyed him to the county jail.

An autopsy was held by three doctors, who were called to testify upon the trial as state's witnesses, and testified as to the condition of deceased's head, and that in their opinion he had received two blows rather than one, due to the fact that a slight indentation or depression was found in deceased's skull just above the left eye, but admitted that all the other fractures might have been caused by one blow. A fourth doctor who saw the autopsy and was called as a witness for appellant testified that there was no indentation or depression above the left eye, and that all the fractures found might have been and were caused by one blow. There is no evidence in the record which accounts for the indentation or in-

dicates that it was produced by any act of appellant, nor were there any eyewitnesses to the affray other than appellant.

The jury returned a verdict of guilty of involuntary manslaughter and recommended lenience. Appellant's motion for new trial was overruled, and judgment was rendered, in which he was sentenced to imprisonment for not less than six months nor more than ten years.

Numerous assignments of error are made by appellant, but, as we view the case, it will be necessary to consider but one, viz. that the evidence is insufficient to support the verdict.

It is undisputed that deceased met his death at the hands of appellant, and the state, as we understand it, practically concedes that, if the evidence shows that but one blow was inflicted by appellant, the homicide was committed in self-defense and is justifiable, and there is not sufficient evidence upon which to base a conviction.

Upon the trial appellant testified in part as follows:

"When he [deceased] went to push the boards out of the headgate, I took hold of his right arm with my * * * right arm, * * * and detained him from taking the checks out of the gate; told him to wait a moment and lets reason this thing out and do it in a proper way, and immediately as soon as I let go of his arm, without saying a word or anything, he * * * hit at my head with his shovel. * * * As he struck at my head I threw up my shovel. I was holding my shovel in my right hand and threw it up and caught the lick on the shank of my shovel, broke his blow, stopped it from hitting me. Then he struck at my head, this time striking more directly down so that I was not able to catch the lick on my shovel, but managed to dodge his lick. He immediately threw his shovel back to strike the third blow at me, and I struck at him, aiming to hit his arm and stop him from striking me. As I struck he ducked down and a little forward and caught the blow on the right side of his head. He turned just slightly until he faced the ditch and pitched forward into the ditch with his shovel under him. As soon as I seen that I knocked him down I jumped on the bank where he had been standing and stood and looked at him for a second or so to see if he wasn't going to get up, and then I stepped down into the ditch and took hold of him and lifted him onto the ditch bank and looked at him a minute or two longer to see if he appeared to be going to get up, and I stepped down into the ditch and picked his shovel up and put it on the bank and took my shovel and went down to Mr. Bernard's place and called the sheriff. * * * I was standing in the cut in the ditch bank; the water was running out onto the beets; it was muddy. If I moved east I went right into the soft mud, if I went west I went into the irrigating ditch. If I tried to retreat, * * * I had to go up over the bank about 18 inches or 2 feet high, and also sweet clover growing there that was 4 or 5 feet high, which made it practically impossible for me to get out of the way.

"Q. Now at the time that you aimed the blow at Mr. Koury, did you intend to take his life? A. No, sir.

"Q. Were you afraid at that time? A. Yes, sir.

"Q. Why did you strike at him? A. Because I knew that my person was in danger from his blows, the way he was striking at me, and I wished to stop him from striking at me.

"Q. Where did you hit him at that time? A. As near as I could tell, I hit him on the right side of the head, just in front of the ear.

"Q. What part of the shovel did you strike with? Which way did you hold the shovel? A. Well, it was the back of the shovel that struck Mr. Koury.

"Q. The back and flat side, in this manner? A. Yes, sir.

"Q. I will ask you if you struck Mr. Koury a blow upon the front of the skull, on the head, at a point approximating this point, or any way about that point as shown on this exhibit? A. No, sir; I did not.

"Q. The only place you struck and the only time you struck was on the right side and about this point? A. Yes, sir."

Dr. W. E. Patrie, a witness for the state, upon direct examination, in reference to the autopsy performed upon deceased, testified that:

"A. A circular incision was made across the anterior portion of the cranium or across the forehead and back to a point just above and a little posterior to the ears on both sides, and his scalp was laid back, the posterior portion of the scalp laid well back, and the scalp from his forehead laid down, exposing both orbits in front, and I think it was laid back as far as the lambdoid suture of the cranium in the rear, and we found two, we thought, two distinct fractures, one on the left side extending from a point well within the left orbit outwards to the ridge in front of the superciliary ridge above the eye and extending back for a distance of probably four or five inches straight back to a point an inch posterior to the sagittal suture that runs across the head."

On cross-examination he testified in part as follows:

"Q. Do you want the jury to believe from your testimony that it is impossible for a skull to be fractured on one side from a blow on the other? A. No, sir.

"Q. You don't know of your own knowledge there was two blows struck upon the head of Joseph Koury, do you? A. No, sir. * * * It is my opinion that two blows were struck. I don't say my opinions are absolutely correct.

"Q. So that you have information that a person can be hit on one side of the head and the skull fractured on the other side, haven't you? A. Yes, sir.

"Q. Was the skin at any point on the head of the deceased broken? A. No, sir.

"Q. The skin and tissue were intact all over the head? A. Yes, sir.

"Q. You noticed one swelling on the head, and that was on the right side? A. Yes, sir; right side.

"Q. And that is the only place there was any swelling? A. Yes, sir."

Dr. H. J. Simmons, called as a witness by the state, testified on cross-examination in part as follows:

"Q. And the question of whether a cranium might be fractured on the opposite side from the point of impact depends entirely on the nature and force of the blow, doesn't it? A. Force and direction of the blow and the resistance of the skull.

"Q. And if struck by a flat instrument be more liable to produce a bursting effect than if struck by a comparatively small instrument? A. Yes, sir.

"Q. * * * Why should you say, after saying it would depend on the nature of the instrument and the force of the blow the making of a fracture of that kind, when you were not present, didn't know what kind of an instrument was used or the force of the blow, that it would be impossible to make that kind of a fracture? A. For the simple reason that this fracture was depressed in front.

"Q. And it is a linear fracture isn't it, Doctor? A. It is.

"Q. And as the books say usually caused by bursting? A. Yes, sir."

On direct examination Dr. F. W. Mitchell, a witness for the state, testified:

"Q. I will ask you to give your reasons for the opinion you have expressed to the effect that the injuries were not done with one blow? A. There was a distinct fracture on the right side and a depression over the wing of the temporal bone and a fracture through this line of suture and over to another fracture from the left side and about an inch or such a matter above the ridge of the eye and a slight depression, and I could not see how he could get this from this, get the two depressions from one blow."

On cross-examination he testified that:

"Q. * * * You don't think that a blow on one side of the head would produce a fracture as you have testified to on the right? A. Yes, sir; that could be done.

"Q. All those fractures could have, as a matter of fact, been produced at the point you have mentioned here? A. All except this depression."

Dr. O. M. Cline, also called as a witness for the state, testified on cross-examination:

"Q. I will ask you, Doctor, if you think it is impossible for a person to be struck on the head at this point here by an instrument such as the shank of a shovel * * * sufficiently hard to fracture as indicated on this * * * illustrated skull, whether or not it would be impossible to produce a bursting fracture over here? A. In my opinion, yes.

"Q. Do you know of your own knowledge that that couldn't be done? A. In my opinion it could not be done. * * * One learns in fractures to know nothing of his own knowledge.

"Q. In other words you can never tell in looking at fractures? A. The fracture is very erratic.

"Q. A blow made at one place might cause any kind of a fracture? A. Yes, sir."

Dr. W. W. Beck, a witness called on behalf of appellant, testified on direct examination that:

"Q. I will ask you, Doctor, if there was at or near or approximately at a point over the left eye any depression or indentation as represented here? * * * A. There was no depression at all on this side of the head. * * *

"Q. Now, I will ask you, Doctor, if in your opinion a blow on the right side of the head such as you found upon the deceased, made with a shovel, could have produced all of the fractures * * * which you found upon the head of Joseph Koury? A. Yes, sir."

[1] There is no competent evidence in the record to support the theory that fractures in the skull of the deceased, as described by the state's expert witnesses, could not have been caused by one blow. However, these same witnesses testified that the slight depression over the left eye was not in their opinion caused by the same blow that produced the fractures. Conceding that there was a slight depression over deceased's left eye, still there is a total lack of evidence that the slight depression was due to any act of appellant. The skin over the slight depression was not even broken. There was no swelling or discoloration. This slight depression may have been due to many causes, wholly unconnected with the appellant. When we take into consideration all of the evidence, it is apparent that there is no sound reason suggested which leads to the conclusion that the depression was attributable to appellant rather than to some cause unknown. The fact that the slight depression was found, connected with the admission of appellant that he struck the deceased with his shovel, may have been sufficient to create in the minds of the jury a suspicion that the slight depression was due to some act of appellant. But, at most, this suspicion must of necessity rest upon a mere inference, and it will hardly be contended that appellant's conviction should be upheld if supported by a mere inference only, in the face of the universally accepted rule that the evidence must establish appellant's guilt beyond a reasonable doubt and to a moral certainty. If there was a second blow attributable to appellant, it is lamentable that there was no competent evidence to establish this fact. We understand the rule to be that, where evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the theory of innocence be adopted.

[2, 3] If appellant was attacked by deceased with a shovel in the manner as testified to by him, he was clearly justified in defending himself, and the homicide was justifiable, upon the ground that he had a right to protect his life or to avoid receiving great bodily injury at the hands of deceased, provided he was in present fear and used no

greater force than was necessary in view of the exigencies of the situation as it appeared to him as a reasonable man.

The evidence is undisputed that the deceased struck one blow, which appellant ward off with his shovel. In this appellant is corroborated by proof of the indentation left upon his shovel. Appellant further testified, and in this he is uncontradicted, that the deceased struck a second blow, which he dodged, and was in the act of striking a third blow, when appellant struck the deceased, causing the injuries from which he died. Appellant stated that just as he struck the deceased, the latter "ducked down and a little forward and caught the blow on the right side of the head; that he aimed to strike him on the arm." There is no evidence of malice, premeditation, or ill will shown to have existed in the mind of appellant against the deceased.

From the whole evidence, we think it clearly appears that the killing was accidental and not intentional. We think it can be fairly said that the undisputed evidence in this case is entirely consistent with the appellant's innocence, and, if the settled rules of law uniformly recognized in the trial of criminal cases are to be applied, it becomes our duty to so declare and grant appellant a new trial.

We therefore conclude that the trial court erred in refusing to grant a new trial in this case. From what has been said, it follows that the judgment must be reversed, and the cause remanded; and it is so ordered.

RICE, C. J., concurs.

DUNN, J. (concurring). I think the evidence in this case is sufficient to support the verdict, but concur in reversing the judgment and granting a new trial, solely on the ground that the court committed reversible error in giving instruction No. 29, which reads as follows:

"The court instructs the jury that a killing is not in self-defense if the defendant, having the opportunity to decline further combat in good faith, instead continues the struggle or follows the deceased the result of which is homicide."

Under this instruction a defendant must first in good faith have declined further combat before he can successfully plead self-defense, no matter how savage, dangerous, and unprovoked the attack by his antagonist. This is not in harmony with the law of self-defense in homicide cases as laid down in our statute, which reads as follows (C. S. § 8219):

"Homicide is also justifiable when committed by any person in either of the following cases:

3. When committed in the lawful defense of such person, or of a wife or husband, parent,

child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal (mutual) combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed. * * *

I find nothing in the other instructions given that could possibly have cured this error so as to leave the jury with a correct understanding of the law of self-defense, and therefore concur in reversing the judgment and granting a new trial.

McCARTHY, J., concurs with DUNN, J.
LEE, J., took no part in the opinion.

(28 N. M. 161)

McDONALD et al. v. DE WITT et al.
(No. 2662.)

(Supreme Court of New Mexico. June 19, 1922.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 1010(1)—Findings supported by substantial evidence not disturbed.

Findings supported by substantial evidence will not be disturbed on appeal.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by W. W. McDonald and another against O. H. De Witt and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. A. Keleher, of Albuquerque, for appellants.

J. A. Miller, of Albuquerque, for appellees.

RAYNOLDS, C. J. The appellees, W. W. McDonald and J. P. Gill, recovered a judgment against the appellants, O. H. De Witt and Emma B. De Witt, in the trial court, in the sum of \$500, and from that judgment this appeal has been perfected.

The complaint alleged the making of a broker's contract for the sale of a ranch owned by Emma B. De Witt and the performance thereof by the appellees. The appellants' main contention is based upon the alleged insufficiency of the proof. The contention goes to the proposition that the evi-

dence discloses that, while it is true services were rendered by the appellees in the sale of the ranch, yet it appears that such services were purely gratuitous, and for that reason no recovery was possible. It is argued that the appellants failed to prove employment, performance, procuring cause, and amount of compensation. It would serve no useful purpose to set forth the evidence. It is sufficient to say that in many respects it was conflicting, and that there was substantial evidence to sustain the findings of the trial court.

For that reason the judgment will be affirmed; and it is so ordered.

PARKER and DAVIS, JJ., concur.

(28 N. M. 162)

HINDI v. DURAN (DURAN, Intervener).
(No. 2701.)

(Supreme Court of New Mexico. July 1, 1922.)

(Syllabus by the Court.)

Sufficiency of evidence.

Evidence examined, and held to sustain finding of trial court.

Appeal from District Court, Torrance County; Ed Mechem, Judge.

Action by William Hindi against Dionisio Duran, in which Maria S. Duran intervened. From judgment dismissing attachment, the plaintiff appeals. Affirmed.

Laughlin & Barker, of Santa Fe, for appellant.

W. P. Harris, of Vaughn, for appellee.

DAVIS, J. A writ of attachment was issued in this case based upon an affidavit charging that the defendant, appellee here, was about fraudulently to dispose of his property, and had fraudulently disposed of his effects, so as to hinder, defraud, and delay his creditors. These allegations were denied by an answer. After hearing the evidence the court entered judgment dismissing the attachment. This appeal was then taken, and the argument is made here that the uncontradicted proof was sufficient to sustain the allegations of the attachment affidavit. We have reviewed the evidence and agree with the trial court that it was not sufficient. The judgment is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(28 N. M. 156)

STATE v. HERRERA et al. (No. 2651.)

(Supreme Court of New Mexico. April 11, 1922. Rehearing Denied July 1, 1922.)

(Syllabus by the Court.)

1. Criminal law \S 1028—Errors not involving fundamental rights not reviewed where not called to attention of lower court.

Where fundamental rights are not involved, this court will not review errors not called to the attention of the trial court.

2. Perjury \S 29(4) — Variance held immaterial.

Where an indictment for perjury alleges that it was committed in a case of the state against three defendants, while the proof shows that one of the persons named was not a defendant, the variance is immaterial.

3. Perjury \S 29(4)—Variance between allegation of indictment and proof immaterial where allegation was surplusage.

A variance between an allegation of the indictment and the proof is immaterial if the allegation was surplusage.

(Additional Syllabus by Editorial Staff.)

4. Indictment and information \S 124(4)—Indictment charging three persons jointly with perjury held faulty.

Indictment charging three persons jointly with perjury by giving false testimony held faulty, since perjury is an individual offense which may not be committed by several persons together.

5. Criminal law \S 1032(1)—That indictment was faulty in joining three defendants is not available on appeal where not raised in lower court.

In prosecution of three defendants for perjury, the defendants could not complain on appeal that indictment was faulty in improperly joining the three defendants, where such question was not raised in the lower court.

6. Criminal law \S 1038(2)—Failure of court to give jury form of verdict finding some of defendants guilty and others not guilty held not available on appeal in absence of objection in trial court.

In prosecution of three defendants for perjury, failure of court to give jury a form under which a verdict of guilty as to one or more of them and not guilty as to the others might be rendered, although jury was instructed that such a verdict was possible, held not available on appeal, where the matter was not called to the attention of the lower court.

7. Indictment and information \S 167—Surplusage need not be proved except where it constitutes a part of description of offense.

Ordinarily surplus matter in an indictment need not be proved, but may be disregarded, but such rule does not apply where the facts unnecessarily alleged constitute a part of the description of the offense.

Appeal from District Court, Valencia County; R. R. Ryan, Judge.

Trinidad Herrera, Francisco Vallejos, and Mateo Chavez were convicted of perjury, and they appeal. Affirmed.

Rodey & Rodey, of Albuquerque, for appellants.

A. M. Edwards, Asst. Atty. Gen., for the State.

DAVIS, J. [4] The three appellants were jointly indicted for perjury. The indictment charged that each of them was called and sworn as a witness and each gave certain false testimony. All three were convicted. They now object to the indictment and assign as error that the charges against them were improperly joined. The indictment amounted to three separate accusations, one against each of the appellants. Perjury by its very nature is an individual offense which may not be committed by several persons together. The indictment was faulty in charging against the three appellants offenses committed by each of them individually and in which the others did not participate. But no objection to the joint indictment or the joint trial was made in the lower court. The error is raised here for the first time.

The record is in the same condition as to various other errors which are assigned. The court gave the jury only two forms of verdict, one finding all three defendants guilty, and the other finding them not guilty, neglecting to furnish a form under which a verdict of guilty as to one or more of them and not guilty as to the others might be returned, although the court instructed that such a verdict was possible. Appellants also argue that the indictment did not sufficiently allege the materiality of the testimony upon which the perjury was assigned, nor was its materiality proved on the trial. But neither by motion in arrest of judgment for a directed verdict, for a new trial, nor in any other manner did appellants call to the attention of the trial court any of these matters of which they now complain.

[1, 5, 6] These phases of the case, therefore, fall fairly within the rule of State v. Garcia, 19 N. M. 414, 143 Pac. 1012, holding that this court will not consider errors not called to the attention of the trial court. As pointed out in the opinion upon the rehearing of that case, an exception exists where some fundamental right has been invaded to the extent that plain injustice has been done. The errors complained of here are not of the class covered by this exception.

The same observations in a more limited degree apply to another assignment of error. Proof of the statements made by appellants upon which the perjury was assigned was made by the stenographer who took their

testimony on the trial in which the alleged perjury occurred. He read their evidence from his stenographic notes. The important testimony was that given by appellants as to the brand of certain cattle. It appears from the testimony of the stenographer that appellant Trinidad Herrera did not describe the brand verbally, but drew it on a paper which was then introduced on the original trial as Exhibit A. When the stenographer had finished the reading of the stenographic notes, counsel for the state offered the notes themselves in evidence. The attorney for appellants then asked to have Exhibit A introduced as a part of them. This exhibit was not then available, and the court said that the notes might be admitted and the documentary evidence produced later. The attorney for appellant then asked, "The court holds then that these exhibits do not have to be produced at this time," to which the court replied in the affirmative. Appellants then excepted. There was no error in this ruling. The notes without the exhibits were admissible for what they were worth, which was probably very little, since they were in stenographic form, and had already been read to the jury. Failure to offer the exhibit did not affect the admissibility of the notes, and the court was within its rights in allowing the notes in evidence and postponing the introduction of the exhibit. The failure to produce it was never raised again in any form. There was no suggestion that the case of the state was incomplete without it, nor did the court finally rule upon its necessity. The matter is therefore not available as error here.

[2] The indictment alleged that the case in which the perjury was committed was "cause No. 1176, entitled State of New Mexico v. Nicolas Mares, Trinidad Herrera, and Manuel Cheeles, upon the criminal docket of the district court * * * sitting within and for the county of Valencia." The proof was that Trinidad Herrera was not a defendant in that case, so that the true title should have been the state against the other two parties only. This variance was claimed in the trial court as fatal, and the refusal of that court to sustain this contention is alleged as error here. We think the variance was immaterial. The case was sufficiently identified by stating the court in which it was pending, giving its number upon the docket, and correctly stating the names of the plaintiff and the two defendants. Appellant could not have been misled as to the proceeding intended, and the judgment in the present case could be availed of as a bar to a second proceeding. In *State v. Lucero*, 20 N. M. 55, 146 Pac. 407, in sustaining an indictment attacked by demurrer, this court said:

"The tendency of courts in modern times is to brush aside technicalities in pleading, and to uphold indictments where the facts are al-

leged with sufficient certainty to apprise the accused of the specific charge which he is called upon to meet, and to enable him to plead the judgment in bar of a second prosecution for the same offense."

The docket number distinguishes the case intended in this indictment beyond the possibility of a mistake and makes unnecessary a consideration of such cases as *Walker v. State*, 96 Ala. 53, 11 South. 401, *People v. Straussman*, 112 Cal. 683, 45 Pac. 4, and *Wilson v. State*, 115 Ga. 206, 41 S. E. 696, 90 Am. St. Rep. 104, in which minor variances between the description of the case as alleged and proved were held fatal, but in which the identity of the cases intended were not as definitely fixed as here.

[3] But one assignment of error remains for discussion. The indictment alleged that the appellants testified that certain cattle bore the brand [N], whereas in truth and in fact the cattle did not bear said brand. If the drawer of the indictment had been satisfied with thus negating the truth of the alleged false testimony, it would have been sufficient, and no question concerning it would have arisen. But the indictment went further, and, in addition to negating the truth of the statements, alleged that the brand actually on the cattle was M G—. Upon the trial of the case there was proof that the cattle did not bear the [N] brand, but there was no proof that they were branded M G—. To the contrary, the evidence in the perjury case showed that the cattle bore the brand MG. This was claimed in the lower court, and asserted here, as a fatal variance. That it is a variance between the indictment and the proof cannot be doubted, for there is a material difference in the two brands. The question is as to whether the variance is fatal to the verdict. The alleging of the correct brand after negating the truth of the testimony as to the brand stated was unnecessary and surplusage.

[7] The ordinary rule is that surplus matter in an indictment need not be proved, but may be disregarded. An exception to the rule exists where the facts unnecessarily alleged constitute a part of the description of the offense. We do not think that the charge as to the brand actually on the cattle was descriptive of the perjury. The perjury consisted in swearing that the cattle were branded [N], when in truth they were not so branded, and the perjury was complete without reference to what brand they did in fact bear and irrespective of whether they were branded at all. The real brand in no way entered into the essentials of the offense. Proof of the falsity of the testimony was sufficiently made when it was shown that the cattle did not bear the brand testified to. While there is no doubt as to a variance between this unnecessary allegation in the indictment and the proof of the case, it was not

upon a matter material to the prosecution, nor is it fatal to the conviction.

Joyce on Indictments, § 263, states:

"It is a general rule that an indictment will not be vitiated by matter which is mere surplusage, and that such matter need not be proved."

A case illustrative of the rule is *Hull v. State*, 120 Ind. 153, 22 N. E. 117. It was a prosecution for disturbing a religious meeting, and the information unnecessarily alleged the names of the persons disturbed. There was a failure of proof in this regard. The court said:

"Where unnecessary descriptive matter is mingled with matter of essential description, the whole must be proved as laid, but 'the limit of the doctrine is that, if the entire averment whereof the descriptive matter is a part is surplusage, it may be rejected, and the descriptive matter falls with it and need not be proved.' * * * The information in the present case was complete without the allegation that the appellant's conduct was to the disturbance of certain persons named; and within the rule above stated, since the matter of description was merely surplusage, it was not necessary to prove it as laid."

The judgment is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(24 Ariz. 230)

MOSHER v. CITY OF PHOENIX.
(No. 2053.)

(Supreme Court of Arizona. July 29, 1922.)

Municipal corporations §297(2)—Commission cannot order improvement within six months from date of sufficient protest, though enough signers withdraw to leave majority of property owners in favor of improvement.

Under Civ. Code 1913, par. 1957, as amended by Laws 1917, c. 52, § 2, providing that a protest against a street improvement by the owners of a majority of the property will bar further proceedings for six months unless the owners of one-half or more of the frontage meanwhile petition that the work be done, a sufficient protest cannot be changed by withdrawals of signers so as to confer jurisdiction to order the work done within such time by numbering those withdrawing among those favoring the improvement, whether the protests be filed together or separately.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Application by Hattie L. Mosher for a writ of certiorari to the City of Phoenix. From an order quashing the writ, petitioner appeals. Reversed and remanded, with directions to enter judgment for petitioner.

J. B. Woodward, of Phoenix, for appellant.
R. W. Kramer, City Atty., and Kibbey, Bennett, Gust & Smith, all of Phoenix, for appellee.

McALISTER, J. The commission of the city of Phoenix passed a resolution of intention on May 26, 1921, to pave a portion of Culver street in that city, to wit, the section between the east line of Central avenue and the west line of Twelfth street, and immediately thereafter gave the required notice of its contemplated action. According to the resolution the total frontage on this portion of Culver street was 9,152.57 feet, but in the opinion of the commission that improvement was of more than local or ordinary public benefit, so it created an adjacent assessment district containing 5,542 feet, in order that it might bear a part of the costs and expenses of the work, which made a total frontage of 14,694.57 feet. A protest against the proposed improvement, signed by "owners of property fronting on East Culver street, and in the assessment district adjacent thereto," representing on its face 7,909.62 feet, was filed in the office of the city clerk of Phoenix on June 20, 1921, but on the same day written withdrawals from it to the extent of 758.78 feet were also filed, and on June 29th following the city commission, finding that the protest after deducting the withdrawals represented less than one-half of the frontage involved, to wit, 7,150.84 feet or 48.66 per cent. ordered that the improvement proceed. Thereupon, or after some other proceedings immaterial to the issue involved, appellant, Hattie L. Mosher, filed a petition in the superior court of Maricopa county, praying for the issuance of a writ of certiorari directed to the city of Phoenix and the commission of the city of Phoenix, ordering the return to that court of all records and proceedings relative to the proposed paving of Culver street. An order to show cause why the writ should not be granted was issued, and a full hearing thereafter had, which resulted in an order quashing the writ. It is from this order that the petitioner appeals.

It is conceded that if the withdrawals were not properly allowed the protest was sufficient to prevent further action by the commission, since, as filed, it contained a majority of the property fronting on the improvement and in the assessment district; hence the only question presented is whether signers of a protest may withdraw from it during the time allowed owners to object, and be counted in favor of the improvement. It is the contention of appellant that they cannot, because a proper protest, when filed, deprives the commission of jurisdiction to proceed further in the matter, while appellee contends that they can, since the jurisdiction of the commission depends entirely upon

the action of the property owners themselves, as that is disclosed from the records in the office of the city clerk at the close of the protest period. The correctness of these contentions must be determined by paragraph 1957, Revised Statutes of Arizona 1913 (Civ. Code), and amendments thereto as they appear in chapter 52, Session Laws of 1917, under which this part of the proceedings was had. It reads, so far as pertinent to this inquiry, as follows:

"1957. The owners of a majority of the frontage of the property fronting on said proposed improvement, or when the cost of said improvement has been made chargeable upon a district, then the owners of a majority of the frontage of property fronting upon the proposed improvement, together with the owners of a majority of the frontage of property fronting upon the streets or parts of streets contained within the limits of said assessment district, may make a written protest against said improvement within fifteen days after the date of the last publication of the resolution of intention, or within fifteen days after the completion of the posting of notices of the proposed improvement by the superintendent of streets if such date be subsequent to the day of said last publication. Such protest shall be filed with the city clerk or other officer exercising like official functions, who shall indorse thereon the date of their reception by him, and such objections so delivered and indorsed shall be a bar to any further proceedings in relation to the making of said improvement for a period of six months from the date such objections are filed unless the owners of one-half or more of the frontage as aforesaid shall meanwhile petition for the said work to be done. * * *

When no protests against such work or no objections as to the extent of the proposed assessment district have been filed within the time above specified, or when a protest shall have been filed and it is found by said legislative body to be insufficient, or when the objections to the extent of the proposed district shall have been heard, and shall have been denied, immediately thereupon the said legislative body shall have jurisdiction to order the proposed improvements. Upon acquiring jurisdiction, the said legislative body may by resolution order the improvement described in the resolution of intention to be done."

The commission of the city of Phoenix is invested by a preceding section with jurisdiction to order paved or otherwise improved, in the manner provided, its streets, and whenever in its judgment the public interest or convenience requires that an improvement of this character be made, it is authorized and empowered to initiate proceedings looking to that end, and, if not thereafter prevented by the protest of the required percentage of the property owners concerned, to order the work done. Such an undertaking is carried out by the commission's first passing a resolution of intention in which the work to be done is described, then giving the required notice of its intended action, and, after the expiration of the pre-

scribed 15 days, directing that the other necessary steps be taken, if there be not filed within that time a protest signed by the owners of a majority of the property fronting on the improvement proposed, and in the adjacent assessment district if there be one; but if a protest of this kind be filed, "such objections so delivered and indorsed shall be a bar to any further proceedings in relation to the making of said improvement for a period of six months," unless in the meanwhile the owners of one-half or more of the frontage involved petition that the work be done, and there is no claim that such a petition was filed in this instance. The mere delivery of such objections to the city clerk within the prescribed 15 days and the indorsement thereon by him of the date he received them constitute under this statute a complete bar to any further work under that resolution of intention, except in the instance mentioned, and to say that their delivery and indorsement shall be a bar to further proceedings for six months is to state as effectively as language will permit that the filing of the protest becomes an insurmountable obstacle to further action during that time. Necessarily then a sufficient protest operates as a bar from the day it is filed, and, inasmuch as its delivery and indorsement alone accomplish the purpose of its signers, its condition, when filed, must remain unchanged and determine its sufficiency.

The filing of such a protest being a bar to further action "in relation to the making of said improvement," it follows that jurisdiction to order the work done, or the possibility of acquiring it, is also defeated, because the statute does not confer on any tribunal the right and power to order done a thing which it in express language prohibits from being done. Appellant's contention, therefore, that a sufficient protest when filed cannot be changed or modified by withdrawals from it is sustained by the statute, and this is true whether the protests be filed together or separately, for the moment the owners of a majority of the frontage file objections to the improvement that entire proceeding, except it be the right to ascertain after the close of the 15-day period that the protest is sufficient, is foreclosed. The protest in this case being admittedly sufficient when filed on June 20, 1921, the withdrawal from it after that time of a frontage of 758.78 feet should not have been allowed. The owners of this property, together with the remainder of the protestants, by filing their objections defeated any possibility of complete and full jurisdiction's attaching, and no act of theirs during the six months following, after they had aided in the accomplishment of this result, would enable them to be numbered among those favoring the improvement, unless it be that during this time they join with a number of other owners of frontage

in petitioning that the improvement be made; it being required of course that the total signers on such a petition own one-half or more of the frontage involved.

It is the contention of appellee that the Legislature conferred upon the property owners, who under the law must pay for the improvement, the right and power to say whether it should be made, and that consequently the statute should be so construed as to allow them the full period of protest in which to decide if they want it. If protests against it may be filed up to the end of this time, there is, it is contended, no reason why those who have protested may not change their minds, withdraw therefrom within the time allowed for objecting, and be counted as favoring the improvement, though it is not claimed that the statute specifically authorizes such withdrawals. In substantiation of this position reliance is had principally on two cases—*City of Sedalia ex rel. v. Montgomery et al.*, 227 Mo. 1, 88 S. W. 1014, 127 S. W. 50, and *Hawley v. City of Butte*, 53 Mont. 411, 164 Pac. 305. In neither of these states, however, is the law relative to the power of the city council to improve the streets of the city similar to that of this state, but in both the jurisdiction conferred on that body is merely conditional, that is, held in abeyance or suspended until the end of the protest period, irrespective of whether the protest is sufficient or insufficient at the time of filing, when it is determined whether it shall attach. And, they hold, if the city council had been given full jurisdiction to order the improvement subject only to annulment by the owners of a majority of the frontage, the filing by the latter of a sufficient protest would defeat it, and it could not be reconferred by withdrawals from the protest. Where, however, jurisdiction is in abeyance until the close of the protest period, there is none to annul previous to that time, and property owners are free either to oppose or favor the improvement. If they have opposed it by protesting, they may favor it by withdrawing from the protest, for the general doctrine is that a protestant may withdraw from the protest and be counted in favor of the improvement up to the end of the protest period. *Littell et al. v. Board of Supervisors of Vermillion County*, 198 Ill. 205, 65 N. E. 78; *Armstrong et al. v. Ogden City et al.*, 12 Utah, 476, 43 Pac. 119; *Thorn v. Silver*, 174 Ind. 504, 89 N. E. 943, 92 N. E. 161; *Rodgers v. City of Ottawa*, 83 Kan. 176, 109 Pac. 765, and cases cited above. In paragraph 1957, above, however, jurisdiction to order the improvement is held in abeyance until the end of the protest period only when no protest at all, or an insufficient one, has been filed, while from the time a protest signed by the owners of a majority of the frontage is delivered to the city clerk and

indorsed by him with the hour he received it the entire proceeding is barred for a period of six months, unless a proper petition is filed within that time, and necessarily there can be no jurisdiction to do what the statute bars.

The judgment is reversed, and the case remanded, with directions to enter judgment for appellant.

ROSS, C. J., and FLANIGAN, J., concur.

(24 Ariz. 207)

KJERSCHOW et al. v. DAGGS. (No. 1979.)

(Supreme Court of Arizona: June 28, 1922.)

1. Principal and agent §189(1) — General allegation of agency is sufficient without averring that the agent had authority.

Where an agency is alleged, a general allegation is sufficient without averring that the agent had authority to act in the premises; that being regarded as an averment of a conclusion of law or an unnecessary repetition.

2. Brokers §43(2) — Authority to sign contract authorizing or employing a broker to purchase or sell may be verbal.

Under Civ. Code 1913, par. 3272, subd. 7, providing that no party shall be sued on an agreement authorizing or employing an agent or broker to purchase or sell real estate, mines, etc., unless signed by him "or by some person by him thereunto lawfully authorized," does not mean that the person authorized must have been authorized in writing, and he may be verbally authorized, though to execute the conveyance he must have been authorized in writing.

3. Evidence §129(1) — Evidence as to other transactions and statements in connection therewith held admissible on issue as to whether party was acting for copartners in employing real estate agent.

On the issue whether O., in employing plaintiff to render services in connection with the acquisition of lands, was acting as agent for defendants as partners with him, evidence of the course of conduct pursued by defendants and O. in finding and purchasing other properties, and that, in discussing proposed purchases, one of the defendants made statements indicating that they and O. were partners in acquiring properties, and intended to continue such relation, and that one sent to Arizona by such defendant to assist in getting certain options investigated the property in controversy, accompanied by plaintiff, held admissible as tending to establish a continuing agency.

4. Appeal and error §1002 — Verdict on conflicting evidence substantially supported must stand.

Where the facts are complicated and the testimony conflicting to the point of irreconcilability, the duty of passing thereon, if left to the jury, ought to be respected by the courts,

and their verdict upheld where found to be substantially supported.

5. Appeal and error §1005(2)—Ruling of judge denying new trial held entitled to some consideration as to sufficiency of evidence.

Where a trial judge not only heard the evidence, but passed upon its sufficiency on a motion for new trial, and he, like the jury, had first-hand opportunity to judge of the worth and weight of testimony, his ruling on the motion is entitled to some consideration.

6. Trial §333—Verdict for recovery of money not stating amount is sufficient basis for judgment where pleadings and evidence point unerringly to the amount.

The provision of Civ. Code 1913, par. 544, that, when a verdict for recovery of money is found for plaintiff or for defendant on a counterclaim, the jury shall find the amount, is for the purpose of making the verdict certain and definite, and, while it is best to write into the verdict the amount of the money recovery decided by the jury, yet, when it finds the issue generally for plaintiff, and the pleadings and evidence unerringly point to the amount that ought to have been written into the verdict, it is a sufficient basis for the judgment.

7. Trial §340(5)—Pleadings and evidence held to warrant judgment on money verdict for amount to be determined by arithmetical calculation.

Where a verdict for recovery of money for services due upon a written contract did not state the amount, evidence and pleadings held such that the verdict could be made certain and definite by the process of arithmetical calculation, so that it was proper for the court to make such calculation and render judgment on the verdict in the amount found.

8. Appeal and error §883—Defendant should not be permitted to question form of verdict where form should be held to have been stipulated, especially when defect is merely technical.

Where the court submitted two forms of verdict and stated, "These two forms are as counsel for plaintiff desired them to be, and I believe counsel for defendant desired, so I think it is understood, is it not, gentlemen?" no objection having been made, the defendants should be held to have stipulated the form of verdict returned by the jury, and should not be allowed to question the deficiency, especially where the defect is merely technical.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Hugh R. Daggs against H. Kjerschow and others. Judgment for plaintiff, and from an order overruling a motion for new trial and from the judgment, defendants appeal. Affirmed.

R. E. Sloan, C. R. Holton, and Greig Scott, all of Phoenix, for appellants.

Hayes, Laney & Allee, of Phoenix, for appellee.

ROSS, C. J. This is an action by Hugh R. Daggs against Vic Hanny, as administrator of the estate of John Christy, deceased, H. Kjerschow and Birger Lie, for a balance of \$11,668.67 alleged to be due him upon a written contract for services in securing from the Gila Land & Cattle Company, a corporation, an agreement to sell and convey to said Christy 4,280 acres of land situated in Maricopa county and owned by the said corporation. The contract which is the foundation of plaintiff's action was dated January 21, 1920. On its face it was between Christy and plaintiff, and by its terms Christy obligated himself to pay Daggs \$5 per acre if he would secure from the Gila Land & Cattle Company an agreement to sell and convey to him said 4,280 acres at \$35 per acre. It is not questioned that plaintiff performed his part of the contract and earned his commissions. Christy died in April, 1920. The administrator of his estate did not contest plaintiff's claim, but admitted the liability. The other defendants, Kjerschow and Lie, against whom judgment was also entered, contested plaintiff's claim against them upon grounds that will be hereafter stated. The theory upon which the plaintiff bases his claim of liability against Kjerschow and Lie is that Christy, in entering into the agreement to pay plaintiff commissions for his services in procuring a contract of sale from the Gila Land & Cattle Company, was acting not only in his own behalf, but as the agent and representative of said defendants, the allegations of the complaint in that regard being as follows:

"That on the 21st day of January, 1920, the plaintiff entered into an agreement in writing with John Christy, acting for himself and as the agent and representative of the defendants H. Kjerschow and Birger Lie, whereby the plaintiff agreed to procure from the Gila Land & Cattle Company, a corporation, a contract and agreement to sell and convey to the said Christy the said company's real estate and lands situate in the county of Maricopa, state of Arizona, comprising 4,208 acres, for a consideration and purchase price to be paid to said company of \$35 per acre, or a total consideration to be paid to said company of \$149,800, said purchase price to be paid in the following sums and at the following times, to wit: Ten thousand dollars on the 1st day of February, 1920, and the balance of said purchase price on the 1st day of April, 1920—the said Christy agreeing with the plaintiff that, immediately upon the delivery by the said company to the said Christy of good and sufficient deeds of conveyance of said real estate, the said Christy, acting in that behalf for himself and as the agent and representative of the defendants H. Kjerschow and Birger Lie, would pay to the plaintiff the sum of five dollars for each and every acre of land so conveyed."

The defendants Kjerschow and Lie demurred generally, and denied the allegations of

the complaint, and particularly that John Christy in entering into the contract set forth in the complaint was "acting as the agent and representative of said defendants." It appears from the complaint and the answer that the deal was consummated by the defendants and others associated with them, instead of taking a conveyance of the lands, purchasing all the outstanding stock of the Gila Land & Cattle Company at a price, as defendants allege in their answer, equal to \$40 per acre for the lands owned by the company. It is further alleged by defendants Kjerschow and Lie that at the time they became purchasers of stock of the Gila Land & Cattle Company they did not know nor had any information that plaintiff was entitled to receive by virtue of any agreement with Christy, the equivalent of \$5 per acre for said land, and that, if anybody owed plaintiff anything, it was Christy in his lifetime, and, since his death, his estate. The form of the verdict was:

"We, the jury duly impaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff against the defendants."

Upon this verdict the court entered judgment against the defendants Kjerschow and Lie for the sum of \$11,668.67, with interest at the rate of 6 per cent. per annum from April 1, 1920. Defendants objected to the entering of judgment upon said verdict upon the ground that the verdict failed to find the amount of recovery. The appeal is from the order overruling the motion for a new trial and from the judgment.

[1] It is first contended by defendants that the complaint does not state facts sufficient to constitute a cause of action against them, and that the court erred in overruling their general demurrer. It is claimed that the allegation that John Christy, "acting for himself and as the agent and representative of the defendants" Kjerschow and Lie in making said contract, falls short of being an allegation that he had authority from said defendants to enter into said contract for them, an essential fact to be shown. We are cited to no pertinent authority sustaining this view. On the contrary, the rule seems to be that—

"Where agency is alleged, a general allegation is sufficient, without averring that the agent had authority to act in the premises, that being regarded as an averment of a conclusion of law, or at best an unnecessary repetition of a fact already stated." 2 O. J. 906, § 611.

[2] It is said the complaint, for another reason, is insufficient in that it fails to allege that Christy had written authority to enter into said contract in their behalf from defendants Kjerschow and Lie. This, it is contended, is necessary under subdivision 7,

par. 3272, Civil Code, which provides that no party shall be sued upon "an agreement authorizing or employing an agent or broker to purchase or sell real estate, mines, or other property for compensation or a commission," unless the same be signed by him, "or by some person by him thereunto lawfully authorized." The contract in this case is in writing and signed by Christy in his own behalf and as agent and representative of the other defendants if the allegations to that effect are to be believed. This court in *Murphey v. Brown*, 12 Ariz. 268-275, 100 Pac. 801, ruled against defendants' contention, in construing subdivision 4 of paragraph 2696, Civil Code of 1901, practically the same as subdivision 7 of paragraph 3272, Civil Code 1913, stating:

"That one shall be 'lawfully authorized' to sign a binding memorandum under section 4 of the statute of frauds does not mean that he must have been authorized in writing; he may have been verbally authorized, although to execute the conveyance he must have been authorized in writing."

Daggs' employment was not to convey the lands in question, but to secure an agreement from the owner to sell and convey. So we conclude that the complaint stated a cause of action against the defendants, Kjerschow and Lie.

[3] The next assignment of error is as follows:

"The court erred during the trial in permitting, over the objection of the defendants Kjerschow and Lie, the witness Desmond Christy to testify to a conversation between the defendant Birger Lie and John Christy relative to business relations existing between said Lie and said Christy on November 18, 1919, for the reason that it related to other matters than that set forth in plaintiff's complaint and did not prove or tend to prove the allegations of said complaint, and for the further reason that the witness stated that the substance of the conversation was as to matters fully disclosed by an instrument in writing which had been offered in evidence by plaintiff and refused by the court upon the ground that it did not relate to the transactions set forth in the complaint, and the evidence was too remote, and therefore incompetent."

We think it necessary, in order to understand the above assignment, to make a statement of some of the facts not in dispute, and then the evidence toward which the assignment is directed. The defendants Kjerschow and Lie (brothers-in-law) during the time of this deal, and before, were residents of Christiansa, Norway, and John Christy resided at Clifton, Arizona. Prior to September, 1919, these three parties became interested together in the acquisition of mines and mining claims and timber lands and cattle in Greenlee and Apache counties, Ariz., and in Grant county, N. M. Christy's contribution to the

enterprise consisted in finding desirable properties, and Kjerschow and Lie were to, and did, furnish the money to pay for the properties. Christy had authority to acquire all such property in his own name, in trust for all, and they were to be equal owners thereof; that is, each was to have one-third of all property acquired and of the rents, issues, profits, interests, and accruments thereof, and to bear expenses and losses equally. This arrangement, so far as the record shows, was originally verbal, but on September 20, 1919, it was reduced to writing in a paper designated a "declaration of trust" signed by Christy, Kjerschow, and Lie. This instrument was offered by plaintiff as evidence tending to show the relation that Christy sustained to the other defendants and as tending to show the course of dealing between them from which Christy's agency to make contract with Daggs might be inferred, but upon objection of defendants that it was concerning other transactions, and therefore immaterial, the court rejected it. Later it was admitted upon an offer of the defendants, and its substance we have stated.

We next state the substance of the evidence admitted over defendants' objection and assigned as error. In November, 1919, Lie came to Arizona, and was with Christy three weeks or more looking over the properties in Apache and Greenlee counties, Ariz., and in Grant county, N. M. During this visit Lie and John Christy (according to the testimony of Desmond Christy, son of John) became interested in two tracts of land known as the Palomas tract and the Santa Cruz tract near Tucson, and they also discussed the possibilities of cotton development in the Salt River Valley. Desmond Christy, in speaking of what he heard between his father and Lie, testified, among other things:

"The substance of the conversation was that Mr. Lie, my father, and Mr. Kjerschow were associated in agreements as partners in various enterprises in Arizona and would continue to be so in the future; * * * that under a partnership agreement which was then in existence he and my father and Mr. Kjerschow were equal partners in propositions which they were then working on, and it was their intention to acquire more interests. * * * He was satisfied with the work and wanted to continue in the same manner and wanted my father to acquire more interests for himself, his brother-in-law, Mr. Kjerschow, and my father."

Statements of a similar character were made to two or three other witnesses. He also testified that on Lie's leaving Arizona he stated he would send his New York office man, Christian Schlott, out to Arizona with the books of the Globe Copper Company (one of the properties they had acquired), and that he, Schlott, would help his father get options on the Palomas and Santa Cruz

tracts; that Schlott did come to Arizona, and with his father visited Phoenix, and on his return therefrom between the 23d and 26th of January, 1920, told him that he had gone over the Gila Land & Cattle Company properties and had investigated them thoroughly. He showed Desmond Christy a number of pictures taken out on the property of the Gila Land & Cattle Company, in which plaintiff, Daggs, was taken. Schlott said Daggs accompanied him in his investigations.

This evidence was offered, as stated by plaintiff's counsel, for the purpose of establishing "agency or representative capacity of the deceased (John Christy) and a continuing representative capacity, right down through this transaction," and we think it was competent for that purpose. Plaintiff's theory being that the three, Kjerschow, Lie, and Christy, were equal partners not only in the properties acquired before September 20, 1919, but that their agreement contemplated an extension of the enterprise upon like terms to the acquisition of other property in Arizona, any oral statements of Lie or Kjerschow admitting such an understanding or agreement would be admissible as evidence for what it is worth. The fact that the Gila Land & Cattle Company contracts were all taken in Christy's name, the course of conduct pursued in the finding and purchasing their other properties, while not conclusive that they acquired the Gila Land & Cattle Company's lands upon the same terms, is not so unrelated as to be incompetent.

"The law of partnership is a branch of the law of agency. The functions, rights, and duties of the partners in a great measure comprehend those of agents, and the general rules of law applicable to agents likewise apply to partners. Accordingly the liability of one partner for the acts of his copartner is founded on the principles of agency." 20 R. C. L. 882, § 94.

The testimony of Desmond Christy had a tendency to establish a relationship between the defendants and Christy, similar to that in connection with the properties acquired by them in Apache and Greenlee counties, Ariz., and Grant county, N. M.

Assignment No. 3 is practically a restatement of the objections contained in assignment No. 2, and what we have said concerning assignment No. 2 disposes of this assignment.

[4] At the close of plaintiff's case, the defendants moved the court to direct a verdict in their favor because there was no legal evidence to establish that John Christy, in signing the contract, did so as the agent and representative of the defendants. At the conclusion of all the evidence the same motion was renewed. Both motions were denied by the court. These rulings are assigned as error. As we have heretofore said, there is no question but that Daggs earned his com-

missions, and the liability of the Christy estate is not only admitted, but settled beyond peradventure. The serious question, and one of considerable doubt, is the liability of the other defendants, Kjerschow and Lie. If the agency of Christy, as alleged in the complaint, was established by competent evidence, either as growing out of their partnership arrangement, or out of the relation of principal and agent, the other defendants would be liable on the contract. We confess, after a careful review of the whole evidence, we entertain some doubt upon the question. There is evidence that defendants Kjerschow and Lie had a general understanding with Christy that their relationship of partners should be extended to cover other properties upon like terms as those included in the "declaration of trust," and that Christy might in the same manner acquire such property as he had theretofore pursued.

Letters, telegrams, and cablegrams from defendants Kjerschow and Lie to Christy, were introduced in evidence, which, when considered with other evidence, show, or strongly tend to show, that they and Christy were interested together in the Gila Land & Cattle Company purchase as in their former acquisitions. It a letter dated March 3, 1920, Lie wrote to Christy, among other things:

"When your message about the Gila Bend came I wavered between a deep admiration for your courage and despair. * * * Harald [Kjerschow] considered it lost game from the start. * * * At the precipice of failure I resorted to Mr. Erichsen and explained our dilemma and we have arranged to raise \$80,000 on the presumption that he gets in on the ground floor. * * * I do not for a moment doubt that the investment is splendid and will be the basis for the Exploration Company [the holding company for Kjerschow's, Lie's, and Christy's properties]. * * * You can feel that your efforts in our behalf are highly appreciated on this side, and Harald is doing nothing but preparing for Arizona."

On January 9, 1920, Kjerschow and Lie sent a cablegram to Christy in which they said:

"Convinced can make everlasting connections for all propositions."

February 28, 1920, Kjerschow cabled Christy:

"* * * Cable highest obtainable mortgage Gila Bend and consequently when and how much cash required for purchase. * * * All documents and description property necessary [to] obtain result here. If necessary draw on Birger [Lie] ten thousand dollars as others not available."

There were several other cablegrams of the same nature as the ones we have quoted from sent by Kjerschow or Lie to Christy. Beside there was evidence that after Kjerschow came to Arizona in July, 1920, and af-

ter he had made some local investigations and inquiries, he acknowledged to the plaintiff, and to another witness, that there was due Daggs the amount sued for.

Since the jury, and not we, are the triers of the facts, we feel constrained to yield to their judgment. In this case, as in all others where the facts are somewhat complicated, and the testimony thereon conflicting to the point of irreconcilability, the duty and office of passing thereon, if left to a jury, is, and of right ought to be, respected by the courts, and their verdict upheld, if in the evidence the court finds substantial support thereof. If there was an agreement between Christy, Kjerschow, and Lie to extend the partnership to cover other properties, and as to that it was for the jury to say, then Christy's contract made in pursuance of the aims and purposes of such partnership would be binding alike on all the partners.

[5] The question of agency as growing out of the relations of partners and the power of one partner to make contracts binding the other partners, and the proper limitations of that power, was submitted to the jury in instruction unobjectionable as applied to the evidence in the case. It would extend this opinion, and serve no useful purpose, to review in detail the evidence, and we will not undertake the task.

The trial judge not only heard the evidence, but passed upon its sufficiency on a motion for a new trial. He, like the jury, had a first-hand opportunity to judge of the worth and weight of the testimony as gained by actual contact and observation of the witnesses. His action on the motion for new trial is entitled to some consideration. 4 C. J. 864, § 2839.

[6] It is next contended the form of the verdict is not in compliance with the statute which reads:

"When a verdict is found for the plaintiff in an action for the recovery of money or for the defendant, when a counterclaim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery." Par. 544, Civil Code.

The purpose of this provision is that the verdict shall be certain and definite as to the amount intended to be given the successful litigant and form the sole basis for the judgment to be entered. One way, and by far the best way, is to write into the verdict the amount of the money recovery decided upon by the jury. But when the jury finds the issues generally for the plaintiff, and the state of the pleadings and the evidence is such as unerringly to point out the amount that ought to have been written into the verdict, we think, on principle and authority, it is sufficient to form the basis of a judgment. 38 Cyc. 1880; Warren v. Smith, 24 Tex. 488, 76 Am. Dec. 115; Carothers v. Lange (Tex.

Civ. App.) 55 S. W. 580; Redmond v. Weissman, 77 Cal. 423, 20 Pac. 544; Sandell v. Norment, 19 N. M. 549, 145 Pac. 259. In the last case it is said:

"Where the question as to the amount of the money judgment which plaintiff is entitled to recover, if a recovery is to be had, is not disputed, and can be ascertained from the pleadings, and is simply a matter of calculation, a verdict returned by the jury, finding the issues in the case for the plaintiff, without stating the amount of the recovery, is sufficient to support a judgment."

[7] In the present case it was admitted by all that Daggs was entitled under the contract to \$5 per acre from the estate of John Christy; the only question being as to whether he was also entitled, under the contract, to a recovery against Kjerschow and Lie. The liability was in dispute, and not the amount, in case liability was established. While defendants' general denial of any indebtedness to plaintiff in any sum whatever was broad enough to admit evidence of other defenses, the fact remains that defendants' evidence was all directed to disproving authority in Christy to act in making the contract as their agent and representative, and not to disprove the amount claimed by plaintiff after allowing all credits. By the process of arithmetical calculation the verdict can be made very certain as to the amount intended to be given plaintiff. The total amount of Daggs' commissions at \$5 per acre, for 4,280 acres, was \$21,400. This should be credited with a draft paid to Daggs for \$10,000, less exchange. While witness Hanny testified plaintiff acknowledged the \$10,000 draft as a credit to that amount, the uncontradicted testimony is that the exchange thereon was the sum of \$268.87, and that he received out of such draft only \$9,731.33. Deducting this payment from the total of commissions, there is left a balance of \$11,668.87. This is the amount of the judgment as entered, together with interest at 6 per cent. per annum from April 1, 1920, being the amount prayed for in the complaint.

[8] At all events, before the jury retired to consider the case, the court submitted to them two forms of verdict and stated:

"These two forms are as counsel for plaintiff desired them to be, and I believe counsel for defendants desired, so I think that is understood, is it not, gentlemen?"

No objection having been made, we think defendants should be held to have stipulated the form of verdict returned by the jury, and should not be allowed to question its sufficiency, especially when the defect is merely technical, as in this case.

The judgment is affirmed.

McalISTER and FLANIGAN, JJ., concur.

(104 Or. 472)

BEEM v. BEEM.

(Supreme Court of Oregon. July 25, 1922.)

Divorce — 124—Evidence held not to afford grounds for recrimination.

Evidence considered, and held not to show grounds of recrimination, where the reputation of plaintiff, who came of an excellent family, was not questioned by defendant, and plaintiff retained the esteem of her associates.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 207 Pac. 604.

L. Denham, of Elgin, for appellant.

R. J. Green, of La Grande, for respondent.

HARRIS, J. In the petition for a rehearing it is asserted that we overlooked the evidence concerning the conduct of the plaintiff occurring subsequent to April 4, 1920; and it is argued that her conduct after that date was such as to constitute a cause of divorce, and that therefore the plaintiff cannot prevail even though the defendant was guilty of cruelty as charged in the complaint. The rule that divorce is a remedy for the innocent against the guilty is quite generally recognized, and has been frequently applied in this jurisdiction. 9 R. C. L. 387; 19 O. J. 93. But, though the rule is conceded, the conclusion urged by the defendant cannot be conceded.

We expressly stated in the original opinion that "if the plaintiff is entitled to a divorce, it is because of what happened on or before April 4, 1920," and, although we did not discuss in detail the evidence relating to occurrences subsequent to April 4, 1920, the date when the defendant was guilty of the brutal and inexcusable conduct narrated in the original opinion, we did not overlook any evidence concerning the conduct of the plaintiff, nor is it necessary now to rehearse the details found in the record, for it is sufficient to say that the plaintiff did nothing which, in the circumstances revealed by the record, could have constituted cause for divorce. As stated in the original opinion, the plaintiff comes from an excellent family, and her standing and reputation are not even questioned by the defendant. It is not going far afield to say that if her behavior had been censurable she could not have retained, as she did, the esteem and confidence of the people among whom she has lived. The plaintiff, whether in attendance upon meetings or dances or social functions, was almost invariably chaperoned by her mother. The petition for a rehearing is denied.

(104 Or. 356)

LIVESLEY et al. v. STRAUSS.

(Supreme Court of Oregon. July 18, 1922.)

1. Costs \S 247—Term properly includes only indemnity for attorney fees.

Under Or. L. \S 561, the term "costs" properly includes only the indemnity for attorney fees fixed by statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

2. Costs \S 252 — \$15 allowed in Supreme Court on appeal.

The amount of costs allowed in Supreme Court to the party prevailing on an appeal is \$15.

3. Costs \S 254(1)—Cost of transcript chargeable in Supreme Court.

By force of Laws 1921, p. 621, the cost of a transcript, including certified copies of the judgment, notice of appeal, and undertaking on appeal, skeleton or short form of bill of exceptions, transcript of the whole testimony, and all of the proceedings at the trial, or long form of bill of exceptions, is chargeable in the Supreme Court.

4. Costs \S 256(1)—Appellant not entitled to reimbursement for duplication if he files both long and short bill of exceptions.

An appellant may prepare and file both a long and a short form of bill of exceptions, but, if he prevails, is not entitled to reimbursement for the expense of duplication.

5. Costs \S 254(6) — Reimbursement allowed for certified copy of judgment and other copies prepared by county clerk.

Reimbursement may be had for the certified copy of the judgment and other copies prepared by the county clerk at the rates fixed by Or. L. \S 3635.

6. Costs \S 254(6) — Reimbursement allowed for expense of transcript.

Reimbursement may be had for the expense of the transcript of the whole testimony and all of the proceedings at the rate fixed by Or. L. \S 931.

Department 1.

Appeal from Circuit Court, Marion County; George G. Bingham, Judge.

Action by T. A. Livesley and another, doing business under the firm name and style of T. A. Livesley & Co., against Edwin Strauss, doing business under the firm name and style of Strauss & Co. From a judgment for defendant, plaintiffs appeal. Judgment affirmed, and plaintiffs objected to defendant's cost bill. Objections sustained in part.

See, also, 206 Pac. 850.

John H. McNary and Walter E. Keyes, both of Salem (McNary, McNary & Keyes, of Salem, on the brief), for appellants.

C. O. Fenlason, of Portland (Coy Burnett, F. Gronnert, and Chester A. Sheppard, all of Portland, on the brief), for respondent.

HARRIS, J. [1, 2] The plaintiffs filed a cost bill, claiming, among other items, the sum of \$159 as "costs," and the further sum of \$70.60 as "cost of transcript." The defendant objected to the item listed as "costs \$159." The term "costs" properly includes only the indemnity for attorney fees fixed by statute. Section 561, Or. L.; In re Pittock's Estate (Or.) 202 Pac. 216. The amount of costs allowed in the Supreme Court, on an appeal, to the prevailing party is \$15. The item listed as "costs" will be reduced from \$159 to \$15.

[3] The defendant objected to the item listed as "cost of transcript \$70.60" upon two grounds: (1) That it is not properly chargeable; and (2) that it is "unreasonable and out of proportion to the actual cost of the same." This item is now by force of a statute, recently enacted, properly chargeable in this court. Chapter 322, Laws 1921. See *Shepherd v. Inman*, *Poulsen Lumber Co.*, 85 Or. 639, 167 Pac. 785; *Burdick v. Tum-Lum Lumber Co.*, 97 Or. 459, 461, 191 Pac. 654.

[4-6] We shall assume that the plaintiffs intended the word "transcript" to include certified copies of the judgment, notice of appeal, and undertaking on appeal, the skeleton or short form of a bill of exceptions, and also the transcript of the whole testimony and all of the proceedings at the trial or long form of a bill of exceptions. The appellants presented a short form of a bill of exceptions, accompanied by a transcript of the whole testimony and of all of the proceedings at the trial. See *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303, 321, 173 Pac. 267, 175 Pac. 659, 176 Pac. 589. An appellant may, of course, if he wishes, prepare and file both a long and a short form of a bill of exceptions, but if he prevails upon the appeal he is not entitled to reimbursement for the expense of duplication. The appellants are entitled to reimbursement for the certified copy of the judgment and other copies prepared by the county clerk at the rates fixed by section 3635, Or. L. The appellants are entitled to reimbursement for the expense of the transcript of the whole testimony and all of the proceedings at the rate fixed by section 931, Or. L. The item listed as "cost of transcript \$70.60" will be reduced to \$21.80.

BURNETT, O. J., and McBRIDE and RAND, JJ., concur.

(104 Or. 373)

HOWLAND v. FENNER MFG. CO.

(Supreme Court of Oregon. July 18, 1922.)

1. Costs \S 254(6)—Cost of printing brief and abstracts allowed at \$1.25 a page.

Under rule 29 (202 Pac. xiii), providing that the prevailing party upon appeal is allowed the actual cost of printing abstract and brief not to exceed \$1.25 a page, including cover, unless for some special reason apparent in the record it should be otherwise ordered, *held* an appellant who had paid for printing such abstract and brief was entitled to charge therefor at that rate.

2. Costs \S 256(3)—Cost of entire transcript of testimony allowed when necessarily a part of record on appeal.

Under Gen. Laws 1921, p. 621, providing that, when costs are allowed to the prevailing party on appeal to the Supreme Court, the transcript of testimony or other proceedings, when necessarily forming part of the record on appeal, shall be taxed as costs of the appeal, appellant was entitled to necessary expenses paid by him to secure the entire transcript of testimony, since, under the questions involved, it necessarily formed a part of the record on appeal.

En Banc.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by B. J. Howland against the Fenner Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, and plaintiff objects to defendant's cost bill. Objection sustained in part.

See, also, 206 Pac. 730.

W. L. Cooper and W. E. Farrell, both of Portland (Davis & Farrell, of Portland, on the brief), for the objections.

John W. Shuler and A. B. Winfree, both of Portland (Teal, Minor & Winfree, of Portland, on the brief), opposed.

RAND, J. The respondent objects to the following items of appellant's cost bill:

Transcript of testimony.....	\$177 30
Paid for printing appellant's abstract of record	74 70
Paid for printing appellant's brief.....	63 50

[1] Appellant's printed abstract of record, including cover, consists of 50 pages. Appellant's printed brief, including cover, consists of 40 pages. Under rule 29 (202 Pac. xiii) the prevailing party, upon appeal, is allowed the actual cost of printing abstract and brief, providing such cost does not exceed \$1.25 a page, including cover, unless for some special reason apparent in the record it should be otherwise ordered. It appears from the cost bill and from the answer to respondent's objection to the cost bill that the appellant paid for printing his abstract of record, \$74.70, and for printing his brief,

\$63.50. Under the rule, appellant was entitled to charge in his cost bill, for printing his abstract of record, \$62.50, and for his brief he is entitled to charge the sum of \$50. and the items mentioned will be decreased accordingly.

[2] Chapter 322, p. 621, General Laws of Oregon 1921, provides:

"When costs are allowed to the prevailing party on appeal to the Supreme Court the appearance fees, trial fees, attorney fees, as provided by law; the necessary expenses of transcript or abstract, as the law or rules require; the printing required by rule of the court, and the transcript of testimony or other proceedings, when necessarily forming part of the record on appeal, shall be taxed in the Supreme Court as costs of the appeal."

Objection is made to the item of \$177.30 for transcript of testimony upon the ground that the short form of a bill of exceptions, instead of the entire transcript of testimony, could have been used. We find that under the questions involved this transcript of testimony necessarily formed a part of the record on appeal, and under the statute above quoted appellant was entitled to the necessary expenses paid by him to secure the transcript used upon the appeal. For that reason the objections to this item will be overruled. The other items forming the cost bill are not objected to. The cost bill shows a total charge of \$351.50. This amount will be decreased to the sum of \$325.80, and judgment for that sum will be allowed accordingly.

(104 Or. 383)

TAYLOR v. WINN.

(Supreme Court of Oregon. July 18, 1922.)

1. Judgment \S 645—Suit in equity lies to litigate equitable matters after law judgment, provided question involved was not determined.

A litigant may defend an action at law and, after judgment, begin a suit in equity to urge an equitable defense against the cause of action on which judgment was rendered, provided the question involved in such defense was not litigated; if litigated, however, by Or. L. \S 756, the judgment is conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the action, suit, or proceeding litigated for the same thing, under the same title, and in the same capacity.

2. Judgment \S 720—No reformation of deed where issue has been determined in legal action.

Where a grantee recovered a judgment in an action at law against his grantor for rent collected by the latter in the year following the grant, contrary to a covenant in the warranty deed given, the issue of mistake having been determined in the action at law, the judgment therein was conclusive against a suit to

reform the deed on the ground of mistake in the warranty.

Appeal from Circuit Court, Umatilla County; T. E. J. Duffy, Judge.

Suit by Moses Taylor against Iley Winn. From a decree for defendant, plaintiff appeals. Affirmed.

See, also, 98 Or. 556, 194 Pac. 857.

Edward J. Clark, of Pendleton (Peterson, Bishop & Clark, of Pendleton, on the brief), for appellant.

Homer I. Watts, of Athena (E. C. Presthye, of Athena, on the brief), for respondent.

BURNETT, C. J. The plaintiff was the owner of real property in Umatilla county, which he had let to a tenant, Hansell, for a term of years, by a lease which required the payment of a sum of money in cash, also \$6 per acre on October 1, 1914, and a like sum per acre payable on October 1, 1915, and the 1st of each October thereafter during the term. The lease began on April 21, 1914, and ran "until the 1st day of October in the year 1919." On August 21, 1917, the plaintiff Taylor issued to the defendant a receipt reciting the payment of \$10,000 as earnest money on the purchase price of the lands, which Taylor thereby agreed to deed to Winn on the further payment of \$40,000 on or before November 1, 1917, the balance of \$50,440 to be paid in cash or secured by note and first mortgage on the land. In that receipt Taylor used this language:

"I also agree to furnish abstract of title showing all of above lands clear of incumbrances."

On October 2, Taylor collected the rent from his tenant, being the installment due the day before, in the sum of \$3,522. Thereafter on October 17, 1917, Taylor executed, acknowledged, and delivered to Winn a warranty deed for the lands in question, containing a covenant that—

"The premises are free from all incumbrances except the right of way of the O. W. R. & N. Company through the lands, * * * and that he [Taylor] will, and his heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, save and except as to incumbrance above mentioned."

Afterwards Winn sued Taylor to recover the money thus collected as rent due October 1, 1917. In his complaint the matters heretofore stated were recited, and substantially all of them were admitted by the answer of Taylor.

That pleading contains the following language:

"That on or about the 21st day of August, 1917, he agreed in writing to sell the real property described in plaintiff's complaint to the said plaintiff, a copy of which said writing is

hereto attached, marked 'Exhibit A,' hereby referred to and made a part hereof, but it was specifically understood and agreed prior thereto and at said time and as a part of the same transaction, though not so stated in said writing, that the defendant would be entitled to collect the lease money coming due and payable on account of said real property from the said M. W. Hansell on the 1st day of October, 1917, and he did collect it. Thereafter, on the 17th day of October, 1917, at the time when the plaintiff paid another portion of the purchase price and secured the payment of the balance of it, thereby completing the purchase of the said real property, defendant executed and delivered to the plaintiff a warranty deed to it; but before doing so it was expressly and specifically understood and agreed by and between plaintiff and defendant that the lease money which was due and payable on the said 1st day of October, 1917, should belong to the defendant."

This in turn was denied by the reply. That case went to judgment in favor of Winn for the full amount claimed, and was affirmed on appeal to this court in *Winn v. Taylor*, 98 Or. 556, 190 Pac. 342, 194 Pac. 857. The essence of the dispute is: Who was entitled to collect the installment of rent due October 1, 1917? As disclosed by the opinions of Mr. Justice Johns and Mr. Justice Brown, the decision was made to depend largely but not exclusively upon the effect of the warranty in the conveyance from Taylor to Winn.

The present suit in equity has been instituted for the purpose of procuring the reformation of the covenant of warranty in that deed, so as to except therefrom the lease mentioned, and in addition thereto to secure the cancellation of the judgment in favor of Winn and against Taylor as a cloud on the latter's realty and that of his surety on appeal.

[1] Without question, a litigant may defend an action at law even to judgment, and afterwards may begin a suit in equity upon proper grounds, to urge an equitable defense against the cause of action which has ripened into judgment. *Churchill v. Meade*, 92 Or. 626, 82 Pac. 368. All this, however, is subject to the condition that the same question involved has not been litigated at law. If, however, the matter has been directly determined in the action at law, it is conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the action, suit, or proceeding litigated for the same thing, under the same title, and in the same capacity. Or. L. § 753.

[2] The situation here is that the plaintiff was sued in the action at law for the money which he had collected as rent due on the 1st day of October, 1917. The warrantee in the deed claimed that this rent was due for the year succeeding his purchase of the property, and that instead of conveying to him the full fee-simple title, Taylor had conveyed less than that by as much at least as

the installment of rent amounted to. In other words, while professing by his covenant to convey the fee, Taylor had in fact diminished that estate by carving out of it an estate for years the issues of which he was enjoying. By a competent allegation already quoted, Taylor asserted in the action his right to collect that rent. It was an averment competent to be made, and if he could have proved it and convinced the jury of the truth of his statement, he would have recovered a verdict. He gave testimony on that subject, as the record before us discloses. Among other things, he put in evidence the oral admissions of Winn to the effect that it was satisfactory to him for Taylor to collect the rent. However, the latter was confronted with his warranty in the deed. That document spoke as a witness against him, saying in effect that "this title is not incumbered except by the right of way." The jury believed that witness and concluded that Taylor had no right to the money he had collected. The effect of this proceeding is nothing more than this, that the plaintiff says:

"I have discovered since then that the witness, the deed, did not speak the truth, owing to a mistake of the scrivener in writing that document. Having tried out that issue, however, and a judgment having been entered establishing the truth of the controversy between the parties as to the right to collect the rent, I now seek to overturn that judgment because I conceive that I am able to prove that the witness did not indeed testify truly."

In our judgment, even if we were to reform the deed, it could not affect the question raised by Taylor's allegation in the action. He submitted the main question, the right to collect the rent, to a tribunal having jurisdiction of the parties and of the subject-matter. He produced oral testimony consisting of his own statements directly as a witness, and admissions attributed to Winn, who in turn confronted Taylor with his deed. Even if the deed were reformed, it would not preclude the admission of other legal evidence to sustain or to controvert the contentions of either party. The decision must therefore remain as determined by the judgment. With the record all before it, the circuit court was right in rendering a decree in favor of the defendant on the pleadings in the equity suit.

The decree is therefore affirmed.

(29 Wyo. 31)

SPENCER et al. v. LOEWENSTEIN.
(No. 1039.)

(Supreme Court of Wyoming. July 20, 1922.)

1. Appeal and error §356—Appeal dismissed where notice of appeal not given within statutory period.

Where judgment was entered on April 29, 1920, and notice of an appeal was not served

and filed until September 7, 1920, a motion to dismiss the appeal was granted, under Comp. St. 1920, § 6402, requiring notice of appeal to be filed within 10 days of the entry of judgment.

2. Appeal and error §345(1)—Motion for new trial held not to extend time for filing notice of appeal.

Where after trial of an issue of fact and ordinary motion for new trial was made and filed under Comp. St. 1920, §§ 5870 and 5872, not being a motion under sections 5923-5934, it did not extend the time for serving and filing notice of appeal from the judgment.

Appeal from District Court, Uinta County; John R. Arnold, Judge.

Action by George Spencer and another, doing business under the firm name of Spencer & Bird, against Fred Loewenstein. Judgment for plaintiffs, and defendant appeals. On motion to dismiss the appeal. Appeal dismissed.

Reuel Walton, of Evanston, for appellant.
Louis Kabell, Jr., of Evanston, for respondent.

KIMBALL, J. [1] This case has been brought here by direct appeal from the judgment entered April 29, 1920. The respondents move to dismiss the appeal for the reason, among others, that the notice of appeal was not served and filed within 10 days from the entry of the judgment as required by section 6402, C. S. Wyo. 1920. The notice was not served and filed until September 7, 1920, and it is therefore apparent that the appeal from the judgment has not been taken within the time required by statute, and must be dismissed.

[2] A motion for a new trial filed May 7, 1920, was denied August 30, 1920, but, as was held in *Mitter v. Black Diamond Coal Co.*, 27 Wyo. 72, 191 Pac. 1069, 193 Pac. 520, the filing of that motion did not extend the time for serving and filing the notice of appeal from the judgment. In the *Mitter* Case on rehearing (27 Wyo. 78, 193 Pac. 520, and 206 Pac. 152), because of the peculiar circumstances then brought to its attention, the court felt justified in considering the motion for a new trial as a motion under chapter 370, C. S. Wyo. 1920, to vacate the judgment, and the order denying it as an appealable order; the notice of appeal in that case reciting that the appeal was taken from that order as well as from the judgment. The dismissal of the appeal from the judgment was not affected by the rehearing. The reasons which induced the court to entertain the appeal, for limited purposes, on the rehearing in the *Mitter* Case, do not appear in the case at bar. Here the record shows that there had been a trial, a judicial investigation of an issue of fact; and the motion for a new trial, asking a re-examination of that issue,

was clearly the ordinary motion applying for that relief under section 5870. It was filed at the same term and within 10 days after the judgment was rendered, as required by section 5872. There was nothing in its form or substance to indicate that it was intended or should be treated as anything other than what it purported to be. We can find no reason why the motion should have been below or should be here considered as a motion under chapter 370. If we were to hold otherwise on that point, we would then be met by the fact that there was no notice of appeal from the order denying that motion, for the notice found in the record recites that the defendant appeals from the judgment of April 29 only.

The appeal is dismissed.

BLUME, J., concurs.

POTTER, C. J., being ill, did not sit.

(29 Wyo. 1)

SPARKS et al. v. MOUNT et al.

(Supreme Court of Wyoming. July 20, 1922.)

1. Mines and minerals §36—Staking and posting notices held to indicate extent of possession taken pursuant to location of site for oil wells.

Where a location for oil and prospecting was made February 18, 1918, but no actual discovery was perfected thereunder, the land in question was open to entry under the mineral land laws of the United States on August 29, 1919, and where plaintiffs entered and took possession of the land lawfully, and duly staked and marked the boundaries under their location, and duly recorded the location notice, their acts indicated the extent of possession taken pursuant to the location.

2. Mines and minerals §36—No rights adverse to party lawfully in possession of claim can be initiated by trespass.

Where party is lawfully in possession of land duly located and claimed for oil prospecting, no rights adverse to him can be initiated by trespass.

3. Mines and minerals §36—Prospector on oil claim held entitled to possession thereof.

Where defendants entered on public lands and made a location for prospecting for oil on February 18, 1918, but had not made any discovery, and plaintiffs, finding no one in possession, entered August 29, 1919, and took possession of the land lawfully pursuant to a location which they made to prospect for oil, and defendant during a short temporary absence of plaintiffs' manager entered on the land and set up an oil derrick to which action plaintiffs at once protested, and instituted a suit to oust defendants five days thereafter, plaintiffs were entitled to possession, having acquired the right thereto by peaceful and lawful entry on lands open to location.

Appeal from District Court, Weston County; Ernest C. Raymond, Judge.

Action by G. F. Sparks and another against J. D. Mount and others. From judgment for defendants, plaintiffs appeal. Reversed and remanded.

R. E. McNally, of Sheridan, and E. E. Wakeman, of Newcastle, for appellants.

Hagens & Murane, of Casper, and Greenwood & Dunbar, of Newcastle, for respondents.

BLUME, J. The parties will herein be referred to in the same manner as in the case below. It will not be necessary, for the purposes of this case, to set forth in detail the rights of the defendants as between themselves. There is some conflict in the evidence as to whether or not the defendants had discovered oil on December 22, 1919, but for the purposes of this case we shall have to treat that as an established fact. With that so taken, the evidence in this case is substantially undisputed, and we must determine as to whether the judgment herein was warranted thereunder. The testimony, so far as it bears materially on the questions here involved, is in substance as herein set out. The predecessors in interest of the defendants filed an oil placer location on the S. E. ¼ of section 6, township 46 north, range 63, Weston county, Wyo., on February 18, 1918. No possession of the land was taken under this location until about December 15, 1919, and no discovery is claimed thereunder until December 22, 1919.

On August 29, 1919, the predecessors in interest of the plaintiffs made an oil placer mining claim on the same land, duly marked the boundaries thereof, and placed of record the location notice. These locators leased the land to R. J. Armstrong Company, who in turn leased the land to plaintiffs. Plaintiffs entered and took possession of the land, for the purpose of drilling for oil, in the latter part of November, 1919. No other party was then in possession. Plaintiffs through a drilling contractor erected a small building on the land, and moved an oil-drilling machine onto the premises, and commenced about that time to drill for oil, pursuing the work diligently until December 13, 1919, when the well was "plugged" by some unknown party during the nighttime. The drilling contractor thereupon attempted to get the material from the well, succeeded in getting out at least most of it, and shortly thereafter, the exact date not appearing, plaintiffs commenced another well, diligently pursuing the work, till the commencement of this suit, on December 22, 1919, and, in fact, until the trial of this case on December 29, 1919. The drilling outfit was visible at all times to parties entering upon the land.

In the meantime, about December 15th, de-

fendants, through one Briggs, entered the land, apparently in the daytime, and on that and the succeeding day moved some material onto the land. On December 17, 1919, they moved a drilling outfit onto the premises for the purpose of drilling for oil, locating the well a short distance from where plaintiffs were drilling. No one made any objections to such entry on December 15th, but on December 17th, the plaintiff Sparks, who in the meantime had temporarily been in Sheridan, and in response to a telegram that the land in question was being entered by other parties, followed, within about one hour and a half, the moving of the drilling outfit onto the land. Defendants had not then commenced drilling. What took place then will best be stated by setting out the testimony. Plaintiff Sparks testified:

"Q. And for what purpose did you go out there? A. To see whether anybody had moved on and notify them to get off, if they had.

"Q. What did you find when you got out there? A. We found they just pulled a rig in just ahead of us.

"Q. Do you know about how long ahead of you they had moved the rig in before you heard about it? A. As nearly as I could find out, from inquiry, not to exceed an hour and a half.

"Q. Now, what did you do, Mr. Sparkes, when you went on the ground and found a rig there? A. I talked with a man named Briggs, and asked him if he knew what ground he was on, and he said he did. I asked him if he knew that we were drilling on it, and he said he didn't know whether we were or not, and I pointed to the rig right under the hill from him, and he said it didn't make any difference; he had a lease on it. I notified him that we were working under a lease from the Armstrong Company, and told him if he didn't get off, we would begin proceedings, and he said that is just what he wanted done.

"Q. Was Mr. Briggs apparently in charge there? A. Said he was. He was running the outfit."

The witness Briggs testified on this matter as follows:

"Q. You recall Mr. Wakeman and Mr. Sparkes coming out to see you when you moved the rig in the first day? A. Yes, sir.

"Q. And when you got the rig there they notified you they were in possession of that land? A. That is what they said.

"Q. And that they didn't want you to come on there? A. That is what they said; something in regard to that."

The plaintiffs immediately placed the matter into the hands of their attorney, but owing to the difficulty of obtaining an injunction bond, this suit was not commenced till December 22, 1919. The action was instituted for the purpose of restraining the defendants from trespassing on said land. A temporary restraining order was issued. The case was tried on December 29, 1919, upon issues joined, and judgment was entered herein, dismissing plaintiffs' petition and ad-

judging the right of possession to defendants. From this judgment plaintiffs appeal under the so-called direct appeal statute.

[1] No possession having been taken under the location of February 16, 1918, and no actual, real discovery having been perfected thereunder, the land in question was open to entry under the mineral land laws of the United States on August 29, 1919. Hence the plaintiffs, finding no one in occupancy, and having reasonable cause to believe that oil would be discovered, entered and took possession of the land lawfully, pursuant to the location made on the latter date, for the purpose of making a discovery of oil. These propositions are not seriously, if at all, questioned. The ground had been duly staked, the boundaries marked under the latter location, and the location notice had been duly recorded. Under these circumstances, these acts, as we said in *Phillips v. Brill*, 17 Wyo. 26, 36, 95 Pac. 856, indicated the extent of possession taken pursuant to such location. The rule appears to be reasonable, nor is any question raised thereon. It is supported by *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 15, 50 C. C. A. 79, 61 L. R. A. 230, and cases there cited. See, also, *Miller v. Chrisman*, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. As a practical matter in oil placer mining claims, discovery generally follows the posting of notices and other acts of location. If possession were confined to the ground actually occupied by the drilling outfit, then by reason of the interest, nay, excitement, often created by the findings of considerable traces of oil, scrimmages and contests as to who should first occupy the soil adjacent to the drilling ground would be apt to ensue, leading to breaches of peace. Hence the plaintiffs must be held to have been in actual occupancy of the whole of the land in question. They commenced to drill and work toward discovery of oil in the latter part of November, 1919, and continued such work diligently up to the time that the defendants attempted to enter. At that time, therefore, plaintiffs were lawfully in possession of the land, and the question is whether, notwithstanding that fact, they were lawfully ousted therefrom.

[2] The rule of law upon which counsel for defendants rely is stated aptly in the late case of *Cole v. Ralph*, 252 U. S. 286, 40 Sup. Ct. 321, 64 L. Ed. 567, as follows:

"In advance of discovery an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent, or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. *Belk v. Meagher*, 104 U. S. 279,

287, 26 L. Ed. 735; Union Oil Co. v. Smith, 249 U. S. 337, 346, 348, 39 Sup. Ct. 308, 63 L. Ed. 635, and cases cited."

Defendants claim that the acts of entry of Briggs for them can in no manner be characterized as "forcible," "fraudulent," or "clandestine"; that, on the contrary, it was peaceable; that therefore, defendants having made a discovery first, the possession of the land was legally adjudicated to them. The cases do not throw a great deal of light on the question as to what is meant by the terms "forcible," "fraudulent," and "clandestine" when used in connection with an entry, nor when such entry is effected in a forcible manner. In the case of Crossman v. Pendery (C. C.) 8 Fed. 693, the adverse entry was effected by the consent of the first entryman. In the case of Ferris v. McNally, 45 Mont. 20, 121 Pac. 889, the first locator had neither actual possession, nor was he doing any work of discovery. In Cole v. Ralph, supra, no diligent search leading to discovery was being made when the second locator entered. Similar facts appear in other cases. Hence these cases throw no light on the case at bar. We may, however, glean some light from cases which treat the question here involved and state the rule of law applicable in a somewhat different manner. Thus, it was said in the case of Smith v. Oil Co., 166 Cal. 217, 135 Pac. 966:

"If a qualified person peaceably enters upon public lands of the United States for the purpose of discovering oil or other valuable mineral deposits therein, and such land is at the time unoccupied and there is at the time no valid mineral location or lawful entry thereon, under the land laws of the United States, such person has the right to continue in possession so long as he continues to occupy the same to the exclusion of others, and diligently and in good faith prosecutes thereon the work of endeavoring to discover such mineral therein."

In three California cases language similar to that employed in Cole v. Ralph was used, but the courts elucidated the question somewhat more fully. These cases are Miller v. Chrisman, 140 Cal. 447, 73 Pac. 1063, 74 Pac. 444, 98 Am. St. Rep. 63; McLemore v. Express Oil Co., 158 Cal. 562, 112 Pac. 59, 139 Am. St. Rep. 147; Weed v. Snook, 144 Cal. 443, 77 Pac. 1023. In the first of these cases the court also said:

"It further appears that certain valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (Garthe v. Hart, 73 Cal. 541, 15 Pac. 93), and they may defend this possession in the courts (Richardson v. McNulty, 24 Cal. 339). They have then the right of possession and with it the right to protect their possession against all intrusions, and to work the land for the valuable minerals it is thought to contain."

In the second case the court says also:

"What the attempting locator has is the right to continue in possession, undisturbed by *any form of hostile or clandestine entry*, while he is diligently prosecuting his work to a discovery." (Italics are ours.)

In the third case the court also says:

"And we regard the law as settled, that while a locator, who has made his location is engaged in good faith in prospecting it for minerals, and complies with the laws as to expenditures, and is in possession, the land is not open for location by others. In case of petroleum lands the discovery cannot in most cases be made except by considerable labor and expense in sinking wells. In making the location the locator necessarily takes into consideration surface indications, geological formations, proximity to known mines or wells producing oil. He must make his location in good faith and use proper diligence to make discovery of oil. If he does not do so, he will lose his rights under his location, as to parties who may afterwards in good faith acquire rights. But where the locator is in possession under his location, and is actively at work through his lessees or otherwise, and expending money for the purpose of discovering oil, his rights cannot be forfeited to third parties who attempt to make locations under such circumstances. The law must be given a liberal and equitable interpretation with a view of protecting prior rights acquired in good faith."

The foregoing citations seem but to state the general rule, that where one party is lawfully in possession of a claim, no rights adverse to him can be initiated by a trespass. That rule has been announced by a number of courts, including this court, in the cases of Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849, 129 Am. St. Rep. 1093, and Phillips v. Brill, 17 Wyo. 26. It is supported by 27 Cyc. 560; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705; Field v. Grey, 1 Ariz. 404, 25 Pac. 793; Lincoln-Lucky & Lee Min. Co. v. Hendry, 9 N. M. 149, 50 Pac. 330; Cook v. Johnson, 3 Alaska, 506, 542; Cowell v. Lambers (C. C.) 21 Fed. 200, and other cases.

[3] Since on December 15, 1919, the plaintiffs were in lawful possession of the land, attempting, by diligent prosecution of the work, to discover oil, the entrance on the land by the defendant Briggs, without the consent of plaintiff, constituted a trespass through which the defendants could not initiate any rights of possession against plaintiffs. In face of the protest made, we should hardly characterize the entrance made as peaceable. It was certainly hostile. We further think it not entirely free from clandestineness. Briggs entered on the land during a short temporary absence of the plaintiff Sparks, who, apparently, was looking after the land for himself and his coplaintiff. Defendants were not entitled to take advantage

of such short temporary absence. See Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Hanson v. Craig, 161 Fed. 861, 89 C. C. A. 55. The work on the premises was done without interruption by agents of the plaintiffs. Because these agents were not instructed to look out for and promptly stop intrusion by strangers should not operate to the prejudice of plaintiffs. The latter were not compelled to anticipate trespass upon their lawful possession. If they were entitled to indulge in any presumptions, it was that men would respect lawful possession, rather than the opposite. The agents of plaintiffs apparently promptly notified Sparks by telegram of an intended intrusion, though not feeling called upon to stop it. Sparks promptly left Sheridan to meet the situation, and as soon as possible notified Briggs of his rights, and that he would institute suit if necessary to protect them. This was before any drilling was done for the defendants. We do not think that it was necessary to keep on protesting prior to the commencement of the suit. Briggs apparently well understood the claims of the latter; his attitude was in defiance of those claims, and he welcomed a suit. To hold that plaintiff should have protested sooner, under the circumstances, would be equivalent to holding that the possession of a mining claim, held as in this case, cannot be legally maintained except by placing around the land a fence, with gates, or to have some one on the boundaries of the land continually on the watch against intruders. We do not think that the law should place that burden on a locator in good faith. In practice, the building of a fence would often be out of the question. To require a constant watch would frequently lead to attempts to evade him, and would simply encourage strife, breaches of the peace, and violence. Nor do we think that there is shown herein a waiver of the rights of plaintiff by reason of the fact that the suit herein was not instituted till December 22, 1919, five days after Sparks protested to Briggs. Plaintiffs continued their work until the institution of the suit and even to the trial. The delay of bringing the action sooner was caused by circumstances beyond their control. We do not think that because of their inability, on account of the lack of financial resources, instantly to furnish an injunction bond, we should visit punishment upon them. The learned trial court was no doubt misled herein by the somewhat ambiguous language used in *Cole v. Ralph*, supra, and other cases, and by the apparent equity existing in favor of defendants after they had gone to the expense and trouble of drilling and had actually made a discovery. But such apparent

equity cannot outweigh the clear legal rights of plaintiffs, particularly when practically all the expense of defendants was incurred after definite warning of the claims of plaintiffs had been received.

The case is accordingly reversed and remanded to the district court of Weston county, with directions to enter judgment for the plaintiffs as prayed.

Reversed and remanded.

KIMBALL, J., concurs.

POTTER, C. J., being ill, did not participate in the final decision.

(45 Nev. 335)

PAGE v. SUTTON. (No. 2499.)

(Supreme Court of Nevada. July 6, 1922.)

Appeal and error \Leftrightarrow 835(2) — No review of question presented for first time on petition for rehearing.

A question presented for the first time on petition for rehearing will not be considered.

On petition for rehearing. Petition denied.

For former opinion, see 204 Pac. 881.

Robbins, Elkins & Van Fleet, of San Francisco, Cal., for appellant.

Booth B. Goodman, of Lovelock, for respondent.

COLEMAN, J. The petition for rehearing must be denied. It is contended that in February, 1918, and before Loring visited Mill City, Sutton sold an interest in the property to W. C. Pitt, and hence the plaintiff is not entitled to commission thereon. This point was not urged in the briefs, nor, so far as we remember, or as appears from our notes or the notes of the official reporter, was it presented upon the oral argument. In view of the entire record in the case, we think there is no merit in the contention; but, in any event, we cannot consider it when presented for the first time on petition for rehearing. *Nelson v. Smith*, 42 Nev. 302, 176 Pac. 261, 178 Pac. 625; *In re Forney's Estate*, 43 Nev. 227, 184 Pac. 206, 186 Pac. 678.

As to the other matters urged in the petition, we are entirely satisfied with what we said in our former opinion.

For the reasons given, the petition is denied.

SANDERS, C. J., and DUCKER, J., concur.

(46 Nev. 103)

Ex parte WEINROTH. (No. 2557.)

(Supreme Court of Nevada. July 25, 1922.)

Criminal law \Rightarrow **§ 208(9)—Indeterminate sentence for receiving stolen goods held proper.**

Under Rev. Laws, § 6648, providing that a person convicted of receiving stolen goods shall be imprisoned for a term not exceeding five years, and section 7260 as amended by St. 1913, c. 199, St. 1915, c. 158, and St. 1921, c. 176, authorizing indeterminate sentences limited only by the minimum and maximum terms of imprisonment provided for the offense when no fixed period of confinement is imposed by law, and, where no minimum term is fixed, authorizing the court to impose a sentence of not less than one or more than five years, the court was authorized to give a defendant convicted of receiving stolen goods an indeterminate sentence of not less than one year, as section 6648 fixed only the maximum punishment.

Original application for a writ of habeas corpus on behalf of Louis Weinroth. Refused.

A. Grant Miller, of Reno, for petitioner.

L. B. Fowler, Atty. Gen., Robert Richards, Deputy Atty. Gen.; and Lester D. Summerfield, Dist. Atty., and Harlan L. Heward, Deputy Dist. Atty., both of Reno, for respondent.

SANDERS, C. J. Upon the conviction of Louis Weinroth of the offense of receiving stolen goods, he was sentenced under and by virtue of the Indeterminate Sentence Law to confinement in the state prison for a term of not less than one year, where he has been confined for some months past by a commitment issued out of the Second judicial district court of this state in and for Washoe county, wherein he was tried and convicted.

In his petition for a writ of habeas corpus, addressed to this court, he alleges that his confinement and detention by the warden of the state prison is illegal, in that the judgment or sentence pronounced against him is entirely unlawful, illegal, and void, for the reason that the statute which defines the offense of receiving stolen goods prescribes the only punishment that can be imposed by law for that offense.

In the exercise of our original jurisdiction in such matters, we issued the writ to inquire into the legality of the sentence; there being no question raised as to the court's jurisdiction of the offense and of the petitioner.

The precise question before us is whether the court had jurisdiction to pronounce the particular sentence and order petitioner's commitment.

The statute (Rev. Laws, § 6648), which defines the offense of receiving stolen goods provides that the person charged "shall upon conviction, be imprisoned in the state prison

for a term not exceeding five years, or by a fine not exceeding one thousand dollars, or both."

The Indeterminate Sentence Law (Rev. Laws, § 7260), as amended (Stats. 1913, p. 275; Stats. 1915, p. 192; Stats. 1921, p. 265), provides, inter alia:

"Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law and where a judgment of confinement is rendered, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state prison for an indeterminate term limited only by the minimum and maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the minimum term in his discretion at not less than one year nor more than five years, and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment. * * *

The lower court manifestly based its authority to pronounce the sentence upon the assumption that the minimum punishment prescribed by law for the offense of receiving stolen goods (a felony) is indeterminate, or, in other words, that no fixed minimum period of confinement in the state prison is imposed for the offense. And it is argued by counsel for the state that, as no minimum term of imprisonment is prescribed by the statute making it a felony to receive stolen goods, the sentence of petitioner to imprisonment in the state prison for a term of not less than one year is entirely legal. In this counsel are correct. It is true the maximum punishment for such offense is prescribed, but the minimum is not fixed. It is our view that the Indeterminate Sentence Law, among other things, was designed and enacted to cover and include statutes which fix the maximum punishment, but fail to prescribe the minimum; and to accomplish its purpose it expressly provides that—

"Where no minimum term of imprisonment is prescribed by law, the court shall fix the minimum term in his discretion at not less than one year nor more than five years."

But it is argued by counsel for petitioner that upon every reasonable intendment the statute (section 6648) must be construed or interpreted as fixing the minimum punishment for the offense of receiving stolen goods at one day's imprisonment in the state prison, and the court therefore exceeded its jurisdiction in sentencing the petitioner for a term of not less than one year in the state prison. The statute (section 6648) fixes only the maximum punishment, and we are of the opinion that the sentence is entirely legal. Therefore the petitioner must be remanded to the custody of the warden of the

state prison, there to remain until otherwise legally discharged.

DUCKER and COLEMAN, JJ., concur.

(46 Nev. 107)

DAHLQUIST v. NEVADA INDUSTRIAL COMMISSION. (No. 2527.)

(Supreme Court of Nevada. July 26, 1922.)

Master and servant ~~§~~417(1)—Compensation suit against Industrial Commission original proceeding not tried "de novo" on issue relied on before Commission.

Since there is no appeal from a ruling of the Industrial Commission, but the suit for compensation brought against the Commission in the district court is an original suit, plaintiff can rely in the district court on a common-law marriage with the deceased employee, though her claim before the commission was based on a ceremonial marriage, there being in such case no trial "de novo" in the technical sense, which signifies that there had already been a trial before some tribunal, and that the trial de novo was not before a court upon an original hearing, but on appeal.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, De Novo.]

Appeal from District Court, Nye County; Mark B. Averill, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 206 Pac. 107.

L. B. Fowler, Atty. Gen., and Robert Richards, Deputy Atty. Gen., for appellant.

Harry Dunseath and A. M. Hardy, both of Tonopah, for respondent.

COLEMAN, J. A very earnest petition for a rehearing has been filed. It appears that the only conclusion reached in our former opinion complained of is the last one stated in the opinion. In the petition for a rehearing counsel quote in full our views expressed on that point, and then observe:

"We declare that this question is a vital question, not in so much as its decision affects the respondent or appellant in the instant case, but because, if the quoted language is carried to its logical analysis, it is a mandate to any and all claimants to ignore the act and its requirements in establishing, or attempting to establish, jurisdictional conditions precedent before the Commission prior to prosecuting an action de novo upon a rejected claim, and because, if the quoted language is not carried to its logical analysis, it leaves the Commission without judicial guidance in administering the act establishing and creating it."

Counsel then ask this question:

"But does the court intend by its opinion and decision that the trial de novo does not

contemplate that the jurisdictional conditions precedent provided for in the act need be fulfilled by the claimant to an award before the Commission?

We may say that we are entirely satisfied with the disposition made of the question urged upon our consideration in the petition, and would not deem it necessary to file this response to the petition but for the fact that we wish to make it clear that we do not intend to convey any idea save that definitely expressed in the opinion. We are of the opinion that the point suggested by the query quoted was not before us, and we do not understand that we decided it in our former opinion. Upon the oral argument we asked the counsel the question:

"Is there anything in the act which provides that when a claim is presented and a hearing had (before the Commission) and its determination entered, as to the method of procedure thereafter?

To which counsel replied:

"No more than the blanket statement, and the Brown case, that the Commission may sue and be sued."

Counsel seem to base their entire argument upon the theory that the case in the district court, wherein the judgment was rendered which was appealed to this court, was tried by that court de novo. Since the term "de novo" means anew, it may be that, literally speaking, the trial in that court was de novo; but in legal parlance the term "de novo" signifies that there had already been a trial before some tribunal, and that the trial de novo was not before a court upon an original hearing, but upon appeal, whereas this case was originally instituted in the district court. We are sure that learned counsel are well aware of the terms of section 1, art. 6, of our Constitution, and of the holding in *Ormsby County v. Kearney*, 37 Nev. 314, 142 Pac. 803, and following in *V. L. & S. Co. v. District Court*, 42 Nev. 1, 171 Pac. 166, wherein it was held that the Legislature had no authority to create a tribunal with judicial powers, other than as provided in the section of the Constitution mentioned, from which an appeal might be taken to the district court in this state.

We have not been cited to any provision in the Workmen's Compensation Act (St. 1913, c. 111, as amended by St. 1915, c. 190, St. 1917, c. 233, and St. 1919, c. 176) authorizing an appeal from the Commission to the court, nor do we understand that it is contended that there can be such an appeal. If there can be no such appeal, we are at a loss to know how there can be a trial de novo before that court of a matter considered by the Commission. There is absolutely no connection between the proceeding before the Commission and that before this

court, nor, as appears from the answer of counsel to the query propounded during the oral argument, is there any contention that there is.

Counsel relies upon the following authorities to sustain their position: *Englebreton v. Ind. Acc. Comm.*, 170 Cal. 793, 151 Pac. 421; *Employers v. Ind. Acc. Comm.*, 170 Cal. 800, 151 Pac. 423; *Tirre v. Bush T. Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883; *Int. H. Co. v. Ind. Comm.*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330; *In re Fierro*, 223 Mass. 878, 111 N. E. 957. We do not think any of these cases is in point. It appears that the first case mentioned was a proceeding in certiorari "under the provisions of the Workmen's Compensation Act." Just how it can be authority in this case we are unable to see. The second case was before the court, as appears from the preliminary statement, on a writ of review. We are not informed as to the authority of the court in such matters, but it is very evident that the situation was entirely unlike that presented here. The case of *Tirre v. Bush T. Co.*, supra, was one in which an appeal was taken from the award of the Commission. Such is not the case before us. The case of *Int. H. Co. v. Ind. Comm.* supra, was one which was on review by the court pursuant to express legislative authority, and last case mentioned was before the court on appeal. In each of these cases it appears that the court was authorized to review the proceedings had before the Commission. In the case before us the court reviewed nothing; it merely determined a suit commenced before it. There was no connection between the proceedings before the Commission and the court proceeding. We fail to see wherein any of the cases mentioned is an authority in point.

The petition is denied.

SANDERS, C. J., and DUCKER, J., concur.

(46 Nev. 133)

**STATE ex rel. THATCHER et al. v.
JUSTICE COURT OF RENO TP.,
WASHOE COUNTY et al.
(No. 2514.)**

(Supreme Court of Nevada. Aug. 5, 1922.)

1. Certiorari §84(2)—Jurisdiction of court is limit of inquiry upon certiorari.

The limit of inquiry upon certiorari is the question of the jurisdiction of the court.

2. Justices of the peace §122(2)—Copy of complaint served on defendant must be certified as being a true copy in order to give court jurisdiction to enter default judgment.

Where the copy of complaint served personally on defendant was not certified by the justice or the attorney for plaintiff to be a

true and correct copy of the complaint on file in the justice court, the justice acquired no jurisdiction, and hence had no power or authority to render a default judgment against defendant.

3. Justices of the peace §84(6)—Want of process cannot be waived.

The rule that, where one against whom a judgment has been rendered by default without a valid service of process appears to ask that the default be set aside and for leave to answer on the merits, he thereby waives want of process, does not apply where the copy of the complaint served on defendant was not certified as being a true copy of the complaint on file in the justice court.

4. Election of remedies §3(1)—Remedies held not inconsistent.

That defendant in an action in a justice court appeared and asked that the default judgment against him be set aside on the ground of inadvertence and excusable delay did not preclude him from setting up in a certiorari proceeding that the justice was without jurisdiction to render the judgment because of invalid process, as there was nothing inconsistent between the remedies.

5. Election of remedies §3(1)—One must resort to one or two inconsistent remedies to constitute an election.

The very essential of election is that a party must resort to one of two inconsistent remedies.

6. Estoppel §56—One must have changed his position to his detriment by conduct of the other party.

An essential to the invoking of the doctrine of estoppel is that a party has, by the conduct of the other party, been induced to change his position to his detriment.

Appeal from District Court, Washoe County; Edward F. Lunsford, Judge.

Certiorari proceeding by the State of Nevada, on the relation of George Thatcher and others, against the Justice Court of Reno Township, Washoe County, and Sidney O. Foster, Justice. Judgment for petitioners, and respondents appeal. Affirmed.

Augustus Tilden, of Reno, for appellant.

Hoyt, Norcross, Thatcher, Woodburn & Henley, of Reno, for respondents.

PER CURIAM. This is an appeal from a judgment rendered in a proceeding in certiorari and from an order denying a new trial therein.

The undisputed facts are that Augustus Tilden obtained a judgment by default against relators in the justice court of Reno township for their failure to appear, answer, or demur. Seventeen days after the rendition and entry of the judgment, the relators moved in said justice court to have the judgment set aside and vacated, upon the ground of inadvertence and excusable neglect. The justice denied the motion, and thereafter

they sued out a writ of certiorari to review the judgment. Upon the return to the writ and the answer of Augustus Tilden to the petition therefor, the reviewing court decided and held the judgment to be void for want of jurisdiction. Counsel for appellant asserts that the judgment is against law, and that the evidence is insufficient to support the judgment.

[1] The rule is so well established that the limit of the inquiry upon certiorari is the question of the jurisdiction of the court, that it should never again be questioned, directly or indirectly, in this jurisdiction. Ignoring, then, all errors of law and the insufficiency of evidence except in so far as they relate to the question of jurisdiction, we shall inquire whether the return shows that the justice court exceeded its jurisdiction.

[2] It is conceded that the copy of the complaint served personally upon relator was not certified by the justice or the attorney for plaintiff to be a true and correct copy of the complaint on file in the justice court. The reviewing court, upon the authority of *Martin v. Justice Court of Elko Tp.*, 44 Nev. 140, 190 Pac. 977, held this to be a jurisdictional requirement, and that the justice was without jurisdiction, power, or authority to render the judgment.

[3] Counsel for appellant does not question this authority, but invokes the rule that if one against whom a judgment has been rendered by default without a valid service of process appears to ask that the default be set aside and for leave to answer on the merits, he thereby waives the want of process. It is not for want of process that relators attack the judgment, but for the failure of the plaintiff or the justice to comply with what the court held in the *Martin* case to be a jurisdictional requirement of the statute.

This court, in *Iowa M. Co. v. Bonanza M. Co.*, 16 Nev. at page 73, said:

"There is a marked, and in many respects, important and substantial distinction, between defects in practical proceedings, which constitute mere irregularities, or such as render the proceeding a total nullity and altogether void. Where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of conducting it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity, and cannot be made regular by any act of either party."

We are not disposed to change the rule thus adopted. Sustaining the rule are: *Baskins v. Wylds*, 39 Ark. 347; *Southern B. & L. Ass'n v. Hallum*, 59 Ark. 583, 28 S. W. 420; *Correll v. Greider*, 245 Ill. 378, 92 N. E. 268, 137 Am. St. Rep. 327; *Mills v. State*, 10 Ind. 114; *Osborn v. Cloud*, 21 Iowa, 238; *Roals v. Shules*, 29 Iowa, 507; *Mayfield v.*

Bennett, 48 Iowa, 194; *Godfrey v. Valentine*, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657; *Roberts v. Railway Co.*, 48 Minn. 521, 51 N. W. 478; *Spencer v. Court of Honor*, 120 Minn. 422, 139 N. W. 815; *McGuinness v. McGuinness*, 72 N. J. Eq. 381, 68 Atl. 768; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095. And see *Simensen v. Simensen*, 13 N. D. 306, 100 N. W. 708.

[4, 5] We do not think there is any ground for the contention that there was such an election of remedies as precluded the prosecution of this proceeding. The very essential of election is that a party must resort to one of two inconsistent remedies. *Robertson v. Robertson*, 43 Nev. 50, 180 Pac. 122, 187 Pac. 929. There is nothing inconsistent between the remedy resorted to in the justice court and in this proceeding.

[6] As to the contention of estoppel, we need only say that an essential to the successful invoking of the doctrine of estoppel is that a party has, by the conduct of the other party, been induced to change his position to his detriment. *Sharon v. Minnock*, 6 Nev. 377. There has been no change of position on the part of appellant, such as contemplated by the law.

The judgment is affirmed.

(111 Kan. 732)

PHILLIPS et al. v. OKEY. (No. 23865.)

(Supreme Court of Kansas. July 8, 1922.)

(Syllabus by the Court.)

1. Master and servant §405(4)—Evidence as to cause of death of miner within Compensation Act held insufficient.

In an action for compensation for the death of an employee on the ground that his injury and consequent death were caused by breathing bad air in his employer's mine, when the state of the evidence was such that the trial court was constrained to find that there was "not sufficient evidence to show that the death [of the workman] was caused by, or contributed to, by the breathing of the bad air," and when the evidence was uncertain as to what did cause the workman's death, there was no error in the trial court's refusal to make a finding thereon.

2. Trial §395(1)—Finding of fact in harmony with evidence accepted by court held sufficient.

The findings of fact were in harmony with the evidence to which the trial court gave credence, and they were sufficiently pertinent and comprehensive to satisfy the mandate of Civ. Code, § 297 (Gen. St. 1915, § 7197).

3. Trial §395(1)—Court not bound in making findings of fact to follow categorical outline submitted by litigants.

In making findings of fact as required by Civ. Code, § 297 (Gen. St. 1915, § 7197), the trial court is not bound to adopt and follow a categorical outline of questions of fact submitted by the litigants or either of them.

Appeal from District Court, Cherokee County.

Action by Laura Phillips and others, by a next friend, against O. D. Okey. Judgment for defendant, and plaintiffs appeal. Affirmed.

Skidmore & Skidmore, of Columbus, for appellants.

G. W. Earnshaw, of Joplin, Mo., and Don H. Elleman, of Columbus, for appellee.

DAWSON, J. This was an action for an allowance under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216).

[1] The plaintiffs are the wife and children of the late John Henry Phillips, who in his lifetime had been a miner and employed by the defendant for a short time during the year 1920. On August 8, the air compressor in defendant's mine became defective, and the air became so foul that Phillips and his fellow miners had to be taken out of the mine twice during the day. Some of the workmen, including Phillips, were somewhat affected, temporarily at least, by the bad air. That night the defendant was ill at his home. About ten days later, a doctor was called, and he found that Phillips "was suffering pain and had a chill and some fever." The doctor said he "could not ascertain the cause of his illness. * * * It might possibly be the bad air he had breathed in the mine. * * * He spit up substances, * * * in a smoky condition, * * * attended Phillips about six times. * * * An abscess formed and afterwards broke in the chest. He reported to the state board of health an abscess on the lungs, * * * could not say what caused his death. It was due to formed abscess." Phillips died on September 5, 1920.

The counter abstract supplies the attending physician's testimony in greater detail:

"Q. I wish you would state his condition a little more fully. Did he spit up anything? A. The first trip I made to the man, he did not, but the second trip, this abscess had broken, and he was spitting up this matter.

"Q. Now, Doctor, was you able to ascertain the cause of this illness? A. No. * * *

"Q. You say that an abscess formed and afterwards broke in his chest? A. Yes, sir. * * *

"Q. Is that your judgment as to what caused his death? A. I could not say what caused his death. It was due from the abscess that caused his death. * * *

"By the Court: Dr. Jones, have you a judgment as to how long that abscess was there? A. I have not; no sir. I have no history of it and no way of diagnosing that."

There was considerable evidence introduced on both sides, from which the trial court might possibly have found either way as to the main issue of fact; but among the findings which the trial court did make are these:

"3. The court further finds that there is not sufficient evidence to show that the death of said John Henry Phillips was caused by, or contributed to, by the breathing of the bad air on August 8, 1920. * * *

"6. That no notice of the alleged injury was ever given defendant, nor was any claim for compensation made upon the defendant until the service of summons in this action which was on the 12th day of November, 1920."

Judgment for defendant was rendered pursuant thereto, and plaintiffs appeal.

They complain of the trial court's refusal to find "what was the cause of the death of John Henry Phillips." But surely that was not error. It was incumbent on the plaintiffs to prove to the satisfaction of the trial court that the death of Phillips flowed from an injury which he had received in the course of his employment in defendant's mine. This they failed to do. The immediate cause of his death was the abscess; but the doctor who attended him could not tell what caused the abscess; and neither he nor either of the other two medical experts called as witnesses would concede more than a possibility that the bad air Phillips had inhaled on August 8 had caused the abscess, although two of them testified that it might possibly have aggravated an existing abscess. Since there was no convincing testimony that the abscess was caused or aggravated by the foul air in the mine, the trial court properly refused to trace Phillips' injury and death to anything arising out of and in the course of his employment. What else may have caused the abscess and consequent death was not a primary concern.

[2] Complaint is also made because the trial court refused to find whether Phillips was made sick by the bad air in the mine and whether he ever recovered from such sickness. This criticism is ill founded. The trial court did find:

"That some of said men, including Phillips, became affected to some extent on account of said bad air and said Phillips went home about 4 o'clock that afternoon after being so hoisted from said mine and still felt some effects of said bad air. That on the following day, and for some days thereafter, he remained at home and was in bed a part of the time and was up a part of the time, and on the 18th day of August a physician was called, and on his second visit, probably two or three days later, ascertained that the patient was suffering from an abscess on the lung, which abscess resulted in his death on September 15, 1920."

[3] It was not necessary that the trial court's special findings of fact should follow the categorical outline submitted by counsel for plaintiffs. The court's findings as made fully satisfied the mandate of the Civil Code (Civ. Code, § 297; Gen. St. 1915, § 7197; In re Appeal from Survey, 106 Kan. 222, 187 Pac. 677; *Alexa v. Alexa*, 108 Kan. 38, 46, 193 Pac. 1083),

In view of the foregoing, the correctness of the trial court's finding that there was no notice given to the defendant of Phillips' injury and that no claim for compensation had been made becomes immaterial.

The record discloses no prejudicial error, and the judgment is affirmed.

All the Justices concurring.

(111 Kan. 659)

SMITH v. McHENRY et al. (No. 23751.)

(Supreme Court of Kansas. May 6, 1922. Motion for Rehearing Denied July 8, 1922.)

(Syllabus by the Court.)

1. Deeds \S 196(1)—Wills \S 58(1)—May be set aside because of fiduciary relations of parties; owner's contract to give another her land in consideration of support held not procured by fraud or undue influence.

Although a deed based upon a valuable consideration, as well as a mere gift, may be set aside under some circumstances because of the relations of the parties, where no further showing of fraud or undue influence has been made, and no proof of fair dealing has been supplied, it is held that in the present case the evidence does not support a finding that the contract in question was procured by fraud or undue influence.

2. Wills \S 88(5)—Contract to convey land in consideration of support during lifetime, if not operative as deed or will, effective as contract.

A writing by which the owner of land, in consideration of the other party thereto supporting her during her life, agreed to give and convey it to him "either by last will and testament, or in lieu thereof, this instrument to operate in all respects as a good and sufficient conveyance," is held, even if not operative as either a deed or a will, to be effective as a contract that he should have the land at her death.

3. Wills \S 68—Evidence held to show performance of agreement to support owner in consideration of owner's agreement to give or convey land.

The fact that after execution of the contract described in the foregoing paragraph the grantor allowed a will she had previously executed, which devised to the grantee the land in question and other property, to remain until her death unrevoked and unchanged, shows an acceptance on her part of his performance of his agreement to support her. The performance of other agreements on his part is held to have been sufficiently excused.

On Motion for Rehearing.

4. Wills \S 56—Contract to leave another all property remaining at death does not affect subsequent contract that land owned at death shall, on death, go to another in consideration of support.

The fact that one has made a binding contract to leave to another all the property remaining to him at his death does not prevent his making a later valid contract that a tract of land then owned by him shall upon his death

go to a different person in consideration of his caring for him during the rest of his life. The first contract has relation to the property, which up to the time of his death remains subject to his disposal, and the use in good faith of a particular piece of property, although comprising practically his entire estate, to secure his maintenance during his life, withdraws it from that category. Even if a will is made devising the tract in pursuance of the second contract, the person named as devisee acquires his rights with respect thereto through the contract; the devise serving merely to transfer the formal legal title in accordance with the agreement.

Appeal from District Court, Washington County.

Action by Geo. A. Smith against O. I. McHenry and others. Judgment for plaintiff, and named defendant appeals. Reversed and remanded, with directions.

Monroe, Hursh & Monroe, of Topeka, for appellant.

N. J. Ward, of Belleville, for appellee.

MASON, J. This case involves a controversy as to the right to an 80-acre farm formerly owned by Helen Smith, the widow of Daniel Smith, who died in 1912, the claimants being George A. Smith and O. I. McHenry. The claim of the plaintiff George A. Smith, is based upon two oral contracts with his foster parents, Daniel and Helen Smith, to the effect that when the survivor of them died he was to have all the property left, in consideration for certain services. The claim of McHenry, a defendant, is based upon a written contract entitling him, as he contends, to the tract referred to upon the death of Helen Smith, in consideration of his caring for her from the time it was entered into and in discharge of an existing indebtedness of \$1,500. The court allowed McHenry a lien for the \$1,500, but otherwise the plaintiff recovered judgment. McHenry, who will be referred to as the defendant, appeals.

The trial court found specifically that the contracts under which the plaintiff claimed had been entered into, and that he had performed both on his part; that the written contract relied upon by the defendant had been procured by fraud and undue influence, and that he had not performed the obligations he had assumed under it. The defendant asserts that, while there was evidence to the effect that Daniel and Helen Smith had promised the plaintiff that he should be adopted and treated as their heir, there was none tending to show any agreement that would prevent them from disposing of all their property elsewhere by will. We shall assume that upon this proposition the evidence supports the finding, and that the plaintiff in addition to having the rights of an heir, was entitled to any property left by Mrs. Smith, who survived her husband, which

was within her power to dispose of by will. Upon that assumption the case must be determined according to the effect given to the written contract relied upon by the defendant.

[1] 1. The defendant's mother, while not related to the Smiths, had been reared in their home, and the defendant lived there from boyhood until he was married. Mrs. Smith lived with him during the last years of her life upon the farm now in dispute. She appears to have been about 68 years old at the time the contract was executed, and died some 5 years later. The plaintiff contends that by reason of the fiduciary relation which the defendant sustained toward Mrs. Smith her assent to the written contract must be presumed to have been obtained by undue influence, and that in order to derive a benefit therefrom the defendant was required to prove the contrary. The defendant maintains that the rule invoked does not apply here, the contract being based upon a valuable consideration and the relation of the parties not being such as to give rise to that presumption. The rule is often stated as though applying only or especially to voluntary conveyances or gifts *inter vivos*. *Smith v. Smith*, 84 Kan. 242, 114 Pac. 245, and note in 35 L. R. A. (N. S.) 950; 12 R. C. L. 953, note 6; 14 A. & E. Encyc. of L. 1011. A deed or contract, based upon a valuable consideration, may, however, under some circumstances be set aside because of the relations of the parties, where no further showing of fraud or undue influence has been made, and no proof of fair dealing has been supplied. 6 R. C. L. 637; note, 21 Am. St. Rep. 103. See, also, 18 C. J. 422, note 95.

"While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption." 2 *Pomeroy's Eq. Jur.* § 956.

The lawyer by whom the contract in question was prepared and in whose office it was executed testified that Mrs. Smith came to see him, accompanied by two friends, who signed it as witnesses; that he had had no previous conversation about the matter with the defendant; that the data were furnished him, and the instrument was drawn before the defendant arrived; and that there was nothing to indicate that the agreement was not her free and voluntary act. While the trial court was not bound to accept the testimony of any witness, there is nothing whatever in the record to suggest that full credence was not given to this version of what

took place at the time of the preparation and signing of the instrument, or that there is any doubt of its correctness. The testimony of the two witnesses referred to was to the effect that they were fellow church members of Mrs. Smith; that they came with her at her request, she stating in a general way the purpose of the visit; and that there were no indications of any duress exercised upon her. Without attempting to lay down any general rule by which more or less similar cases may be solved, we hold that whatever tendency the relation of the parties may have had to cast suspicion upon the good faith of the transaction, and to call for evidence of voluntary consent on the part of Mrs. Smith, was fully met by this uncontradicted evidence of what actually took place when the contract was signed, and that, if it is to be held invalid, it must be by reason of other evidence tending to show the exercise of undue influence or fraud.

No such evidence was produced, unless it is to be found in testimony that may be thus summarized: Mrs. Smith often said that the defendant wanted a deed to the farm; that he was always "shouldering around after her for it"; that he was deviling her all the time about the place, and she could not stand it down there, but she would not let him or any one else have a deed to it until she was through with it, and had refused to make a deed; that she had fixed everything the best she knew how—the best way she knew without deeding it, but he did not seem satisfied—that he would have to be satisfied with what she had done. (It does not appear whether these statements were made before or after the execution of the contract; a part of the language seems to indicate the latter.) She said that the home was unpleasant; there was so much profane language; that at one time when she had started to go to a neighbor's the defendant took her back and sat her down in a chair not very easy, and told her she could not go. She would sometimes visit at the home of friends and pay her board. One Christmas the defendant had been tantalizing her about his contract with her, and she went to her room. He followed her in, and told her if she wanted to lie down to come out on the couch, so she would not catch cold. He took her by the arm and brought her out, and threw her on the couch not very easy. One witness characterized her as "old, not very strong, and feeble and childish." Another said she seemed to be a woman that had a will of her own with respect to making the deed, but otherwise she was not. She executed the contract in question, and also the will hereafter referred to, by making her mark. Many checks drawn by Mrs. Smith were witnessed by the defendant. Presumably a short time after the contract was executed a neighbor, who had noticed the defendant's riding around two or three times,

said to him that he had been riding around a good deal. He answered, "Yes; I am through now." He was asked if he had his business fixed up now, and said, "Yes; I got it fixed, and fixed the way I want it, too."

The court does not regard this evidence, or other evidence of the same general character, as having any substantial tendency to show the exercise of undue influence upon Mrs. Smith, or the perpetration of any fraud upon her. A presumption of undue influence arises more readily with respect to the execution of a deed or contract than of a will. *Ginter v. Ginter*, 79 Kan. 721, 744, 101 Pac. 634, 643, 22 L. R. A. (N. S.) 1024. But in either case, in order for the evidence to be sufficient to warrant setting aside the instrument upon that ground, it must show that a real consent was lacking. "The undue influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stands in vinculis." *Conley v. Nailor*, 118 U. S. 127, 134, 135, 6 Sup. Ct. 1001, 1005 (30 L. Ed. 112). "In order to render a deed void, it must operate to deprive the grantor of his free agency, by substituting for his will that of another. It does not, therefore, consist in mere gratitude for kindness, affection, or esteem, where a conveyance is induced,

* * nor in a mere desire by the conveyance to gratify the wishes of another, if the free agency of the grantor is not impaired, nor even in suggestions, entreaties, and importunities, short of exactions overpowering the grantor's volition. * * *

8 R. C. L. 1032.

[2] 2. The plaintiff contends that the contract was not effective as a deed because it was testamentary in its nature, and was not effective as a will because it was not probated. It contained an agreement on the part of Mrs. Smith "to give, and to convey, either by last will and testament, or in lieu thereof, this instrument to operate in all respects as a good and sufficient conveyance of the following described real estate," and this agreement among others on the part of the defendant, "upon the death of the said party of the first part, the foregoing conditions having been carried out, and the title to said lands vesting in him by virtue hereof, to pay, or cause to be paid, within three months from such time, the sum of \$100 in cash to G. A. Smith." It was, at all events, a valid contract that in consideration of the \$1,500 for which she was already indebted to the defendant and of his caring for her and furnishing her a home during the rest of her life, and of other agreements on his part, he was to have the farm at her death. If it had been a will, it would at the same time have been a contract, and while revocable in its aspect as a will would, notwithstanding such a revocation, have been enforceable as a contract. *Nelson v. Schoonover*, 89 Kan. 388,

131 Pac. 147. The prior contract with the plaintiff interposed no obstacle. That provided that whatever property was left undisposed of at the death of Mrs. Smith should go to the plaintiff. It did not prevent her disposing of the farm during her lifetime. She could sell it or mortgage it, or perhaps even give it away. At all events she could contract with reference to it. She could use it as she did as a means for providing for her future support. Whether the instrument was itself sufficient to pass a legal title to the defendant at once or at the time of Mrs. Smith's death is not now important. It was at least as effective as the familiar type of oral contracts which are often enforced, where a promise made that in return for services the person performing them shall receive certain property at the death of the owner. Moreover, about two years before this contract was entered into, Mrs. Smith had executed a will which was duly probated, leaving \$100 to the plaintiff and giving the rest of her property to the defendant. No reason is apparent why the contract may not be interpreted as one to give the plaintiff the farm by will, effectuated on the part of Mrs. Smith by allowing the will she had already made, which gave him that with her other property, to remain unchanged. The plaintiff suggests that the will referred to was revoked by the later instrument, which was in itself a will. If it should be regarded as a will, not being inconsistent with that already executed, it could not effect its revocation. 40 Cyc. 1173.

[3] 3. The court found that the defendant had failed to perform the contract on his part in that he did not, as his agreement required, furnish Mrs. Smith with a suitable home or provide her one elsewhere, or make semi annual payments to her, or pay the expenses of her last sickness and funeral, or erect a monument over her grave. The defendant argues that so far as concerns her support, which would include the payment of money for her necessary expenses, the objection is one that could only be raised by Mrs. Smith herself. Where a deed has been executed in consideration of the grantee undertaking to support the grantor for life, there are cases holding that the grantee's failure to perform his agreement can be taken advantage of only by the grantor. 18 C. J. 170, note 68; 18 C. J. 364, 365, note 15(b); *Roche v. Roche*, 286 Ill. 336, 121 N. E. 621. The reasons given for the rule may not apply where the instrument executed is not a deed, but a contract to make a will, no question there arising as to a forfeiture, or of divesting title by reason of the nonperformance of a condition subsequent. There was evidence that Mrs. Smith complained somewhat of the treatment she received, expressed dissatisfaction with it, and at times stayed with friends, paying board. It does not appear, however, that she was refused money, or that

she abandoned her home with the defendant. On the contrary, she seems to have remained with him until her death. Inasmuch as she refrained from revoking or changing the will she had already made in his favor, we think she must be regarded as having shown herself sufficiently satisfied with the existing conditions to accept such performance as he offered and treat the contract as still in force. Of the defendant's omission to pay the expenses of Mrs. Smith's last illness and funeral and to erect a monument, these explanations are offered in his brief: Such expenses were paid in due course of the administration of her estate, he supposing that, inasmuch as he was her residuary legatee, it came to the same thing as payment by him; and Mrs. Smith before her death caused a monument to be erected. Neither statement of fact is challenged in the brief of the plaintiff, and we deem the excuses sufficient.

The judgment is reversed, and the cause is remanded, with directions to render judgment in favor of the defendant, quieting his title to the land as against the plaintiff.

All the Justices concurring.

On Motion for Rehearing.

[4] In a motion for a rehearing it is urged that Mrs. Smith's contract that McHenry should have the 80-acre tract when she died cannot be enforced without violating the rights of the plaintiff under her earlier agreement to leave to him all the property remaining to her at the time of her death. This matter was discussed in the original opinion, but perhaps not at sufficient length to make the view of the court clear. By the first contract Mrs. Smith did not agree that the plaintiff was to receive any particular property. She did not undertake that she would have any property when she died, but that whatever she then had should be left to him. This agreement we regard as having reference to property of which at the time of her death she had the power of disposal. She could have deeded the tract in question to McHenry or to any one else, reserving a life interest in herself, without any invasion of the plaintiff's rights. See 40 Cyc. 1069. What she did was to bargain away the ownership of the land after her death to secure her support during life and to satisfy the debt she owed. The contract was immediately effective; it was not ambulatory; there was no power of revocation. Mrs. Smith had by her earlier contract lost the power to devise or bequeath to any one but the plaintiff

property which at the time of her death still remained to her, in the sense of still being subject to her disposition. But property which she had in good faith bargained away to secure her support, although no conveyance had been executed, was thereby withdrawn from that category.

In *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177, the provision of a contract that after the death of one party the title of land then owned by him should vest in the other, who agreed to care for him during his life, was held to be unenforceable, because it was testamentary. In a later decision, however, the case was distinguished from those in which specific performance of somewhat similar contracts had been allowed, upon the ground that an adequate remedy at law was available, because of the brief period during which services had been rendered under it. *Hazleton v. Reed*, 46 Kan. 73, 26 Pac. 450, 26 Am. St. Rep. 86. Our statute has abrogated the common-law rule that an estate to vest in the future cannot be directly granted. *Miller v. Miller*, 91 Kan. 1, 4, 5, 136 Pac. 953, L. R. A. 1915A, 671, Ann. Cas. 1917A, 918. A deed which purports to "take effect" upon the death of the grantor, but of which he has made a delivery by placing it beyond his power of recall, has often been held valid by construing it as intended to pass a present title, the enjoyment alone being postponed. *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317, and cases there cited; note, 11 A. L. R. 23, 74. Of course an instrument which literally does not take effect until the grantor's death is testamentary and revocable. The present contract obviously became effective at once and was irrevocable. It undertook to bring about results which were unquestionably within the power of the parties, notwithstanding the prior agreement of Mrs. Smith that the plaintiff should receive the property remaining to her at her death. If it failed in this respect, the reason can only have been because the method pursued was not adapted to the purpose, although expressing clearly the intention of the parties, and we do not think this was the case. Although the legal ownership of the tract is conceived as reaching McHenry through the will, his rights with respect thereto were acquired under the contract; the devise serving merely to transfer the formal title in accordance with the agreement.

The motion for a rehearing is denied.

All the Justices concurring.

(71 Colo. 473)

VOSBURGH v. KNIGHT et al. (No. 10062.)(Supreme Court of Colorado. June 5, 1922.
Rehearing Denied July 8, 1922.)**1. Trusts \S 44(2)—Finding of existence of trust held supported by evidence.**

In a suit by one of two daughters to set aside a deed purporting to convey to the children of the other all of certain land which had been conveyed to them by their deceased father and their mother jointly, except a dwelling and a life estate reserved respectively to each grantor, evidence *held* sufficient to support a finding that the land was subject to a trust in the daughters to maintain the property, collect the income, and support the mother out of the net income, using the corpus of the estate for that purpose if necessary.

2. Trusts \S 110—Constructive trust established by oral testimony.

In a suit by one of two daughters to set aside a deed purporting to convey to the children of the other all of certain land which had been conveyed to them by their deceased father and their mother jointly, except a dwelling and a life estate reserved respectively to each grantor, *held*, in view of the confidential relations between the parties, that oral testimony was sufficient to establish the existence of a constructive trust.

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Suit by Florence J. Vosburgh against Grace B. Knight and others, and Mary K. T. Burnham, intervenor. From a judgment for defendants and intervenor, plaintiff brings error. Affirmed.

Ponsford, Carnine & Kavanaugh and Joseph D. Pender, all of Denver, for plaintiff in error.

Wilbur F. Denious, Charles F. Morris, and John W. Sleeper, all of Denver, for defendants in error Grace B. Knight, Genevieve K. Smith, and W. Burnham Knight.

Edward Ring, of Denver, for defendant in error Mary K. T. Burnham.

DENISON, J. Florence J. Vosburgh was the plaintiff below, and brings the case here on error, complaining of the decree whereby the court charged upon her and her sister, the defendant Grace B. Knight, a trust on certain property and directed how the title thereof should go.

The essential facts are as follows: The defendant in error, Mary K. T. Burnham, is the widow of the late Dr. Norman G. Burnham, of Denver. The plaintiff and Grace B. Knight are their daughters, and the defendants in error Genevieve K. Smith and W. Burnham Knight are the children of Grace B. Knight. The plaintiff has no children.

Dr. and Mrs. Burnham, in his lifetime, gave to each of their said daughters a dwell-

ing house, which does not concern us now, and not long before his death they conveyed to their daughters all their property, amounting, perhaps, to \$100,000 in value.

February 19, 1920, some time after Dr. Burnham's death, Mrs. Knight and Mrs. Burnham came with a notary to Mrs. Vosburgh's house, bringing a deed which they persuaded her to sign with Mrs. Knight. By this deed the plaintiff and Mrs. Knight purported to convey to Mrs. Knight's children all the said property except the two dwellings above named, reserving, however, to each of the grantors an estate in an undivided half thereof for her life.

Repenting of her act, Mrs. Vosburgh that night consulted an attorney, and shortly after brought suit to set aside this deed, alleging undue influence by reason of her sister's dominating character and her own weakness from illness and consequent mental incapacity. The defendants allege that the purpose of the original conveyance to the sisters was that they should take care of their parents during their lives, retain life estates for themselves, with remainder to their children, and that the deed sought to be set aside was made in pursuance of that understanding.

Mrs. Burnham intervened, alleging that up to the beginning of the suit the sisters had supported her out of a joint bank account which was made up of the proceeds of the rents from the property conveyed to them, but that since this suit the plaintiff refused to sign checks thereon, and she, the intervenor, was thus without support, and, by an amendment, she prayed that a trust be declared in her favor, with the plaintiff and Mrs. Knight as trustees, to maintain the property, collect the income, maintain the intervenor out of the net income, using the corpus of the estate, if necessary, for that purpose.

The decree is in accordance with this prayer. It adds, however, a provision in accordance with the answer that a life estate in said property, subject to said trust, is vested in the plaintiff and the defendant Mrs. Knight, remainder to the child or children of their bodies then surviving.

Plaintiff in error argues a number of points, all of which we have examined with care, but find it necessary to mention only two: First, that the evidence does not support the finding; second, that the court has established a trust upon oral testimony only.

[1, 2] As to the first proposition it is enough to say that the evidence was conflicting. As to the second we think the court was right. It would require strong evidence to prove that Dr. Burnham and his wife denuded themselves of all their property by deed to their daughters without an understanding of some kind, e. g., that they were to be supported out of the income; and, in view of the confidential relations between the parties, that must be said to be sufficient to create a construc-

tive trust. *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790. It follows that the trust was rightly established by the court so far as the life estates are concerned. As to the remainder to the grandchildren, the plaintiff is in no position to object, for she has parted with her title thereto by deed which the court has declined to cancel; but the life estates and the remainder constitute the whole estate; therefore the validity of the trust cannot be denied.

The judgment is affirmed.

TELLER, Acting Chief Justice, and ALLEN and BURKE, JJ., concur.

(71 Colo. 479)

**UNION AUTOMOBILE INS. CO. v. SAM-
ELSON.** (No. 10150.)

(Supreme Court of Colorado. June 5, 1922.
Rehearing Denied July 8, 1922.)

Insurance §615 — Assured not deprived of right to reimbursement because party having claim against him happened also to be a party assured.

Where automobile liability policy insured against loss from claims on account of accidental bodily injuries to, or death of, "any person or persons" resulting from the operation of the automobile, assured was not deprived of his right to reimbursement for an amount recovered from and paid by assured for such an injury to a third party, simply because the third party happened also to be a party assured under another paragraph of the same policy, which provided that "the assured * * * shall include the assured named in the declarations and any person or persons while riding in or operating" the automobile with the permission of assured or any adult member of his family.

Department 1.

Error to County Court, City and County of Denver; George W. Dunn, Judge.

Action by Nathan Samelson against the Union Automobile Insurance Company. From judgment for plaintiff, defendant brings error. Affirmed.

G. W. Humphrey, S. D. Crump, and K. V. Riley, all of Denver, for plaintiff in error.

William W. Garwood, Omar E. Garwood, Harry Sobol, and George O. Marra, all of Denver, for defendant in error.

ALLEN, J. This is an action to recover upon a policy or contract of liability insurance. Prior to the bringing of this action, the plaintiff incurred a liability to one Nathan Snyder by injuring him through the manipulation and use of an automobile. He was sued by Snyder for damages on account of such injury. Snyder obtained a judgment against plaintiff for \$300, which amount the

latter thereafter paid. To be reimbursed this amount by the insurance company is the purpose of the action brought by plaintiff. The cause was tried to the court without a jury. Findings and judgment were for plaintiff, and the defendant, the insurance company, brings the cause here for review.

The first contention of the plaintiff in error, defendant below, is that the action by Snyder against the plaintiff in the instant case was a collusive suit. The trial court found the fact otherwise, and the finding is supported by the evidence. It is undisputed that Snyder was injured by plaintiff, and there is evidence to show plaintiff's liability to respond in damages on account of the injury. The defendant insurance company was duly notified of the accident, and had an opportunity to defend in Snyder's action against plaintiff.

The plaintiff in error denies its liability in the instant case on the ground that Snyder, as it claims, was also an assured under the policy, and that by reason of that fact, coupled with certain provisions of the policy, the plaintiff, who is the named assured in the policy, cannot recover in this action.

The provisions of the policy, pertinent to this discussion, are as follows:

"Union Automobile Insurance Company * * * does hereby agree to insure the person * * * named, * * * hereinafter called the assured: * * *

"Section II. Against direct loss or expense arising or resulting from claims upon the assured for damages by reason of the ownership, maintenance, manipulation or use of the automobile described * * * if such claims are made on account of: (A) Bodily injuries or death accidentally suffered or alleged to have been suffered by any person or persons as the result of an accident occurring while this policy is in force. * * * This policy is issued * * * subject to the following conditions, limitations, agreements: * * * (16) The assured, wherever referred to under section II of this policy, shall include the assured named in the declarations, and any person or persons while riding in or operating any automobile described in statement 3 of the Schedule of Declarations for private or pleasure purposes or for making business calls, with the permission of the said named assured, or with the permission of any adult member of the said named assured's family."

Assuming, without conceding or deciding, that at the time of the accident Snyder was "riding in" and "operating" the automobile, and under paragraph (16) of the policy, above quoted, was an assured, this fact does not deprive the plaintiff, who is the assured named in the policy, of the right to reimbursement or to recover under the policy. In other words there is nothing in paragraph (16) or elsewhere in the policy which deprives the named assured of the right to recover simply because the party who has or had a claim

against him happens or happened to be a party himself assured. There is nothing in the policy which modifies the plain provisions of paragraph (A) of section II, which indemnifies the named assured for any loss or expense occasioned by certain claims on account of injuries suffered or alleged to have been suffered by any person or persons.

Neither the provisions of the policy above quoted nor any others make it material whether Snyder is a member of plaintiff's family or whether he is an assured. If plaintiff incurred a liability to Snyder and sustained a loss or expense on account thereof, the defendant insurance company is liable to plaintiff, if the case comes within section II of the policy.

There is no error in the record. The judgment is affirmed.

TELLER, J., sitting for SCOTT, C. J., and DENNISON, J., concur.

(60 Utah, 278)

FONNESBECK v. OREGON SHORT LINE R. CO. et al. (No. 3757.)

(Supreme Court of Utah. June 19, 1922.)

Railroads §5½, New, vol. 6A Key-No. Series —Company not liable for damages caused during government control.

While a railroad was under control of the Director General of Railroads, a railroad company was not liable for damages resulting from an accident in operating the railroad.

Appeal from District Court, Box Elder County; A. A. Law, Judge.

Action by Christian Fannesbeck against the Oregon Short Line Railroad Company and James C. Davis, Agent and Director General. From a judgment for plaintiff, defendant Railroad Company appeals. Reversed, with directions.

Geo. H. Smith, J. V. Lyle, R. B. Porter, and J. T. Hammond, Jr., all of Salt Lake City, for appellant.

Leon Fannesbeck, of Logan, for respondent.

WEBER, J. Suit was instituted by plaintiff against James C. Davis, Agent of the President and Director General of Railroads, and the Oregon Short Line Railroad Company. Plaintiff obtained judgment against the Oregon Short Line Railroad Company for damages sustained by him in a collision between an auto driven by him and a train operated by the Director General of Railroads over a track of the Oregon Short Line Railroad. The district court denied a motion, interposed by the Oregon Short Line Railroad Company, for a dismissal of the action so far as it was concerned. This ruling

is one of the errors assigned by the railroad company, the appellant.

The assignment must be sustained. At the time of the accident the Oregon Short Line Railroad system was operated by the Director General of Railroads. The Oregon Short Line Railroad Company had no control over the operation of its railroad, and was not liable to damages resulting from the accident. *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 544, 41 Sup. Ct. 593, 65 L. Ed. 1087.

The judgment is reversed, and the district court of Box Elder county is directed to dismiss the cause of action as against the railroad company. Appellant to recover its taxable costs.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

(60 Utah, 261)

TINTIC MILLING CO. et al. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3813.)

(Supreme Court of Utah. June 19, 1922.)

1. Master and servant §388—Father held partial "dependent" of son within Compensation Act.

Eighty year old father who was unable to support himself and had no means of support except what he received from his son, who had contributed to the father's support over a period of years, in amounts of about \$300 a year, held a partial dependent of the son, within the Workmen's Compensation Act, though no contributions had been made for some time before the injury.¹

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

2. Master and servant §417(7)—Findings of commission on substantial evidence in compensation case conclusive.

In proceedings under the Workmen's Compensation Act, the conclusions of the Industrial Commission based upon substantial evidence, will not be disturbed on review.

3. Master and servant §416—Industrial Commission empowered to appoint trustee to disburse compensation awarded to aged applicant.

In workmen's compensation proceeding, the Industrial Commission was empowered to appoint a trustee to disburse the money to an aged applicant for death benefits where the arrangement was made with his consent.

Proceeding under the Workmen's Compensation Act, by Peter Christensen, for compensation for death of Soren Christensen,

¹ *Globe Grain & Milling Co. v. Industrial Commission* (Utah) 193 Pac. 642; *Hancock v. Industrial Commission* (Utah) 198 Pac. 169; *American Fuel Co. v. Industrial Commission* (Utah) 206 Pac. 788.

opposed by the Tintic Milling Company, employer, and the Aetna Life Insurance Company, insurance carrier. Award by the Industrial Commission for the claimant, and the employer and insurance carrier petition for review. Affirmed.

Bagley, Fabian, Clendenin & Judd, of Salt Lake City, for plaintiffs.

Harvey H. Cluff, Atty. Gen., and J. Robert Robinson, Asst. Atty. Gen., for defendant.

WEBER, J. On January 27, 1922, Soren Christensen died as the result of an accidental injury sustained by him two days before while working as a miner for the Tintic Milling Company in a mine at Silver City, Utah. Application for compensation was made to the Industrial Commission by Peter Christensen, father of the deceased. Upon hearing the evidence, the commission made an award to Peter Christensen, payable in installments of \$13.85 per week for a period of 90 weeks, or a total of \$1,246.50, less \$55.40 already paid. The commission further ordered that said weekly payments should be made to the Tracy Loan & Trust Company, as trustee, for the use and benefit of Peter Christensen, and that, beginning April 1, 1922, the Tracy Loan & Trust Company pay the sum of \$20 per month to Peter Christensen from the trust fund thus created, and pay additional amounts to Peter Christensen only upon the order of the Industrial Commission. Application for a rehearing was made, and, upon denial of the petition by the commission, plaintiffs filed their petition in this court for review of the proceedings.

[1, 2] It is claimed that the record is devoid of any evidence to sustain the commission's conclusion of partial dependency by Peter Christensen upon his son Soren Christensen. At the time of the son's death, the father was 80 years of age and not able to support himself. He could do little work and had practically no means of support except what he received from his son. Soren Christensen usually contributed about \$300 per year to his father's support. His son had not been home for over a year prior to his death, but, at the last time he was home, he left \$300 and sent money at different times since then—at one time \$15. The record shows that the son contributed money to his father's support over a period of years and that the father depended upon this money for maintenance and support. Plaintiffs claim that this case comes within the doctrine of the Globe Grain & Milling Co. et al. v. Industrial Commission (Utah) 193 Pac. 642; Hancock v. Industrial Commission (Utah) 198 Pac. 169, and American Fuel Co. et al. v. Industrial Commission (Utah) 206 Pac. 786, in which it was held that occasional gifts or contributions made at the pleasure of the donor do not constitute dependency within the Workmen's Compensation Act (Comp. St.

1917, §§ 3061-3165). The doctrine announced in the cases cited is not applicable to the facts here. What Soren Christensen gave to his father was not in the nature of an occasional gift or donation but for the purpose of furnishing actual and needed support. It is argued by counsel for plaintiffs that, as the statute provides that "the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case, existing at the time of the injury resulting in the death of the employé," the fact that the son had not for some time before the injury contributed to his father's support does not tend to establish partial dependency. The father was unable to support himself at the time of his son's death, and had no one else to assist him. The status of dependency is thus clearly established. It is only as to contributions that any question arises. Certainly it was never the legislative intent that contributions for maintenance and support of a dependent father must have been made at the very time of the injury to establish dependency. Such a narrow construction would in many cases defeat the plain intent of the law. In cases of partial dependency the question is not whether the contributions were made at regular intervals, but whether they were made for the purpose of continued support, whether at the time of the injury resulting in the death of the contributor there was actual dependency, and whether the facts in the particular case indicate that the contributions for maintenance and support would have continued, had the death of the employé not occurred. The Workmen's Compensation Act of this state does not limit the period of time preceding the injury during which the fact of contribution made for support must be shown. That subject is wisely left to the discretion of the commission, whose conclusions, when based upon some substantial evidence, are not assailable on review.

[3] Plaintiffs object to the manner of payment ordered by the commission, claiming that the insurance carrier is not protected and that the commission has no power to appoint a trustee to disburse the money to the applicant. The arrangement complained of was made by the commission with the consent of the applicant. As long as the beneficiary has no objection to having the money handled by the trustee, as long as he is satisfied, the plaintiffs have no cause for complaint. The money being paid to the trustee with the applicant's consent, the insurance carrier is fully protected. The commission was prudent in making the order relating to the payment of the compensation. We unreservedly approve its course of action.

The award is affirmed, with costs.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

MEMORANDUM DECISIONS

PEOPLE v. RYAN. (Cr. No. 610.) (District Court of Appeal, Third District, California. April 20, 1922.) Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge. William Ryan was convicted of assault with intent to commit murder, and he appeals. Affirmed. Thomas J. Horan, of Vallejo, and L. R. Jacobson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was charged in an information filed by the district attorney of Sacramento county with the crime of assault with intent to murder one W. R. Cook, a deputy sheriff of said county. He was regularly tried and convicted, he moved for a new trial, which was denied, and has appealed from said order and the judgment sentencing him to the penitentiary. There has been no appearance for him in this court, but we have examined the record and find that he was fairly tried and justly convicted. The judgment and order are therefore affirmed.

We concur: **FINCH, P. J.; HART, J.**

STATE v. KOOTLAS. (No. 3715.) (Supreme Court of Idaho. May 29, 1922.) Appeal from District Court, Adams County; Ed. L. Bryan, Judge. John Kootlas was convicted of robbery, and he appeals. On motion to affirm judgment. Judgment affirmed. Stinson, Harris & McClure, of Council, for appellant. Roy L. Black, Atty. Gen., and L. L. Burtenshaw, Pros. Atty., of Council, for the State.

MCCARTHY, J. The case having been set for hearing, appellant submitted no brief or statement of points and authorities and was not represented. The Attorney General, representing respondent, appeared and moved that the judgment be affirmed. The motion is sustained. Rule 48 (176 Pac. xxii); Ellsworth v. Hill, 34 Idaho, —, 200 Pac. 1067. Accordingly the judgment is affirmed.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

STATE v. ORBEA. (No. 3717.) (Supreme Court of Idaho. May 29, 1922.) Appeal from District Court, Lincoln County; H. F. Ensign, Judge. Joe Orbea was convicted of being a persistent violator of the prohibition laws, and he appeals. On motion to affirm judgment. Motion granted, and case affirmed. Perky & Brinck, of Boise, and C. O. Stockslager, of Shoshone, for appellant. Roy L. Black, Atty. Gen., and Paul S. Haddock, Pros. Atty., of Shoshone, for the State.

MCCARTHY, J. The case having been set for hearing, appellant submitted no brief or statement of points and authorities, and was not represented. The Attorney General, representing respondent, appeared and moved that the judgment be affirmed. The motion is sustained. Rule 48 (176 Pac. xxii); Ellsworth v.

Hill, 34 Idaho, —, 200 Pac. 1067. Accordingly the judgment is affirmed.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

BOULET v. BUTTE MOTORS CAR CO. (Supreme Court of Montana. June 20, 1921.) (No. 4885.) Appeal from District Court, Silver Bow County. Harry Meyer, of Butte, for appellant. John G. Brown, of Helena, for respondent.

PER CURIAM. On motion of respondent in the above-entitled cause, the appeal is dismissed.

CONRAD et al. v. DAY HANSEN SECURITY CO. (Supreme Court of Montana. Sept. 13, 1921.) (No. 4884.) Appeal from District Court, Powell County; Geo. B. Winston, Judge. S. P. Wilson, of Deer Lodge, for respondents.

PER CURIAM. On motion of respondents to dismiss the appeal herein for failure of appellant to file transcript or brief within the time allowed by law, the appeal is dismissed.

COSTELLO v. COSTELLO. (Supreme Court of Montana. Sept. 23, 1921.) (No. 4598.) Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge. Nolan & Donovan, of Butte, for appellant. Binnard & Rodger, of Butte, for respondent.

PER CURIAM. This cause this day came on for judgment and decision by stipulation of the parties. Whereupon, in pursuance of said stipulation of the respective parties filed herein, it is now here ordered and adjudged that the judgment of the court below, made on the 30th day of August, 1919, and the order made on the 20th day of December, 1919, be and the same are hereby affirmed; each party to pay his own costs of appeal.

DONOHUE v. PRAIRIE COUNTY. (Supreme Court of Montana. May 10, 1921.) (No. 4556.) Appeal from District Court, Prairie County; Geo. P. Jones, Judge. Jos. C. Tope, of Terry, and George W. Farr, of Miles City, for appellant. N. A. Rotering, of Butte, for respondent.

PER CURIAM. Upon motion of respondent, the appeal in the above-entitled cause is dismissed.

FOLGER v. UPPER GLENDIVE-FALLON IRR. DIST. (Supreme Court of Montana. June 4, 1921.) (No. 4883.) Appeal from District Court, Dawson County; Daniel L. O'Hern, Judge. Loud & Leavitt, of Miles City, for appellant.

PER CURIAM. On motion of appellant, the appeal in the above-entitled cause is dismissed as settled.

HAYDEN v. LALOR. (Supreme Court of Montana. June 29, 1921.) (No. 4896.) Appeal from District Court, Granite County; Geo. B. Winston, Judge. J. J. McDonald, of Phillipsburg, E. F. O'Flynn, of Butte, and S. P. Wilson, of Deer Lodge, for appellant. Cooper, Stephenson & Hoover, of Great Falls, and Rodgers & Rodgers, of Anaconda, for respondent.

PER CURIAM. Upon stipulation of the parties, the appeal in the above-entitled cause is dismissed.

LEARY v. CITY OF BUTTE. (Supreme Court of Montana. Oct. 8, 1921.) (No. 4986.) Appeal from District Court, Silver Bow County. M. Donlan, of Butte, for respondent.

PER CURIAM. The motion of respondent to dismiss the appeal herein, for the reason that the transcript has not been filed within the time allowed by law, is granted, and the appeal dismissed.

MEST v. McKAY. (Supreme Court of Montana. Sept. 17, 1921.) (No. 4910.) Appeal from District Court, Madison County. Geo. R. Allen and Lyman H. Bennett, both of Virginia City, and E. B. Howell, of Butte, for appellant. M. M. Duncan, of Virginia City, for respondent.

PER CURIAM. Pursuant to motion of appellant, the appeal herein is dismissed.

MID NORTHERN OIL CO. v. WALKER et al. (Supreme Court of Montana. July 1, 1921.) (No. 4899.) Original action for injunction to restrain defendant from carrying out the provisions of House Bill No. 115 of the Seventeenth Legislative Assembly (chapter 266, Laws 1921). Donald Campbell, of Billings, for plaintiff.

PER CURIAM. The application of plaintiff for an order requiring defendants to show cause why they should not be restrained from carrying out the provisions of chapter 266, Laws of 1921, and asking that the court take original jurisdiction, is, after due consideration, denied.

MONTANA GRAIN GROWERS v. SCOLLARD. (Supreme Court of Montana. May 20, 1921.) (No. 4836.) Appeal from District Court, Cascade County. John W. Stanton, of Great Falls, for respondent.

PER CURIAM. On motion of respondent to dismiss the appeal herein, because an undertaking on appeal has not been filed, the appeal is dismissed.

MONTANA GRAIN GROWERS v. WEERSING. (Supreme Court of Montana. May 19, 1921.) (No. 4862.) Appeal from District Court, Cascade County. John W. Stanton, of Great Falls, for respondent.

PER CURIAM. On motion of respondent, asking for the dismissal of the appeal herein on the ground of failure to file transcript, the appeal is dismissed.

NELSON et al. v. TRUST. (Supreme Court of Montana. Sept. 13, 1921.) (No. 4523.) Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge. James E. Murray and J. F. Emigh, both of Butte, for appellant. J. A. Poore, of Butte, for respondents.

PER CURIAM. Pursuant to stipulation of the parties herein, the appeal is dismissed; each party to pay his own costs.

POINTER v. MULLIN. (Supreme Court of Montana. June 8, 1921.) (No. 4418.) Appeal from District Court, Powell County; Geo. B. Winston, Judge. W. E. Keeley and W. E. Castleton, both of Deer Lodge, for appellant.

PER CURIAM. This cause coming on for hearing this day, and counsel for the respective parties not appearing, and briefs not having been filed, the appeal is dismissed.

REPUBLIC COAL CO. v. CARTER. (Supreme Court of Montana. Sept. 20, 1921.) (No. 4455.) Appeal from District Court, Musselshell County; Geo. P. Jones, Judge. Thos. J. Mathews, of Roundup, for appellant.

PER CURIAM. This cause coming on for hearing this day, and it appearing that no briefs have been filed, it is ordered that that certain judgment of nonsuit made by the court below on the 9th day of July, 1918, be and it is hereby affirmed, at the cost of the appellant.

SMITH v. MILLER. (Supreme Court of Montana. May 11, 1921.) (No. 4865.) Appeal from District Court, Yellowstone County; A. C. Spencer, Judge. B. L. Price, of Laurel, and Dillavou & Moore, of Billings, for appellant. Thad. S. Smith, of Billings, and Scott S. Smith, of Salt Lake City, Utah, for respondent.

PER CURIAM. Pursuant to precept for dismissal filed herein, the appeal in the above-entitled cause is dismissed as settled.

STATE v. HENKEL. (Supreme Court of Montana. May 23, 1921.) (No. 4462.) Appeal from District Court, Flathead County; T. A. Thompson, Judge. Logan & Child, of Kalispell, for appellant.

PER CURIAM. On motion of appellant, the appeal herein is dismissed.

STATE v. PERCY. (Supreme Court of Montana. May 16, 1921.) (No. 4415.) Appeal from District Court, Fergus County; Roy E. Ayres, Judge. John A. Coleman, of Lewiston, for appellant.

PER CURIAM. At the personal request of appellant that the appeal in the above-entitled cause be not prosecuted, it is dismissed.

STATE ex rel. BOURQUIN et al. v. DISTRICT COURT, SILVER BOW COUNTY, et al. (Supreme Court of Montana. Sept. 26,

1921.) (No. 4911.) Original application for writ of supervisory control, directed to the District Court of Silver Bow County and Jeremiah J. Lynch, a Judge thereof. Wellington D. Rankin, Atty. Gen., and Ed. Fitzpatrick, of Butte, for relators.

PER CURIAM. The application of the relators for writ of supervisory control is, after due consideration, denied.

STATE ex rel. DYER v. DISTRICT COURT, POWELL COUNTY, et al. (Supreme Court of Montana. Sept. 28, 1921.) (No. 4908.) Original application for writ of supervisory control, directed against the District Court of Powell County and Geo. B. Winston, its Judge. S. P. Wilson, of Deer Lodge, for relator.

PER CURIAM. The application of the relator herein for writ of supervisory control is, after due consideration, denied.

STATE ex rel. SEVEN PRODUCTS CO. v. DISTRICT COURT, SECOND JUDICIAL DIST., et al. (Supreme Court of Montana. June 20, 1921.) (No. 4891.) Original application for writ of prohibition, directed to the District Court of the Second Judicial District and W. E. Carroll, a Judge thereof. Frank & Gainea, of Butte, for relator.

PER CURIAM. The application of the relator herein for writ of prohibition is, after due consideration, denied.

STATE ex rel. TAYLOR et al. v. DISTRICT COURT, THIRD JUDICIAL DIST., et al. (Supreme Court of Montana. Sept. 13, 1921.) (No. 4919.) Original application for writ of prohibition, directed against the District Court of the Third Judicial District and Geo. B. Winston, Judge thereof. J. H. Duffy, of Anaconda, and R. E. McHugh, of Phillipsburg, for relators.

PER CURIAM. The application of the relators herein for writ of prohibition is, after due consideration, denied.

STATE ex rel. TROGLIA v. DISTRICT COURT, FIFTH JUDICIAL DIST., et al. (Supreme Court of Montana. Sept. 13, 1921.) (No. 4909.) Original application for writ of supervisory control, directed to the District Court of the Fifth Judicial District and Joseph C. Smith, a Judge thereof. J. R. Jones, of Twin Bridges, for relator.

PER CURIAM. The application of the relator herein for writ of supervisory control is, after due consideration, denied.

STATE ex rel. WORDAL v. DISTRICT COURT, FOURTH JUDICIAL DIST., et al. (Supreme Court of Montana. June 30, 1921.) (No. 4897.) Original application for writ of supervisory control, directed to the District Court of the Fourth Judicial District and Asa

L. Duncan, a Judge thereof. Joseph R. Wine, of Helena, for relator.

PER CURIAM. The application of the relator for writ of supervisory control is, after due consideration, denied.

STEWART v. ABEL. (Supreme Court of Montana. June 7, 1921.) (No. 4413.) Appeal from District Court, Yellowstone County; A. C. Spencer, Judge. Reynolds & Shea, of Billings, for appellant.

PER CURIAM. It having been made to appear to the court that the above-entitled cause has been settled, the appeal is dismissed.

BRUCE v. STATE. (No. A-3982.) (Criminal Court of Appeals of Oklahoma. June 12, 1922.) Appeal from District Court, Carter County, Thos. W. Champion, Judge. C. C. Bruce was convicted of manslaughter in the first degree, and sentenced to four years' imprisonment in the penitentiary, and he appeals. Appeal dismissed on appellant's motion, and cause remanded, with direction to cause judgment and sentence to be executed. Champion & George and Brown & Williams, all of Ardmore, for plaintiff in error. Geo. F. Short, Atty. Gen., and N. W. Gore, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, C. O. Bruce, was by information charged with the murder of one Sidney Jordan, alleged to have been committed in Carter county on or about the 6th day of December, 1919, by shooting him with a pistol. Upon his trial the jury found him guilty of manslaughter in the first degree, and fixed his punishment at four years' imprisonment in the penitentiary. From the judgment rendered on the verdict on the 26th day of November, 1920, he appealed by filing in this court on May 18, 1921, a petition in error with case-made. His counsel of record has filed a motion to dismiss the appeal herein. The motion to dismiss is sustained, the appeal herein dismissed, and the cause remanded to the trial court, with direction to cause its judgment and sentence to be carried into execution. Mandate forthwith.

BARBARE v. MIHICH et al. (No. 17146.) (Supreme Court of Washington. June 26, 1922.) Department 2. Appeal from Superior Court, King County; Everett Smith, Judge. Action by Nicholas Barbare, doing business as Barbare Brother Boat Building Department, against John Mihich and another. Judgment for plaintiff, and the named defendant appeals. Affirmed. Allen & Griffith and Chas. P. Murphy, all of Seattle, for appellant. Wright, Kelleher, Allen & Hilen and B. F. Jacobs, all of Puyallup, for respondent.

PER CURIAM. This appeal is prosecuted only by appellant Mihich; no bond having been given and filed on behalf of Mezich. There is nothing involved but a question of fact. Mihich and Mezich contracted for the construction of one boat by respondent, and about the same time one Nezich contracted for the construction of another. The names all look very much

alike on paper. Nezich sent respondent a payment upon his boat, which respondent's book-keeper first credited to Mihich and Mezich, and later was compelled to undo, when he attempted to collect from Nezich, who promptly proved his payment. A receipt showing full payment was given Mihich and Mezich, which later was repudiated by respondent to the extent of \$1,000. Appellant claims payment by cash in March, 1920. The trial court found otherwise on the evidence, and the testimony sustains the finding. Affirmed.

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In re DISORGANIZATION OF SCHOOL DISTRICT NO. 97 OF LEWIS COUNTY. (No. 17079.) (Supreme Court of Washington. June 20, 1922.) Department 2. Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge. In the matter of the Disorganization of School District No. 97 of Lewis County. From a judgment of the superior court, affirming an order and decision of the superintendent of schools of Lewis county, disorganizing School District No. 97 of such county, and attaching territory thereof to other contiguous districts, an appeal is taken. Affirmed. C. D. Cunningham, of Centralia, for appellant. Herman Allen, of Chehalis, for respondent.

PARKER, C. J. This is an appeal from a judgment of the superior court for Lewis county, which affirmed an order and decision of the superintendent of schools of that county, disorganizing school district No. 97 of that county, and attaching the territory thereof to other contiguous districts. The order and decision of the superintendent was made and rendered under the provisions of section 4470, Rem. Code,

as amended by Chapter 90 of the Laws of 1919, giving the superintendent power to make such order and decision "in case any school district shall have less than an average daily attendance of four pupils or shall not have maintained at least the minimum amount of school required by law during the last preceding school year, * * * ." Section 2, c. 90, p. 208, Laws 1919. It seems plain from the record before us that the school of the district so disorganized did not, during the year immediately preceding the making of the superintendent's order and decision, maintain an average daily attendance of four pupils. Counsel for the school district, in resisting the action of the superintendent, contends, however, that the average daily attendance of pupils at less than four during the year was the result of the fault of the superintendent, in her arbitrary interference with the affairs of the school district and neglect of her official duty with reference thereto, and that, viewing all her actions relative to the school district in connection with her order and decision disorganizing it, the latter was an arbitrary abuse of her power, such as to call for interference at the hands of the court. This question was determined upon oral evidence heard by the superior court upon an appeal to that court from the superintendent's order and decision. We deem it sufficient to say that, after a careful review of the evidence, we are not convinced that the trial court reached a wrong conclusion. We do not feel that it would be profitable to analyze the evidence in detail here. The judgment of the superior court, affirming the order and decision of the superintendent, is affirmed.

HOLCOMB, MAIN, MACKINTOSH and HOVEY, JJ., concur.

